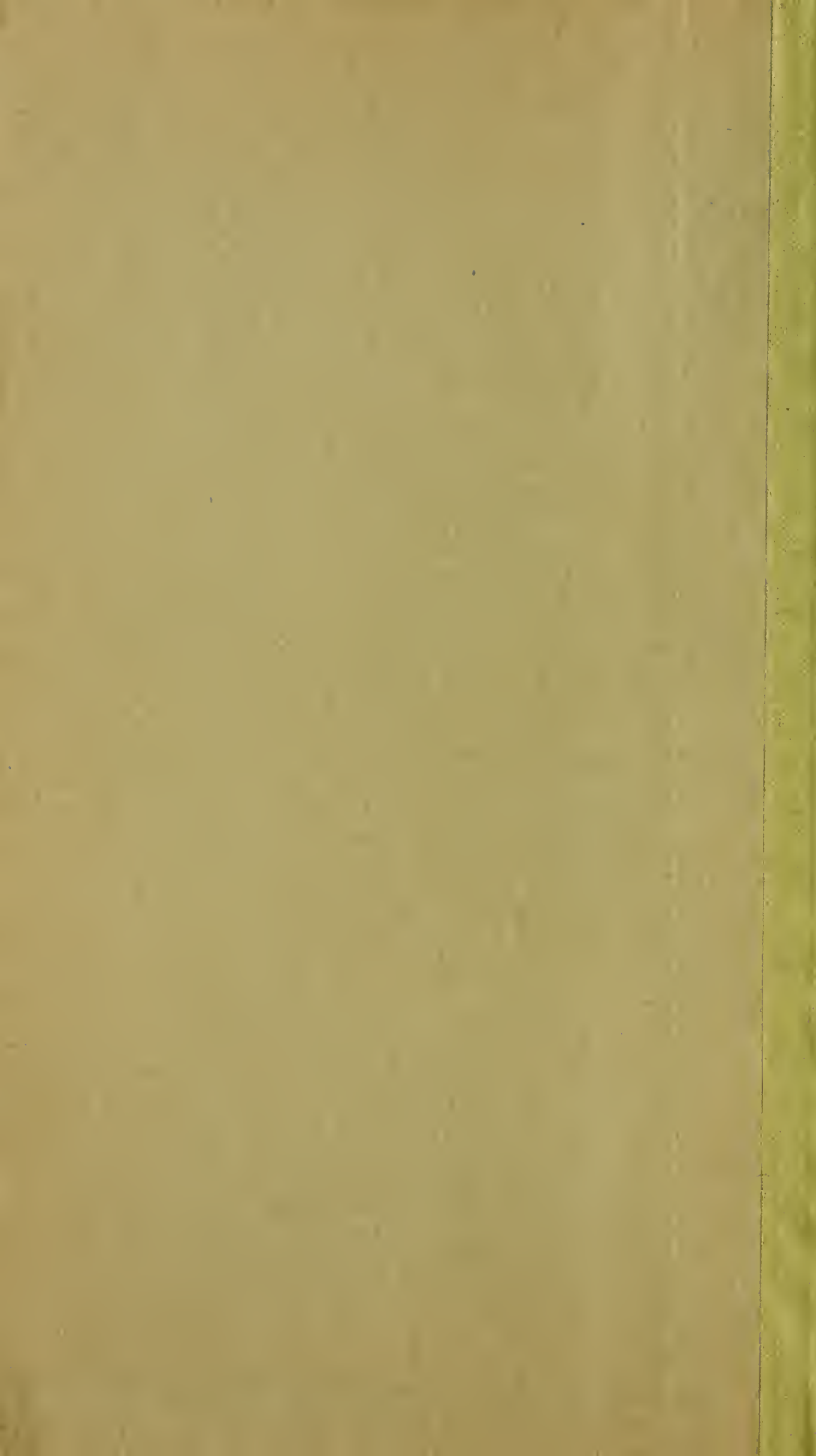


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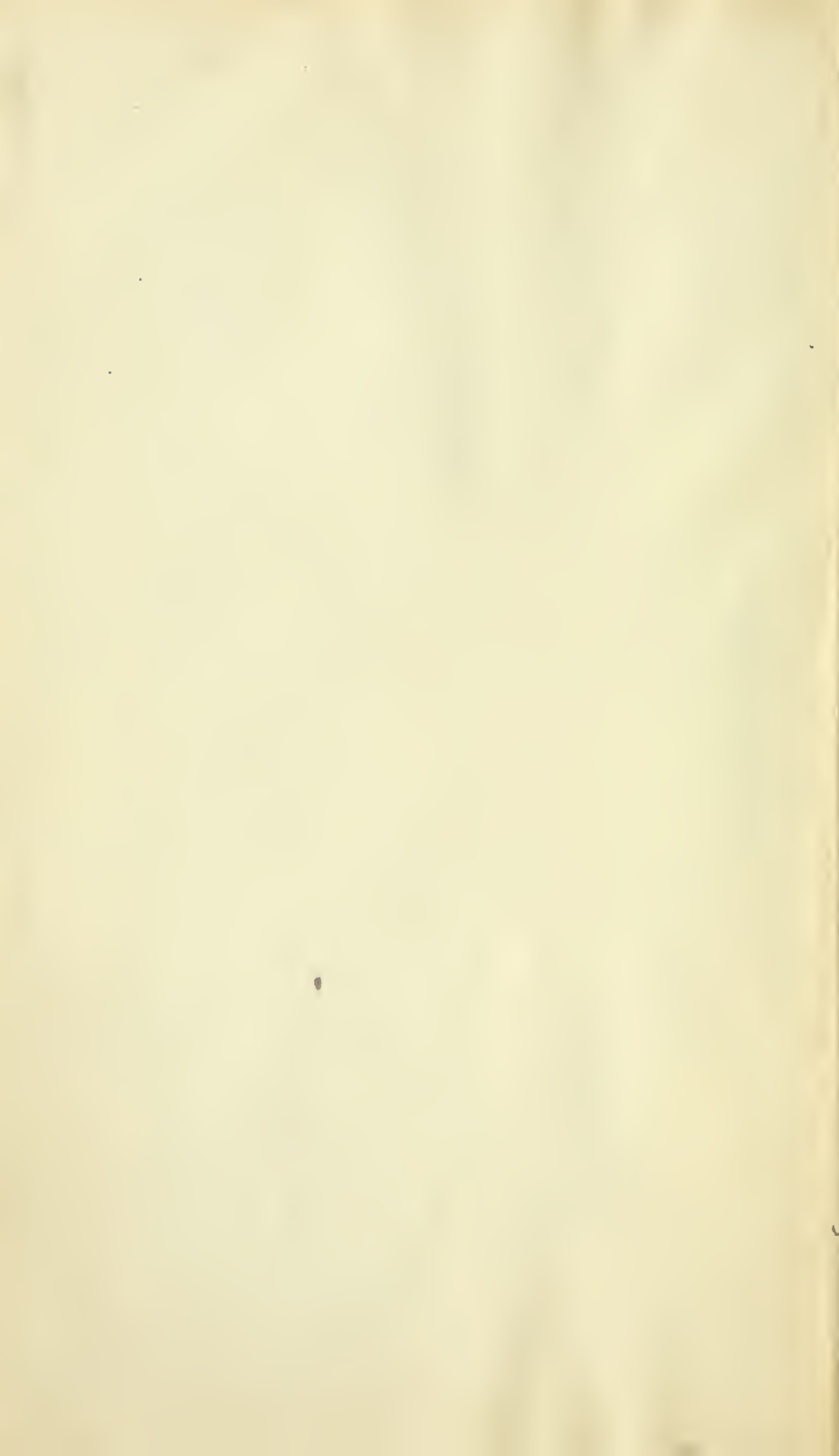


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House





COUNTING ELECTORAL VOTES.

PROCEEDINGS AND DEBATES

OF

CONGRESS

RELATING TO

COUNTING THE ELECTORAL VOTES

FOR

PRESIDENT AND VICE-PRESIDENT OF THE
UNITED STATES.

COMPILED AND PRINTED
BY ORDER OF THE HOUSE OF REPRESENTATIVES,
DECEMBER 23, 1876.

WASHINGTON:
GOVERNMENT PRINTING OFFICE.
1877.

Checked
May 1918



REPORT OF SUB-COMMITTEE ON COMPILATION OF PRECEDENTS.

HOUSE OF REPRESENTATIVES,
ROOM OF THE SPECIAL COMMITTEE ON COUNTING ELECTORAL VOTES,
Washington, D. C., January 4, 1877.

SIR: The undersigned, your subcommittee appointed to compile the proceedings and debates of Congress relating to the counting of the electoral votes for President and Vice-President of the United States, beg leave to present the accompanying compilation as the result of their labor in discharge of that duty. It is believed that this volume embraces everything said or done in Congress pertinent to the question, from the formation of the government to the second session of the present Congress, including also the proceedings of the Federal convention of 1787, relating to the creation of the electoral college.

The proceedings and debates have been presented in their chronological order without comment or suggestion, except an occasional marginal note which seemed necessary for explanation.

An appendix contains certain important speeches made at different times in Congress upon questions relating to the electoral vote, together with other congressional proceedings, which though not strictly pertaining to the presidential count, are nevertheless deemed to possess both interest and value to the inquiry assigned to the committee.

WILLIAM M. SPRINGER.
GEORGE WILLARD.

Hon. HENRY B. PAYNE, Chairman.



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SELECT COMMITTEES.

SENATE SELECT COMMITTEE ON COUNTING ELECTORAL VOTES, WITH POWER TO CON-
FER WITH HOUSE COMMITTEE.

Messrs. GEORGE F. EDMUNDS, of Vermont.
OLIVER P. MORTON, of Indiana.
FREDERICK T. FRELINGHUYSEN, of New Jersey.
ROSCOE CONKLING, of New York.
ALLEN G. THURMAN, of Ohio.
THOMAS F. BAYARD, of Delaware.
MATT. W. RANSOM, of North Carolina.

HOUSE SELECT COMMITTEE ON COUNTING ELECTORAL VOTES, TO ACT IN CONJUNCTION
WITH SENATE COMMITTEE.

Messrs. HENRY B. PAYNE, of Ohio.
EPPA HUNTON, of Virginia.
ABRAM S. HEWITT, of New York.
WILLIAM M. SPRINGER, of Illinois.
GEORGE W. MCCRARY, of Iowa.
GEORGE F. HOAR, of Massachusetts.
GEORGE WILLARD, of Michigan.

COUNTING ELECTORAL VOTES.

APPOINTMENT OF SPECIAL COMMITTEES.

IN THE HOUSE OF REPRESENTATIVES, *December 7, 1876.*

Mr. McCrary offered the following :

"Whereas there are differences of opinion as to the proper mode of counting the electoral votes for President and Vice-President and as to the manner of determining questions that may arise as to the legality and validity of returns made of such votes by the several States ;

"And whereas it is of the utmost importance that all differences of opinion and all doubt and uncertainty upon these questions should be removed, to the end that the votes may be counted and the result declared by a tribunal whose authority none can question and whose decision all will accept as final : Therefore,

Resolved, That a committee of five members of this House be appointed by the Speaker, to act in conjunction with any similar committee that may be appointed by the Senate, to prepare and report without delay such a measure, either legislative or constitutional, as may in their judgment be best calculated to accomplish the desired end, and that said committee have leave to report at any time."

The resolution was referred to the Committee on the Judiciary.

IN THE HOUSE OF REPRESENTATIVES, *December 14, 1876.*

Mr. Knott, from the Judiciary Committee, reported the following substitute for Mr. McCrary's resolution :

"Whereas there are differences of opinion as to the proper mode of counting the electoral votes for President and Vice-President, and as to the manner of determining questions that may arise as to the legality and validity of returns made of such votes by the several States ;

"And whereas it is of the utmost importance that all differences of opinion and all doubt and uncertainty upon these questions should be removed, to the end therefore that the votes may be counted and the result declared by a tribunal whose authority none can question and whose decision all will accept as final : Therefore,

Resolved, That a committee of seven members of this House be appointed by the Speaker, to act in conjunction with any similar committee that may be appointed by the Senate, to prepare and report without delay such a measure, either legislative or constitutional, as may in their judgment be best calculated to accomplish the desired end, and that said committee have leave to report at any time.

Resolved, That a committee of seven members be appointed by the Speaker of this House to ascertain and report what are the privileges, powers, and duties of the House of Representatives in counting the votes for President and Vice-President of the United States, and that said committee have leave to report at any time."

The resolutions were adopted.

IN THE SENATE, *December 18, 1876.*

Mr. Edmunds moved to take up the following resolution, which had been offered on the Friday before, in answer to the message of the House that a similar resolution had been adopted in that body :

Resolved, That the message of the House of Representatives on the subject of the presidential election be referred to a select committee of seven Senators, with power to prepare and report, without unnecessary delay, such a measure, either of a legislative or other character, as may, in their judgment, be best calculated to accomplish the lawful counting of the electoral votes, and best disposition of all questions connected therewith, and the due declaration of the result ; and that said committee have power to confer and act with the committee of the House of Representatives named in said message, and to report by bill or otherwise."

The resolution was adopted.

IN THE SENATE, *December 21, 1876.*

The President *pro tempore* appointed as the special committee respecting the counting of the electoral votes authorized by the resolution of the 18th instant, Messrs. Edmunds, Morton, Frelinghuysen, Logan, Thurman, Bayard, and Ransom.

IN THE SENATE, *December 29, 1876.*

The President *pro tempore* laid before the Senate the following communication ; which was read :

"CHICAGO, *December 27, 1876.*

"Hon. T. W. FERRY,

"*President Senate, Washington, D. C. :*

"I cannot return to Washington in time to act on committee on presidential question. I must ask to be excused from serving, and ask that you appoint some one to act in my place.

"J. A. LOGAN."

The PRESIDENT *pro tempore*. Will the Senate excuse the Senator from Illinois from further service upon this committee as per request ?

The question being put, Mr. Logan was excused ; and the President *pro tempore* being by unanimous consent authorized to fill the vacancy, Mr. Conkling was appointed.

IN THE HOUSE OF REPRESENTATIVES, *December 22, 1876.*

The Speaker announced the following committees :

Committee to ascertain and report what are the privileges, powers, and duties of the House of Representatives in counting the votes for President and Vice-President of the United States: Mr. Knott of Kentucky, Mr. Sparks of Illinois, Mr. Tucker of Virginia, Mr. Maish of Pennsylvania, Mr. Burchard of Illinois, Mr. Seelye of Massachusetts, and Mr. Monroe of Ohio.

Mr. Monroe was excused, and Mr. McDill, of Iowa, was appointed to fill his place.

Committee to meet with the Senate committee as to the counting of the electoral votes for President and Vice-President: Mr. Payne of Ohio, Mr. Hunton of Virginia, Mr. Hewitt of New York, Mr. Springer of Illinois, Mr. McCrary of Iowa, Mr. Hoar of Massachusetts, and Mr. Willard of Michigan.

ORDER TO COMPILE AND PRINT.

December 23, 1876.

Mr. Springer, from the committee appointed to confer with a similar committee on the part of the Senate in reference to counting the votes for President and Vice-President, reported the following resolution and asked its adoption :

"*Resolved*, That the special committee to confer with a similar committee on the part of the Senate in reference to counting the electoral votes for President and Vice-President be authorized to compile and print for the use of that committee and the House the proceedings and debates of Congress relating to the counting of the electoral votes from the first election of President and Vice-President to the present time ; and that said committee shall have power to employ such clerical assistance as may be necessary in the preparation of said compilation."

There being no objection, the resolution was adopted.

COUNTING ELECTORAL VOTES.

PROCEEDINGS IN THE FEDERAL CONVENTION OF 1787.

IN THE FEDERAL CONVENTION, *August 6, 1787.*

In the "draught of a constitution reported by the committee of five, August 6, 1787," article 10, section 1, is as follows:

"The executive power of the United States shall be vested in a single person. His style shall be "President of the United States of America;" and his title shall be "His Excellency." He shall be elected by ballot by the Legislature, [Congress.] He shall hold his office during the term of seven years; but shall not be elected a second time."—(Journal of Convention, page 224.)*

September 4, 1787.

The Hon. Mr. Brearly, from the committee of eleven, to whom sundry resolutions, &c., were referred on the 31st ultimo, reported that in their opinion the following additions and alterations should be made to the report before the convention, namely:

4. After the word excellency, in the first section, tenth article, to be inserted, "He shall hold his office during the term of four years, and, together with the Vice-President, chosen for the same term, be elected in the following manner:

5. "Each State shall appoint, in such manner as its Legislature may direct, a number of electors, equal to the whole number of Senators and members of the House of Representatives, to which the State may be entitled in the Legislature.

6. "The electors shall meet in their respective States and vote by ballot for two persons, of whom one at least shall not be an inhabitant of the same State with themselves; and they shall make a list of all the persons voted for, and of the number of votes for each, which list they shall sign and certify, and transmit sealed to the seat of the General Government, directed to the President of the Senate.

7. "The President of the Senate shall, in that house, open all the certificates; and the votes shall be then and there counted. The person having the greatest number of votes shall be the President, if such number be a majority of the whole number of the electors appointed; and if there be more than one who have such majority and have an equal number of votes, then the Senate shall choose by ballot one of them for President; but if no person have a majority, then, from the five highest on the list the Senate shall choose by ballot the President. And in every case after the choice of the President the person having the greatest number of votes shall be Vice-President. But if there should remain two or more who have equal votes, the Senate shall choose from them the Vice-President.

8. "The Legislature may determine the time of choosing and assembling the electors and the manner of certifying and transmitting the votes."

September 6, 1787.

On the question to agree to the fourth clause of the report, as follows:

"He shall hold his office during the term of four years, and, together with the Vice-President chosen for the same term, be elected in the following manner"—

It passed in the affirmative:

YEAS—New Hampshire, Massachusetts, Connecticut, New Jersey, Pennsylvania, Delaware, Maryland, Virginia, South Carolina, and Georgia—10.

NAYS—North Carolina—1.

On the question upon the fifth clause of the report, prescribing the appointment of electors,

*In this draught of the Constitution there was no Vice-President provided for, and by article 5, section 4, the Senate was to choose its own president and other officers.

It passed in the affirmative:

YEAS—New Hampshire, Massachusetts, Connecticut, New Jersey, Pennsylvania, Delaware, Maryland, Virginia, and Georgia—9.

NAYS—North Carolina and South Carolina—2.

It was moved and seconded to agree to the following clause:

“That the electors meet at the seat of the General Government;”

Which passed in the negative:

YEA—North Carolina—1.

NAYS—New Hampshire, Massachusetts, Connecticut, New Jersey, Pennsylvania, Delaware, Maryland, Virginia, South Carolina, and Georgia—10.

It was moved and seconded to insert the words, “under the seal of the State,” after the word “transmit,” in the sixth clause of the report;

Which passed in the negative.

It was moved and seconded to agree to the sixth clause of the report;

Which passed in the affirmative:

YEAS—New Hampshire, Massachusetts, Connecticut, New Jersey, Pennsylvania, Delaware, Maryland, Virginia, South Carolina, and Georgia—10.

NAY—North Carolina—1.

It was moved and seconded to agree to the words, “the person having the greatest number of votes shall be President,” in the seventh clause of the report;

Which passed in the affirmative:

YEAS—New Jersey, Pennsylvania, Delaware, Maryland, Virginia, North Carolina, South Carolina, and Georgia—8.

NAYS—Massachusetts and Connecticut—2.

Divided—New Hampshire—1.

It was moved and seconded to agree to the words, “if such number be a majority of the whole number of the electors appointed;”

Which passed in the affirmative:

YEAS—New Hampshire, Massachusetts, Connecticut, New Jersey, Delaware, Maryland, South Carolina, and Georgia—8.

NAYS—Pennsylvania, Virginia, and North Carolina—3.

It was moved and seconded to insert the words “in presence of the Senate and House of Representatives,” after the word “counted;”

Which passed in the affirmative:

YEAS—New Hampshire, Maryland, Virginia, North Carolina, South Carolina, and Georgia—6.

NAYS—Connecticut, New Jersey, Pennsylvania, and Delaware—4.

It was moved and seconded to insert the words, “and who shall have given their votes,” after the word “appointed,” in the seventh clause of the report;

Which passed in the negative:

YEAS—Massachusetts, Pennsylvania, Virginia, North Carolina, and South Carolina—5.

NAYS—New Hampshire, Connecticut, New Jersey, Delaware, Maryland, and Georgia—6.

It was moved and seconded to insert the word “immediately” before the word “choose;”

Which passed in the affirmative:

YEAS—New Hampshire, Massachusetts, Connecticut, New Jersey, Pennsylvania, Delaware, Maryland, Virginia, South Carolina, and Georgia—10.

NAY—North Carolina—1.

It was moved and seconded to insert the words “of the electors” after the word “votes;”

Which passed unanimously in the affirmative.

It was moved and seconded to agree to the following clause:

“But the election shall be on the same day throughout the United States” after the words “transmitting their votes;”

Which passed in the affirmative:

YEAS—New Hampshire, Connecticut, Pennsylvania, Maryland, Virginia, North Carolina, South Carolina, and Georgia—8.

NAYS—Massachusetts, New Jersey, and Delaware—3.

It was moved and seconded to strike out the words “the Senate shall immediately choose by ballot,” &c., and to insert the words “the House of Representatives shall immediately choose by ballot one of them for President, the members from each State having one vote;”

Which passed in the affirmative:

YEAS—New Hampshire, Massachusetts, Connecticut, New Jersey, Pennsylvania, Maryland, Virginia, North Carolina, South Carolina, and Georgia—10.

NAY—Delaware—1.

It was moved and seconded to agree to the following amendment:

"But a quorum for this purpose shall consist of a member or members from two-thirds of the States;"

Which passed unanimously in the affirmative.

On the question to agree to the following amendment:

"And also of a majority of the whole number of the House of Representatives;"

It passed in the negative:

YEAS—Massachusetts, Connecticut, Pennsylvania, Virginia, and North Carolina—5.

NAYS—New Hampshire, New Jersey, Delaware, Maryland, South Carolina, and Georgia—6.

On the question to agree to the following paragraph of the report:

"And in every case after the choice of the President the person having the greatest number of votes shall be the Vice-President; but if there should remain two or more who have equal votes, the Senate shall choose from them the Vice-President;"

It passed in the affirmative:

YEAS—New Hampshire, Massachusetts, Connecticut, New Jersey, Pennsylvania, Delaware, Maryland, Virginia, South Carolina, and Georgia—10.

NAY—North Carolina—1.

The several amendments being agreed to, on separate questions, the first section of the report is as follows:

"He shall hold the office during the term of four years; and, together with the Vice-President chosen for the same term, be elected in the following manner:

"Each State shall appoint, in such manner as its Legislature may direct, a number of electors equal to the whole number of Senators and members of the House of Representatives to which the State may be entitled in the Legislature.

"But no person shall be appointed an elector who is a member of the Legislature of the United States, or who holds any office of profit or trust under the United States.

"The electors shall meet in their respective States, and vote by ballot for two persons, of whom one at least shall not be an inhabitant of the same State with themselves. And they shall make a list of all the persons voted for, and of the number of votes for each, which list they shall sign and certify, and transmit sealed to the seat of the Government, directed to the President of the Senate. The President of the Senate shall, in the presence of the Senate and House of Representatives,* open all the certificates and the votes shall then be counted.

"The person having the greatest number of votes shall be the President, (if such number be a majority of the whole number of the electors appointed;) and if there be more than one who have such majority, and have an equal number of votes, then the House of Representatives shall immediately choose by ballot one of them for President, the representation from each State having one vote. But if no person have a majority, then from the five highest on the list, the House of Representatives shall, in like manner, choose by ballot the President. In the choice of a President by the House of Representatives a quorum shall consist of a member or members from two-thirds of the States; and the concurrence of a majority of all the States shall be necessary to such choice. And in every case after the choice of the President the person having the greatest number of votes of the electors shall be the Vice-President. But if there should remain two or more who have equal votes the Senate shall choose from them the Vice-President.

"The Legislature may determine the time of choosing the electors, and of their giving their votes, and the manner of certifying and transmitting their votes. But the election shall be on the same day throughout the United States."

September 13, 1787.

The Hon. Mr. Johnson, from the committee of revision, reported the following as a substitute for the twenty-second and twenty-third articles:

"Resolved, That the preceding Constitution be laid before the United States in Congress assembled, and that it is the opinion of this Convention that it should afterward be submitted to a convention of delegates chosen in each State by the people thereof, under the recommendation of its Legislature, for their assent and ratification; and that each convention assenting to and ratifying the same should give notice thereof to the United States in Congress assembled.

* The words "in presence of the Senate and House of Representatives" were moved to be inserted after the word "counted," (page 334 Journal of Federal Convention,) and this motion was carried. The Journal of the Convention does not show that any motion was made to strike out the words "in that house," which occur in the original draught, nor does it show why the words "in the presence of the Senate and House of Representatives" were inserted in the place of the words "in that house" instead of after the word "counted," as was voted by the convention; but from the clause in the journal, at the bottom of page 371 thereof, it appears that the report of the committee of revision was taken up and read by paragraphs and in some places corrected and amended, and that no entry is made upon the journal of these corrections and amendments adopted or proposed. From this it would appear that this clause was constructed in this shape by the committee of revision.

*“Resolved, That it is the opinion of this Convention, that as soon as the conventions of nine States shall have ratified this Constitution, the United States in Congress assembled should fix a day on which electors should be appointed by the States which shall have ratified the same, and a day on which the electors should assemble to vote for the President, and the time and place for commencing proceedings under this Constitution. That after such publication, the electors should be appointed, and the Senators and Representatives elected. That the electors should meet on the day fixed for the election of the President, and should transmit their votes, certified, signed, sealed, and directed as the Constitution requires, to the Secretary of the United States in Congress assembled; that the Senators and Representatives should convene at the time and place assigned; that the Senators should appoint a president of the Senate, for the sole purpose of receiving, opening, and counting the votes for President; and that after he shall be chosen, the Congress, together with the President, should, without delay, proceed to execute this Constitution.”** (Page 370.)

It was moved and seconded to postpone the consideration of the report of the committee respecting the twenty-second and twenty-third articles;

Which passed in the affirmative:

YEAS—New Hampshire, New Jersey, Pennsylvania, Delaware, Maryland, Virginia, North Carolina, South Carolina, and Georgia—9.

NAYS—Connecticut—1.

It was moved and seconded to proceed to the comparing of the report from the committee of revision, with the articles which were agreed to by the house and to them referred for arrangements.

Which passed in the affirmative:

YEAS—New Hampshire, Massachusetts, Connecticut, Maryland, Virginia, North Carolina, and Georgia—7.

NAYS—Pennsylvania, Delaware, and South Carolina—3.

And the same was read by paragraphs, compared, and in some places corrected and amended.

[No entry of the corrections and amendments adopted or proposed appears upon the journals. The sheets of yeas and nays exhibit, however, many of the questions upon the amendments proposed, and the result of the votes upon them. The amendments adopted are interlined in manuscript in the revised draught of the Constitution used by Mr. Brearly, and, with the minutes furnished by Mr. Madison to complete the journal, collated with the entries on the sheets of yeas and nays, present the following questions and votes:—*Note in the original text Journal of Convention, page 372.*]

Here follow proceedings irrelevant to the question of counting the electoral votes.

PROCEEDINGS IN CONGRESS OF THE CONFEDERATION.

The Journals of Congress, September 23, 1787, contains the following as a part of the proceedings of the Federal Convention, transmitted to Congress by the president of the convention and the secretary:

“In convention Monday, September 17, 1787; present the States of New Hampshire, Massachusetts, Connecticut, Mr. Hamilton from New York, New Jersey, Pennsylvania, Delaware, Maryland, Virginia, North Carolina, South Carolina, and Georgia.” Then follows the resolution above given, signed “by the unanimous order of the convention, George Washington, president, William Jackson, secretary.”

There also appears on the record the letter addressed to the President of Congress by George Washington, “by unanimous order of the convention,” whereupon the Congress passed the following resolution:

Resolved unanimously, That the said report, with the resolutions and letter accompanying the same, be transmitted to the several Legislatures, in order to be submitted to a convention of delegates chosen in each State by the people thereof, in conformity to the resolves of the convention made and provided in that case.—Journals of Congress, vol. 4, pages 781, 782.

CONSTITUTIONAL PROVISIONS AS ADOPTED IN 1787.

Paragraph 3 of section 1, article 2 of the Constitution as adopted in 1787 is as follows:

“The electors shall meet in their respective States, and vote by ballot for two persons, of whom one at least shall not be an inhabitant of the same State with them—

*In the Madison papers, containing the debates on the Confederation and Constitution, page 602, is the following note in reference to these resolutions: “The proceedings on these resolutions are not given by Mr. Madison, nor in the Journal of the Federal Convention. In the Journal of Congress, 25th September, 1787, volume 4, page 781, they are stated to have been presented to that body as having passed in the Convention on the 17th September, immediately after the signing of the Constitution.”

selves. And they shall make a list of all the persons voted for, and of the number of votes for each; which list they shall sign and certify, and transmit sealed to the seat of the Government of the United States, directed to the President of the Senate. The President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates, and the votes shall then be counted. The person having the greatest number of votes shall be the President, if such number be a majority of the whole number of electors appointed; and if there be more than one who have such a majority, and have an equal number of votes, then the House of Representatives shall immediately choose by ballot one of them for President; and if no person have a majority, then from the five highest on the list the said House shall in like manner choose the President. But in choosing the President, the votes shall be taken by States, the representation from each State having one vote; a quorum for this purpose shall consist of a member or members from two-thirds of the States, and a majority of all the States shall be necessary to a choice. In every case, after the choice of the President, the person having the greatest number of votes of the electors, shall be the Vice-President. But if there should remain two or more who have equal votes, the Senate shall choose from them by ballot the Vice-President."

COUNTING ELECTORAL VOTES.

PROCEEDINGS AND DEBATES IN CONGRESS.

ELECTION FOR FIRST TERM, 1789.

GEORGE WASHINGTON, President.
JOHN ADAMS, Vice-President.

IN THE SENATE, April 6, 1789.

The credentials of the members present being read and ordered to be filed, the Senate proceeded, by ballot, to the choice of a President for the sole purpose of opening and counting the votes for President of the United States.

JOHN LANGDON was elected.

Ordered, That Mr. Ellsworth inform the House of Representatives that a quorum of the Senate is formed; that a president is elected for the sole purpose of opening the certificates and counting the votes of the electors of the several States in the choice of a President and Vice-President of the United States; and that the Senate is now ready, in the Senate Chamber, to proceed in the presence of the House to discharge that duty; and that the Senate have appointed one of their members to sit at the Clerk's table to make a list of the votes as they shall be declared; submitting it to the wisdom of the House to appoint one or more of their members for the like purpose.

Mr. Ellsworth reported that he had delivered the message; and Mr. Boudinot, from the House of Representatives, appeared and delivered the following message:

MR. PRESIDENT: I am directed by the House of Representatives to inform the Senate that the House is ready forthwith to meet the Senate to attend the opening and counting of the votes of the electors of the President and Vice-President of the United States.

Ordered, That Mr. Paterson be a teller on the part of the Senate.

The Speaker and the House of Representatives attended in the Senate Chamber, and the president elected for the purpose of counting the votes declared the Senate and House of Representatives had met, and that he, in their presence, had opened and counted the votes of the electors for President and Vice-President of the United States, which were as follows:

Number of the electors appointed by each State.	States.												
		George Washington, esq.	John Adams, esq.	Samuel Huntington, esq.	John Jay, esq.	John Hancock, esq.	Robert H. Harrison, esq.	George Clinton, esq.	John Rutledge, esq.	John Milton, esq.	James Armstrong, esq.	Edward Telfair, esq.	Benjamin Lincoln, esq.
5	New Hampshire.....	5	5										
10	Massachusetts.....	10	10										
7	Connecticut.....	7	5	2									
6	New Jersey.....	6	1		5								
10	Pennsylvania.....	10	8			2							
3	Delaware.....	3			3								
6	Maryland.....	6					6						
10	Virginia.....	10	5		1	1		3					
7	South Carolina.....	7				1			6				
5	Georgia.....	5								2	1	1	1
69	.....	69	34	2	9	4	6	3	6	2	1	1	1

Whereby it appeared that

GEORGE WASHINGTON, esq., was elected President, and

JOHN ADAMS, esq., Vice-President of the United States of America.

Mr. MADISON came from the House of Representatives with the following verbal message:

Mr. PRESIDENT: I am directed by the House of Representatives to inform the Senate that the House have agreed that the notifications of the election of the President and of the Vice-President of the United States should be made by such persons, and in such manner, as the Senate shall be pleased to direct.

Whereupon the Senate appointed Charles Thomson, esq., to notify GEORGE WASHINGTON, esq., of his election to the office of President of the United States of America, and Mr. Sylvanus Bourn to notify JOHN ADAMS, esq., of his election to the office of Vice-President of the said United States.

Ordered, That Mr. Paterson, Mr. Johnson, Mr. Lee, and Mr. Ellsworth be a committee to prepare the certificates of the election of the President and of the Vice-President of the United States, and to prepare letters to GEORGE WASHINGTON, esq., and to JOHN ADAMS, esq., to accompany the said certificates respectively.

Form of the certificate for the President.

"Be it known, that the Senate and House of Representatives of the United States of America, being convened in the city and State of New York, the sixth day of April, in the year of our Lord one thousand seven hundred and eighty-nine, the underwritten, appointed President of the Senate for the sole purpose of receiving, opening, and counting the votes of the electors, did, in the presence of the said Senate and House of Representatives, open all the certificates and count all the votes of the electors for a President and for a Vice-President; by which it appears that George Washington, esquire, was unanimously elected, agreeably to the Constitution, to the office of President of the United States of America.

"In testimony whereof I have hereunto set my hand and seal.

"JOHN LANGDON."

A similar certificate, substituting the word "Vice-President" for that of "President," and the word "duly" for "unanimously," was prepared for Mr. Adams. These certificates, accompanied by appropriate letters from Mr. Langdon, President of the Senate, were dispatched, by special messengers appointed by the Senate for that purpose, to General Washington and Mr. Adams.

IN THE HOUSE OF REPRESENTATIVES, April 6, 1789.

A message from the Senate by Mr. Ellsworth:

Mr. SPEAKER: I am charged by the Senate to inform this House that a quorum of the Senate is now formed; that a President is elected for the sole purpose of opening the certificates and counting the votes of the electors of the several States in the choice of a President and Vice-President of the United States; and that the Senate is now ready in the Senate Chamber, to proceed in the presence of this House to discharge that duty. I have it also in further charge to inform this House that the Senate has appointed one of its members to sit at the Clerk's table to make a list of the votes as they shall be declared, submitting it to the wisdom of this House to appoint one or more of its members for the like purpose.

On motion,

Resolved, That Mr. Speaker, attended by the House, do now withdraw to the Senate Chamber, for the purpose expressed in the message from the Senate, and that Mr. Parker and Mr. Heister be appointed, on the part of this House, to sit at the Clerk's table with the member of the Senate, and make a list of the votes as the same shall be declared.

Mr. Speaker accordingly left the chair, and, attended by the House, withdrew to the Senate Chamber, and after some time returned to the House.

Mr. Speaker resumed the chair.

Mr. Parker and Mr. Heister then delivered in at the Clerk's table a list of the votes of the electors of the several States in the choice of a President and Vice-President of the United States, as the same were declared by the President of the Senate in the presence of the Senate and of this House; which was ordered to be entered on the Journal, and is as followeth:

[Here follows the table, which is an exact copy of the one appearing in the Senate proceedings, except there is a recapitulation of the votes.]

Ordered, That a message be sent to the Senate to inform them that it is the desire of this House that the notifications of the election of the President and Vice-President of the United States should be made by such persons and in such manner as the Senate shall be pleased to direct, and that Mr. Madison do communicate the said message.

LAW REGULATING THE ELECTION OF PRESIDENT AND VICE-PRESIDENT.

[The following act was passed March 1, 1792, to perfect the manner of appointing electors. Only so much of the act as relates to electors is published:]

AN ACT relative to the election of a President and Vice-President of the United States and declaring the officer who shall act as President in case of vacancies in the offices both of President and Vice-President.

Be it enacted, &c., That except in case of an election of a President and Vice-President of the United States prior to the ordinary period, as hereinafter specified, electors shall be appointed in each State for the election of a President and Vice-President of the United States within thirty-four days preceding the first Wednesday in December, one thousand seven hundred and ninety-two, and within thirty-four days preceding the first Wednesday in December in every fourth year succeeding the last election; which electors shall be equal to the number of Senators and Representatives to which the several States may by law be entitled at the time when the President and Vice-President thus to be chosen should come into office: *Provided always*, That where no apportionment of Representatives shall have been made after any enumeration, at the time of choosing electors, then the number of electors shall be according to the existing apportionment of Senators and Representatives.

SEC. 2. *And be it further enacted*, That the electors shall meet and give their votes on the said first Wednesday in December, at such place in each State as shall be directed by the Legislature thereof; and the electors in each State shall make and sign three certificates of all the votes by them given, and shall seal up the same, certifying on each that a list of the votes of such State for President and Vice-President is contained therein, and shall by writing under their hands, or under the hands of a majority of them, appoint a person to take charge of and deliver to the President of the Senate, at the seat of Government, before the first Wednesday in January then next ensuing, one of the said certificates; and the said electors shall forthwith forward, by the post-office, to the President of the Senate, at the seat of Government, one other of the said certificates; and shall forthwith cause the other of the said certificates to be delivered to the judge of that district in which the said electors shall assemble.

SEC. 3. *And be it further enacted*, That the executive authority of each State shall cause three lists of the names of the electors of such State to be made and certified and to be delivered to the electors on or before the said first Wednesday in December; and the said electors shall annex one of the said lists to each of the lists of their votes.

SEC. 4. *And be it further enacted*, That if a list of votes from any State shall not have been received at the seat of Government on the said first Wednesday in January, that then the Secretary of State shall send a special messenger to the district judge in whose custody such list shall have been lodged, who shall forthwith transmit the same to the seat of Government.

SEC. 5. *And be it further enacted*, That Congress shall be in session on the second Wednesday in February, one thousand seven hundred and ninety-three, and on the second Wednesday in February succeeding every meeting of the electors, and the said certificates, or so many of them as shall have been received, shall then be opened, the votes counted, and the persons who shall fill the offices of President and Vice-President ascertained and declared agreeably to the Constitution.

SEC. 6. *And be it further enacted*, That, in case there shall be no President of the Senate at the seat of Government on the arrival of the persons intrusted with the lists of the votes of the electors, then such persons shall deliver the lists of votes in their custody into the office of the Secretary of State, to be safely kept and delivered over as soon as may be to the President of the Senate.

SEC. 7. *And be it further enacted*, That the persons appointed by the electors to deliver the lists of votes to the President of the Senate shall be allowed, on the delivery of the said lists, twenty-five cents for every mile of the estimated distance, by the most usual road, from the place of meeting of the electors to the seat of Government of the United States.

SEC. 8. *And be it further enacted*, That if any person appointed to deliver the votes of the electors to the President of the Senate shall, after accepting of his appointment, neglect to perform the services required of him by this act, he shall forfeit the sum of one thousand dollars.

ELECTION FOR SECOND TERM—1793.

GEORGE WASHINGTON, President.
JOHN ADAMS, Vice-President.

IN SENATE, February 5, 1793.

A message from the House of Representatives, by Mr. Beekley, their Clerk :
Mr. PRESIDENT : The House of Representatives have resolved that a committee be appointed, to join such committee as may be appointed by the Senate, to ascertain and report a mode of examining the votes for President and Vice-President, and of notifying the persons who shall be elected of their election ; and for regulating the time, place, and manner of administering the oath of office to the President, and have appointed a committee on their part.

February 6, 1793.

The Senate proceeded to the consideration of the said resolution and concurred therein ; and appointed Messrs. Izard, King, and Strong the committee on the part of the Senate.

February 11, 1793.

Mr. King, from the joint committee, reported—
That the two Houses shall assemble in the Senate Chamber on Wednesday next, at twelve o'clock ; that one person shall be appointed a teller, on the part of the Senate, to make a list of the votes as they shall be declared ; that the result shall be delivered to the President of the Senate, who shall announce the state of the vote, and the persons elected, to the two Houses assembled as aforesaid ; which shall be deemed a declaration of the persons elected President and Vice-President, and, together with a list of the votes, be entered on the Journals of the two Houses.

And the report was agreed to.

February 12, 1793.

Ordered, That Mr. King be appointed on the part of the Senate a teller of the votes for President and Vice-President of the United States, conformable to the report of the joint committee agreed to on the 11th instant, and that the Secretary notify the House of Representatives of his appointment.

February 13, 1793.

Ordered, That the Secretary notify the House of Representatives that the Senate are ready to meet them in the Senate Chamber to attend the opening and counting the votes for President and Vice-President of the United States, as the Constitution provides.

The two Houses having accordingly assembled, the certificates of the electors of the fifteen States in the Union, which came by express, were, by the Vice-President, opened, read, and delivered to the tellers appointed for the purpose, who, having examined and ascertained the votes, presented a list of them to the Vice-President, which list was read to the two Houses, and is as follows :

Number of electors appointed by each State.	States.	Electors.				
		George Washington, of Virginia.	John Adams, of Massachusetts.	George Clinton, of New York.	Thomas Jefferson, of Virginia.	Aaron Burr, of New York.
6	New Hampshire	6	6	.....	.....	.....
16	Massachusetts	16	16	.....	.....	.....
4	Rhode Island	4	4	.....	.....	.....
9	Connecticut	9	9	.....	.....	.....
3	Vermont	3	3	.....	.....	.....
12	New York	12	.....	12	.....	.....
7	New Jersey	7	7	.....	.....	.....
15	Pennsylvania	15	14	1	.....	.....
3	Delaware	3	3	.....	.....	.....
8	Maryland	8	8	.....	.....	.....
21	Virginia	21	.....	21	.....	.....
4	Kentucky	4	.....	.....	4	.....
12	North Carolina	12	.....	12	.....	.....
8	South Carolina	8	7	.....	.....	1
4	Georgia	4	.....	4	.....	.....
132	.....	132	77	50	4	1

Whereupon

The Vice-President declared GEORGE WASHINGTON unanimously elected President of the United States for the period of four years to commence with the 4th of March next; and

JOHN ADAMS elected, by a plurality of votes, Vice-President of the United States for the same period, to commence with the 4th of March next.

February 14, 1793.

Mr. King, from the committee appointed the 6th instant, to join the committee on the part of the House of Representatives, to report a mode of notifying the person who should be elected President of the United States of his election, submitted the following resolve:

Resolved, That a committee be appointed, to join such committee as shall be appointed by the House of Representatives, to wait on the President and notify him of his unanimous re-election to the office of President of the United States.

And the report was adopted.

Ordered, That Messrs. King, Izard, and Strong be the committee on the part of the Senate.

IN THE HOUSE OF REPRESENTATIVES, *February 5, 1793.*

On motion,

Resolved, That a committee be appointed, to join such committee as may be appointed by the Senate, to ascertain and report the mode of examining the votes for President and Vice-President, and of notifying the persons who shall be elected of their election, and to regulate the time, place, and manner of administering the oath of office to the President.

Ordered, That Mr. William Smith, Mr. Madison, and Mr. Laurance be of the said committee on the part of the House.

February 11, 1793.

Mr. William Smith, from the committee on the part of this House, jointly, with the committee appointed on the part of the Senate, to ascertain and report a mode of examining the votes for President and Vice-President of the United States, and for the other purposes expressed in the resolution of the fifth instant, made a report; which was twice read, and agreed to by the House, as followeth:

"That the two Houses shall assemble in the Senate Chamber on Wednesday next, at twelve o'clock; that two persons be appointed tellers on the part of this House, to make a list of the votes as they shall be declared; that the result shall be delivered to the President of the Senate, who shall announce the state of the vote, and the persons elected, to both Houses, assembled as aforesaid, which shall be deemed a declaration of the persons elected President and Vice-President, and, together with a list of the votes, be entered on the Journals of the two Houses."

Ordered, That Mr. William Smith and Mr. Laurance be appointed tellers on the part of this House, pursuant to the said report.

February 13, 1793.

A message from the Senate by Mr. Otis, their Secretary:

MR. SPEAKER: * * * * I am also directed to inform the House that a President of the Senate is elected * for the sole purpose of opening the certificates and counting the votes of the several States in the choice of a President and Vice-President of the United States; and that the Senate is now ready in the Senate Chamber, to attend with this House on that occasion.

Resolved, That Mr. Speaker, attended by the House, do now withdraw to the Senate Chamber, for the purpose expressed in the said message.

Mr. Speaker accordingly left the chair, and, attended by the House, withdrew to the Senate Chamber, and, after some time, returned to the House.

Mr. Speaker resumed the chair.

Mr. William Smith and Mr. Laurance then delivered in, at the Clerk's table, a list of the votes of the electors of the several States, in a choice of a President and Vice-President of the United States, as the same were declared by the President of the Senate, in the presence of the Senate and of this House; which was ordered to be entered on the Journal, and is as followeth:

[Here follows the table, which is an exact copy of the one appearing in the Senate proceedings, except there is a recapitulation of the votes.]

February 14, 1793.

A message from the Senate, by Mr. Otis, their Secretary:

MR. SPEAKER: * * * * The Senate have also agreed to a resolution for the appointment of a committee, jointly, with a committee on the part of the House, to wait

* This announcement of the Clerk is an error, evidently copied from the form used at the first election of President. The journals of the Senate do not show any such election, and the Vice-President, John Adams, presided at the meeting of the two houses, and announced the result, as appears above.

on the President, and notify him of his unanimous re-election to the office of President of the United States.

Mr. William Smith, from the committee appointed to join such committee as may be appointed on the part of the Senate, to ascertain and report the mode of examining the votes for President and Vice-President of the United States, and for the other purposes expressed in the resolution of the fifth instant, made a report; which was twice read and agreed to on the part of the House, as followeth:

Resolved, That a committee be appointed, to join such committee as may be appointed by the Senate, to wait on the President and to notify to him his unanimous re-election to the office of President of the United States.

Ordered, That Mr. William Smith, Mr. Madison, and Mr. Larrance be of the said committee on the part of this House.

February 15, 1793.

Mr. William Smith, from the committee appointed on the part of the Senate to wait on the President and to notify to him his unanimous re-election to the office of President of the United States, reported that the committee had, according to order, performed that duty.

ELECTION FOR THE THIRD TERM—1797.

JOHN ADAMS, President.

THOMAS JEFFERSON, Vice-President.

IN SENATE, *January 31, 1797.*

Resolved, That Messrs. Sedgwick, Larrance, and Read be a joint committee on the part of the Senate, with such committee as may be appointed by the House of Representatives, to ascertain and report a mode of examining the votes for President and Vice-President, and notifying the persons elected of their election, and for regulating the time, place, and manner of administering the oath of office to the President.

Ordered, That the Secretary carry this resolution to the House of Representatives, and desire their concurrence.

February 2, 1797.

Mr. Sedgwick, from the joint committee, reported that, in their opinion, the following resolution ought to be adopted, viz:

“That the two Houses shall assemble in the Chamber of the House of Representatives on Wednesday next, at twelve o'clock; that one person be appointed a teller, on the part of the Senate, to make a list of the votes as they shall be declared; that the result shall be delivered to the President of the Senate, who shall announce the state of the vote, and the persons elected, to the two Houses, assembled as aforesaid, which shall be deemed a declaration of the persons elected President and Vice-President, and, together with a list of votes, be entered on the Journals of the two Houses.”

On motion,

It was agreed to adopt the report, and that Mr. Sedgwick be the teller of the votes on the part of the Senate.

February 8, 1797.

A message from the House of Representatives, by Mr. Beckley, its Clerk:

MR. PRESIDENT: The House of Representatives are ready to meet the Senate in the Chamber of that House, agreeable to the report of the joint committee, to attend the opening and examining the votes of the electors for President and Vice-President of the United States, as the Constitution provides.

The two Houses of Congress accordingly assembled in the Representatives' Chamber, and the certificates of the electors of sixteen States were, by the Vice-President, opened and delivered to the tellers appointed for the purpose, who, having examined and ascertained the number of votes, presented a list thereof to the Vice-President; which was read, as follows:

Electors from each State.	States.	John Adams, of Massachusetts.	Thomas Jefferson, of Virginia.	Thomas Pinckney, of South Carolina.	Aaron Burr, of New York.	Samuel Adams, of Massachusetts.	O. Ellsworth, of Connecticut.	John Jay, of New York.	George Clinton, of New York.	S. Johnston, of North Carolina.	James Iredell, of North Carolina.	G. Washington, of Virginia.	C. C. Pinckney, of South Carolina.	John Henry, of Maryland.
3	Tennessee	3	3	3	3									
4	Kentucky	4	4	4	4									
4	Georgia	4	4	4	4				4					
8	South Carolina	8	8	8	8									
12	North Carolina	11	11	1	6						3	1	1	
21	Virginia	1	20	1	1	15			3			1		
11	Maryland	7	4	4	3									2
3	Delaware	3		3										
15	Pennsylvania	1	14	2	13									
7	New Jersey	7		7										
12	New York	12		12										
9	Connecticut	9		4				5						
4	Rhode Island	4				4								
16	Massachusetts	16		13		1				2				
4	Vermont	4		4										
6	New Hampshire	6				6								
139	.....	71	68	59	30	15	11	5	7	2	3	2	1	2

Whereupon the Vice-President addressed the two Houses of Congress as follows :

"In obedience to the Constitution and law of the United States and to the commands of both Houses of Congress, expressed in their resolution passed in the present session, I now declare that

"JOHN ADAMS is elected President of the United States for four years, to commence with the 4th day of March next ; and that

"THOMAS JEFFERSON is elected Vice-President of the United States for four years, to commence with the 4th day of March next ;

"And may the Sovereign of the universe, the Ordainer of civil government on earth for the preservation of liberty, justice, and peace among men, enable both to discharge the duties of these offices conformably to the Constitution of the United States with conscientious diligence, punctuality, and perseverance."

The Vice-President then delivered the votes of the electors to the Secretary of the Senate, the two Houses of Congress separated, and the Senate returned to their own Chamber.

IN SENATE, *February 9, 1797.*

Mr. Sedgwick, from the joint committee, to whom it was referred to join such committee as might be appointed by the House of Representatives, to ascertain and report a mode of examining the votes for President and Vice-President of the United States, and notifying the persons elected of their election, reported that, having further conferred with the committee appointed by the House of Representatives, in their opinion, the following resolution ought to be adopted by the Senate :

Resolved, That the Secretary of the Senate be directed to give, by letter, to the Vice-President-elect a notification of his election.

On motion, it was agreed to reconsider the resolution, and to recommit the report from the joint committee.

On motion,

Resolved, That the Senate disagree to the report of the joint committee on the mode of notifying the Vice-President-elect of his election, and that a committee be appointed on the part of the Senate to confer with such committee as may be appointed on the part of the House of Representatives, on the report of the joint committee above mentioned, and that Messrs. Sedgwick, Laurance, and Read be the managers at the conference on the part of the Senate.

On motion, that it be

Resolved, That the Secretary be directed, and he is hereby directed, to lay before the President of the United States a copy of the Journal of yesterday, relative to the opening and counting the votes for President and Vice-President of the United States, and the declaration of the President of the Senate consequent thereon.

Ordered, That the motion lie until to-morrow for consideration.

February 10, 1797.

The Senate resumed the consideration of the motion made yesterday, that the Secretary of the Senate wait upon the President of the United States, and notify him of the election of President and Vice-President of the United States, to commence with the 4th of March next.

And the motion, being amended, was adopted, as follows:

Ordered, That the Secretary of the Senate lay before the President of the United States a copy of the Journal of the 8th instant, relative to the opening and counting the votes for President and Vice-President of the United States, and the declaration of the President of the Senate consequent thereon.

Mr. Sedgwick, from the committee of conference above mentioned, reported that the following resolution should be adopted by the House of Representatives:

Resolved, That the notification of the election of the Vice-President-elect be made by such person and in such manner as the Senate may direct.

On motion, that it be

Resolved, That the President of the United States be requested to communicate (in such manner as he shall judge most proper) to the person elected Vice-President of the United States, for the term of four years, to commence with the 4th day of March next, information of his said election.

It passed in the negative.

On motion.

Ordered, That the resolution this day agreed to by the House of Representatives, relative to the notification of the election of the Vice-President-elect, be referred to Messrs. Mason, Hillhouse and Sedgwick, to consider and report thereon to the Senate.

Mr. Mason reported from the committee appointed, and the report being read was amended and adopted as follows:

Resolved, That the President of the United States be requested to cause to be transmitted to THOMAS JEFFERSON esq., of Virginia, Vice-President-elect of the United States, notification of his election to that office, and that the President of the Senate do make out and sign a certificate in the words following:

"Be it known, That the Senate and House of Representatives of the United States of America, being convened in the city of Philadelphia, on the second Wednesday of February, in the year of our Lord one thousand seven hundred and ninety-seven, the underwritten, Vice-President of the United States and President of the Senate did, in presence of the said Senate and House of Representatives, open all the certificates and count all the votes of the electors for a President and for a Vice-President; by which it appears that THOMAS JEFFERSON, esq., was duly elected, agreeable to the Constitution, Vice-President of the United States of America.

"In witness whereof I have hereunto set my hand and seal this 10th day of February 1797."

IN THE HOUSE OF REPRESENTATIVES, *February 1, 1797.*

The House proceeded to consider so much of the message of yesterday, from the Senate, as relates to the appointment of a joint committee of the two Houses, to ascertain and report a mode of examining the votes for President and Vice-President, and of notifying the persons elected of their election; and to regulate the time, place, and manner of administering the oath of office to the President,

Whereupon,

Resolved, That Mr. Sitgreaves, Mr. Parker, and Mr. Jeremiah Smith be appointed of the said committee, on the part of this House.

February 3, 1797.

Mr. Sitgreaves, from the committee named above, made a report, in part; which was twice read and agreed to by the House, as follows:

"That the two Houses shall assemble in the chamber of the House of Representatives, at Wednesday next, at twelve o'clock. That two persons be appointed tellers on the part of the House, to make a list of the votes, as they shall be declared. That the result shall be delivered to the President of the Senate, who shall announce the state of the vote and the persons elected to the two Houses assembled as aforesaid; which shall be deemed a declaration of the persons elected President and Vice-President, and, together with a list of votes, be entered on the Journals of the two Houses."

Resolved, That Mr. Sitgreaves and Mr. Parker be appointed tellers on the part of the House, pursuant to the said report.

February 8, 1797.

Ordered, That a message be sent to the Senate to inform them that this House is now ready to attend them in opening the certificates and counting the votes of the electors of the several States in a choice of a President and Vice-President of the United States, in pursuance of the resolutions of the two Houses of the 2d and 3d instant.

The Clerk accordingly waited upon the Senate, and the President and members of the Senate soon after entered and took their seats; the President on the right hand of the Speaker of the House of Representatives, and the members of the Senate on the same side of the chamber, when the President of the Senate, Mr. Adams, thus addressed the two Houses:

Gentlemen of the Senate and of the House of Representatives: The purpose for which we are assembled is expressed in the following resolution. [Mr. Adams here read the resolutions which had been adopted by the two Houses relative to the subject.] I have

received packets containing the certificates of the votes of the electors for President and Vice-President of the United States from all the sixteen States of the Union. I have also received duplicates of the returns by post from fifteen of the States. No duplicate from the State of Kentucky is yet come to hand.

It has been the practice heretofore, on similar occasions, to begin with the returns from the State at one end of the United States and to proceed to the other; I shall therefore do the same at this time.

Mr. Adams then took up the packet from the State of Tennessee, and after having read the superscription, broke the seal and read the certificate of the election of the electors. He then gave it to the clerk of the Senate, requesting him to read the report of the electors, which he accordingly did. All the papers were then handed to the tellers, and when they had noted the contents, the President of the Senate proceeded with the other States.

[Here follows the table which is a copy of the one appearing in the Senate proceedings, except that the States follow in a different order, and there is a recapitulation of the votes.]

All the returns having been gone through, Mr. Sedgwick reported that, according to order, the tellers appointed by the two Houses had performed the business assigned them, and reported the result to be as above stated.

The President of the Senate thus addressed the two Houses:

Gentlemen of the Senate and House of Representatives: By the report which has been made to me by the tellers appointed by the two Houses to examine the votes, there are 71 votes for JOHN ADAMS; 68 for THOMAS JEFFERSON; 59 for THOMAS PINCKNEY; 30 for AARON BURR; 15 for SAMUEL ADAMS; 11 for OLIVER ELLSWORTH; 7 for GEORGE CLINTON; 5 for JOHN JAY; 3 for JAMES IREDELL; 2 for GEORGE WASHINGTON; 2 for JOHN HENRY; 2 for SAMUEL JOHNSTON; and 1 for CHARLES C. PINCKNEY. The whole number of votes are 135; 70 votes therefore make a majority; so that the person who has 71 votes, which is the highest number, is elected President, and the person who has 68 votes, which is the next highest number, is elected Vice-President.

The President of the Senate then sat down for a moment, and rising again thus addressed the two Houses:

"In obedience to the Constitution and law of the United States, and to the commands of both Houses of Congress, expressed in their resolution passed in the present session, I declare that—

"JOHN ADAMS is elected President of the United States for four years, to commence with the 4th day of March next; and that—

"THOMAS JEFFERSON is elected Vice-President of the United States for four years, to commence on the 4th day of March next. And may the Sovereign of the Universe, the Ordainer of civil government on earth, for the preservation of liberty, justice, and peace among men, enable both to discharge the duties of these offices conformably to the Constitution of the United States with conscientious diligence, punctuality, and perseverance."

The President and members of the Senate then retired, and the House came to order, when Mr. Sitgreaves made a report on the business; which was read and ordered to be entered on the Journal.

February 9, 1797.

Mr. Sitgreaves, from the joint committee appointed to confer with a committee of the Senate on the subject of the election of a President and Vice-President, made a further report; which was twice read, and agreed to by the House, as followeth:

Resolved, That the Clerk of this House be directed to give, by letter, to the Vice-President-elect a notification of his election.

This resolution was rescinded, and a committee of conference appointed to meet a like committee on the part of the Senate. Mr. Sitgreaves, Mr. Parker, and Mr. Jeremiah Smith were appointed on said committee.

February 10, 1797.

Mr. Sitgreaves, from the above committee, made a report; which was adopted, as followeth:

Resolved, That the notification of the election of the Vice-President-elect be made by such person and in such manner as the Senate may direct.

AN ATTEMPT TO REMEDY THE DIFFICULTIES LIKELY TO ARISE IN REGARD TO COUNTING ELECTORAL VOTES.

IN SENATE, January 23, 1800.

Mr. James Ross, a Senator from Pennsylvania, offered the following :

Resolved, That a committee be appointed to consider whether any, and what, provisions ought to be made by law for deciding disputed elections of President and Vice-President of the United States, and for determining the legality or illegality of the votes given for those officers in the different States.

A motion was made to amend the resolution by adding "and the committee be authorized to report by bill or otherwise."

In the debate upon this resolution,

Mr. John Brown, of Kentucky, was of opinion that this was a subject on which Congress had no right to legislate. * * * He wished the gentleman who had made this motion would pay further attention to the subject, and believed he would find that if anything was to be done, it must be done by proposing an amendment to the Constitution.

Mr. Ross said the Constitution had certainly made no provision on this subject. It only directed that after the votes were received, &c., the President of the Senate should, in the presence of the Senate and House of Representatives, open the certificates, and the votes should be counted. Suppose, said he, persons should claim to be electors who had never been properly appointed, should their vote be received? Suppose they should vote for a person to be President who had not the age required by the Constitution, or who had not been long enough a citizen of the United States, or for two persons who were both citizens of the same State; such cases might happen, and were very likely to happen, and is there no remedy? What a situation would the country be in if such a case was to happen? He thought it their duty to make provision for it, and he believed a law was sufficient.

Mr. Charles Pinckney, of South Carolina, thought it a very dangerous practice to endeavor to amend the Constitution by making laws for the purpose. * * * He remembered very well that in the Federal Convention great care was used to provide for the election of the President of the United States independently of Congress; to take the business as far as possible out of their hands. The votes are to be given by electors appointed for that express purpose, the electors are to be appointed by each State, and the whole direction as to the manner of their appointment is given to the State Legislatures. Nothing was more clear to him than that Congress had no right to meddle with it at all; as the whole was intrusted to the State Legislatures, they must make provision for all questions arising on the occasion.

Mr. Samuel Dexter, of Massachusetts, did not doubt the right of the Legislature to make such provisions on this subject as appeared to be necessary. The proceedings in the election of a President may be defective, and can it be supposed there is no way to correct them? The law now proposed appears to be necessary to carry into effect the power of appointing the President; it is therefore clearly constitutional.

Mr. Samuel Livermore, of New Hampshire, never felt less doubt on any subject than the one now under consideration; the Constitution has given many directions as to appointment of the President, some of which he read. Is it possible that gentlemen can suppose all these may be violated and disregarded, and yet that it is nobody's business to interpose and make provision to prevent it?

Mr. Abraham Baldwin, of Georgia, is reported at greater length than any other speaker. The gist of his remarks was in his last sentence. His own opinion was that the provisions on this subject were already sufficient; that all the difficulties which had been suggested were as safely left to the decision of the assemblies of electors as of any body of men that could be devised; and that the members of the Senate and House of Representatives, when met together in one room, should receive the act of the electors as they would the act of any other constitutional branch of the Government, to judge only of its authentication, and then to proceed to count the votes, as directed in the second article of the Constitution.

January 24, 1800.

A committee, consisting of Messrs. Ross, Laurance, Dexter, Pinckney, and Livermore, was appointed, and they reported a bill February 14. This bill is not printed in the *Annals of Congress*, but appears in the "Aurora" newspaper, printed at Philadelphia, Wednesday, February 19, 1800, as follows :

A bill prescribing the mode of deciding disputed elections of President and Vice-President of the United States.

SECTION 1. *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That on the day before the second Wednesday in February of any year when a President and Vice-President of the United States shall

have been voted for by electors in the preceding December, it shall be the duty of the Senate and House of Representatives of the United States, to choose, by ballot, in each house, six members thereof, and the twelve persons thus chosen, together with the Chief-Justice of the United States, or if he is absent from the seat of Government, or unable to attend, then with the next senior judge of the Supreme Court of the United States who is present and able to attend, shall form a grand committee, and shall have power to examine, and finally to decide, all disputes relating to the election of President and Vice-President of the United States: *Provided, always,* That no person shall be deemed capable of serving on this committee who is one of the highest candidates, or of kin to any of the five highest candidates out of whom a President of the United States, to be chosen by the House of Representatives in case no person shall be found to have a majority of the whole number of electors by the different States.

SEC. 2. *And be it further enacted,* That it shall be the duty of all of the judges of the Supreme Court to attend at the seat of Government on the day before the second Wednesday of February, in every year, when a President and Vice-President of the United States shall have been voted for in the preceding December, and to remain there until the committee to be appointed under this act shall have made their final report.

SEC. 3. *And be it further enacted,* That after the members of the committee shall have been appointed in the Senate and House of Representatives as aforesaid, each house shall then proceed to choose by ballot two members thereof as tellers, whose duty it shall be to receive the certificates of the electors from the President of the Senate after they shall have been opened and read, and to note in writing the dates of the certificates, the names of the electors, the time and place of their meeting, the number of votes given, the names of the persons voted for, and also the substance of the certificates from the executive authority of each State accompanying the certificates of the electors; and the minutes thus made by the tellers shall be read in the presence of both houses, and a copy thereof entered on the journals of each.

SEC. 4. *And be it further enacted,* That when the certificates transmitted by the electors of the different States shall have been opened by the President of the Senate, and read in the presence of both houses, and the minutes of the tellers read and compared, the President of the Senate shall administer the following oath to all the members of the grand committee appointed in pursuance of this act:

"I, A. B., do swear (or affirm, as the case may be) that I will impartially examine the votes given by the electors of President and Vice-President of the United States, together with the exceptions and petitions against them, and a true judgment give thereon, according to the evidence: so help me God."

The President of the Senate shall then deliver to the chairman of the grand committee all the certificates of the electors, and all the certificates or other documents transmitted by them, or by the executive authority of any State, and all the petitions, exceptions, and memorials against the votes of the electors, of the persons for whom they have voted, together with the testimony accompanying the same.

SEC. 5. *And be it further enacted,* That after the grand committee shall have been appointed and sworn in the manner herein directed, the Chief-Justice of the United States, or other judge of the Supreme Court of the United States, as the case may be, shall act as chairman of the committee. They shall meet on every —, (Sundays excepted,) from the time of their appointment until they make their final report. They shall sit with closed doors, and a majority of the members may proceed to act, provided the number from each house is equal; and if any member of the committee, appointed by either house, should die, or become unable to attend after his appointment, the committee, before they proceed further, shall notify both houses of such death or inability, and the house by which such member was appointed shall immediately proceed to choose another member, by ballot, to supply such vacancy; and the member thus chosen shall be sworn before the President of the Senate; and if the Chief-Justice or other judge of the Supreme Court of the United States, being a member of the said committee, should die, or become unable to attend after his appointment, the committee, before they proceed farther, shall notify both houses of such death or inability, and the judge of the Supreme Court of the United States who is next in seniority, and qualified according to the provisions of this act, shall be sworn before the President of the Senate; and the person or persons thus appointed and sworn shall from thenceforth have and exercise the powers necessary to supply such vacancy.

SEC. 6. *And be it further enacted,* That the grand committee shall have power to send for persons, papers, and records to compel the attendance of witnesses, to administer oaths to all persons examined before them, and to punish contempts of witnesses refusing to answer, as fully and absolutely as the Supreme Court of the United States may or can do in causes depending therein; and if any person sworn and examined before this committee shall swear or affirm falsely, such person being thereof convicted shall incur the pains, penalties, and disabilities inflicted by the laws of the United States upon willful and corrupt perjury.

SEC. 7. *And be it further enacted,* That it shall be the duty of the marshals of the

several districts of the United States, and of their deputies, to serve all process directed to them and signed by the chairman of the grand committee, and for such services they shall receive the fees allowed for the services of similar process issued by the Supreme Court of the United States; and all witnesses attending the committee in consequence of summons or other process shall receive the same compensation as witnesses attending the Supreme Court of the United States.

SEC. 8. *And be it further enacted*, That the grand committee shall have power to inquire, examine, decide, and report upon the constitutional qualifications of the persons voted for as President and Vice-President of the United States, upon the constitutional qualifications of the electors appointed by the different States, and whether their appointment was authorized by the State legislature or not; upon all petitions and exceptions against corrupt, illegal conduct of the electors, or force, menaces, or improper means used to influence their votes; or against the truth of their returns, or the time, place, or manner of giving their votes: *Provided, always*, That no petition or exception shall be granted, allowed, or considered by the sitting grand committee which has for its object to dispute, draw into question the number of votes given for an elector in any of the States, or the fact whether an elector was chosen by a majority of votes in his State or district.

SEC. 9. *And be it further enacted*, That the grand committee shall appoint a clerk, who shall keep a journal of their proceedings under their direction; and after the grand committee shall have made their final report, he shall deposit with the Secretary of the Senate this journal, together with all the certificates, written testimony, and documents which were under the consideration of the grand committee, where the same shall remain open for the inspection of the members of both houses.

SEC. 10. *And be it further enacted*, That on the first day of March next after their appointment, the grand committee shall make their final report to the Senate and House of Representatives, stating the legal number of votes for each person, and the number of votes which have been rejected; the report of the majority of the said committee shall be a final and conclusive determination of the admissibility or inadmissibility of the votes given by the electors for President and Vice-President of the United States; and where votes are rejected by the grand committee, their reasons shall be stated in writing for such exclusion, and signed by the members of the committee who voted for rejecting them, and the report shall be entered on the journals of both houses, who shall, on the day after the report is made, meet and declare the persons duly elected, and if no election of President has happened, then the House of Representatives shall immediately proceed, as the Constitution directs, to elect a President.

SEC. 11. *And be it further enacted*, That when the grand committee shall have been duly formed according to the directions of this act, it shall not be in the power of either house to dissolve the committee or to withdraw any of its members.

SEC. 12. *And be it further enacted*, That it shall be the duty of the executive authority of each State to cause three copies of the law, resolution, or act of the State legislatures, respectively, under which electors are chosen or appointed, to be made, certified, and delivered to the electors in such State before they give their votes, and the electors shall annex one of the said copies to each list of their votes.

SEC. 13. *And be it further enacted*, That all petitions respecting the election of President and Vice-President of the United States shall be presented and read in the Senate of the United States, and remain there until delivered to the grand committee, at which time each petition shall be read in the presence of both houses; but no petition shall be received after the certificates of the electors shall have been opened, read, and committed to the grand committee, nor unless it is signed by at least ——— citizens of the State where the votes complained of were given.

SEC. 14. *And be it further enacted*, That persons petitioning against the votes given by any of the electors of President and Vice-President of the United States, and persons desirous of supporting such contested votes, may respectively obtain testimony in the same manner and under the same rules and regulations which are provided by the act entitled "An act to prescribe the mode of taking evidence in cases of contested elections for members of the House of Representatives of the United States, and to compel the attendance of witnesses;" and the rules, regulations, provisions, and penalties of the said act shall be, and they are hereby, extended to cases arising under this act, as fully and absolutely as if the same were herein recited and enacted: *Provided, always*, That the testimony thus taken shall be transmitted to the Secretary of the Senate of the United States, instead of being transmitted to the Clerk of the House of Representatives, as is directed by the said act: *And provided also*, That all testimony taken in pursuance of this act shall be transmitted and delivered to the Secretary of the Senate on or before the day upon which the certificates of the electors of the President and Vice-President of the United States are to be opened.

March 25, 1800.

A motion was made to strike out the ten first sections of the bill and insert the following:

Whereas, On an election of President and Vice-President of the United States, ques-

tions may arise whether an elector has been appointed in a mode authorized by the Legislature of his State or not: whether the time at which he was chosen and the day he gave his vote were those determined by Congress: whether he were not at the time a Senator or Representative of the United States, or held an office of trust or profit under the United States: whether one at least of the persons he has voted for is an inhabitant of a State other than his own: whether the electors voted by ballot, and have signed, certified, and transmitted to the President of the Senate a list of all the persons voted for, and the number of votes for each: whether the persons voted for are natural-born citizens, or were citizens of the United States at the time of the adoption of the Constitution, were thirty-five years old, and had been fourteen years resident within the United States: And the Constitution of the United States having directed that "the President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates, and the votes shall then be counted," from which the reasonable inference and practice has been that they are to be counted by the members composing said Houses, and brought there for that office, no other being assigned them; and inferred the more reasonably as thereby the constitutional weight of each State in the election of those high officers is exactly preserved in the tribunal which is to judge of its validity; the number of Senators and Representatives from each State, composing the said tribunal, being exactly that of the electors of the same State:

SECTION 1. *Be it enacted, &c.*, That whensoever the members of the Senate and House of Representatives shall be assembled for the purpose of having the certificates of the electors of the several States opened and counted, the names of the several States shall be written on different and similar tickets of paper, and put into a ballot-box, out of which one shall be drawn at a time; and so soon as one is drawn, the packet containing the certificate of that State shall be opened by the President of the Senate, and shall then be read, and then shall be read also the petitions, depositions, and other papers and documents concerning the same; and if no exception is taken thereto, the votes contained in such certificates shall be counted; but if the votes, or any of them, shall be objected to, the members present shall, on the question propounded by the President of the Senate, decide, without debate, by yea or nay, whether such vote or votes are constitutional or not; and the votes of one State being thus counted, another ticket shall be drawn from the ballot-box, and the certificate, and the votes of the electors of the State drawn, shall be proceeded on as before directed; and so on, one after another, until the whole of the votes shall be counted; and if the counting cannot be completed in one day, the members of the said two Houses may adjourn from day to day until it be completed.

A division of the question was called for, and that it first be taken on striking out.

The motion to strike out (see proceedings March 27) was passed in the negative—yeas 10, nays 15: as follows:

YEAS—Messrs. Anderson, Baldwin, Bloodworth, Cocke, Franklin, Hillhouse, Langdon, Mason, Nicholas, and Pinckney.

NAYS—Messrs. Bingham, Chipman, Dayton, Dexter, Foster, Goodhue, Greene, Latimer, Lloyd, Paine, Read, Ross, Schureman, Tracy, and Wells.

March 27, 1800.

On motion to strike out the seventh section, as follows:

SEC. 7. *And be it further enacted*, That the grand committee shall have power to inquire, examine, decide, and report upon the constitutional qualifications of the persons voted for as President and Vice-President of the United States; upon the constitutional qualifications of the electors appointed by the different States, and whether their appointment was authorized by the State Legislature or not, or made according to the mode prescribed by the Legislature; upon all petitions and exceptions against corrupt, illegal conduct of the electors, or force, menaces, or improper means used to influence their votes; or against the truth of their returns, or the time, place or manner of giving their votes: *Provided always*, That no petition, or exception, shall be granted or allowed by the grand committee which shall have for its object to draw into question the number of votes on which any elector in any of the States shall have been declared appointed.

It passed in the affirmative—yeas 15, nays 12; as follows:

YEAS—Messrs. Chipman, Dayton, Dexter, Foster, Goodhue, Greene, Hillhouse, Latimer, Lloyd, Paine, Read, Ross, Schureman, Tracy, and Wells.

NAYS—Messrs. Anderson, Bingham, Bloodworth, Cocke, Franklin, Langdon, Laurance, Livermore, Marshall, Mason, Nicholas, and Pinckney.

Mr. Pinckney discussed the bill at length. Upon the power of Congress over the electoral vote he said: "Knowing that it was the intention of the Constitution to make the President completely independent of the Federal Legislature, I well remember it was the object, as it is at present not only the spirit but the letter of that instrument, to give to Congress no interference in or control over the election of a President. It is made their duty to count over the votes in a convention of both Houses,

and for the President of the Senate to declare who has the majority of the votes of the electors transmitted. It never was intended, nor could it have been safe, in the Constitution, to have given to Congress thus assembled in convention the right to object to any vote, or even to question whether they were constitutionally or properly given. This right of determining on the manner in which the electors shall vote; the inquiry into the qualifications, and the guards that are necessary to prevent disqualified or improper men voting, and to insure the votes being legally given, rests and is exclusively vested in the State Legislatures. If it is necessary to have guards against improper elections of electors, and to institute tribunals to inquire into their qualifications, with the State Legislatures, and with them alone, rests the power to institute them, and they must exercise it. To give to Congress, even when assembled in convention, a right to reject or admit the votes of States, would have been so gross and dangerous an absurdity as the framers of the Constitution never could have been guilty of. How could they expect that in deciding on the election of a President, particularly where such election was strongly contested, that party spirit would not prevail, and govern every decision? Did they not know how easy it was to raise objections against the votes of particular elections, and that in determining upon these it was more than probable the members would recollect their *sides*, their favorite candidate, and sometimes their own interests? Or must they not have supposed that, in putting the ultimate and final decision of the electors in Congress, who were to decide irrevocably and without appeal, they would render the President their creature, and prevent his assuming and exercising that independence in the performance of his duties upon which the safety and honor of the Government must forever rest?

"But it is said, are Congress bound to receive every vote of an elector, whether it is constitutionally given or not? Suppose votes are sent for a person not a citizen, or fourteen years a resident of the United States, or under thirty-five years of age, or that the Legislature of a State has not authorized by their act the votes of the electors; or that double returns are made: who are then to decide? Or has not Congress, under these circumstances, a power to determine which of the votes shall be received or rejected?

"These being the avowed reasons for introducing this bill, I answer them by observing that the Constitution having directed that electors shall be appointed in the manner the Legislature of each State shall direct, it is to be taken as granted that the State Legislatures will perform their duties, and make such directions as only qualified men shall be returned as electors. The disqualifications against any citizen being an elector are very few indeed; they are two: The first, that no officer of the United States shall be an elector; and the other that no member of Congress shall. The latter is a provision which goes unanswerably to prove the solidity of my objections to this bill, and to show how extremely guarded the Constitution is in preventing the members of Congress from having any agency in the election except merely in counting the votes. They well knew that to give to members of Congress a right to give votes in this election, or to decide upon them when given, was to destroy the independence of the Executive and make him the creature of the Legislature."

Mr. Pinckney further said, in other parts of his speech, "that no power or authority is given to Congress, even when both Houses are assembled in convention, further than to open and to count the votes, and declare who are President and Vice-President, if an election has been made;" "that so far from appointing committees to receive memorials or petitions respecting the election, or decide upon it, or so far from having any right to delegate an authority on this subject, that Congress shall not themselves, even when in convention, have the smallest power to decide on a single vote." "I have intentionally gone into repetitions on this subject to show how utterly unconstitutional it would be for Congress, either acting in their separate chambers or in convention, to attempt to assume to themselves the power to reject a single vote."

Mr. Pinckney, on the necessity of guarding against violations of the Constitution, such as has been suggested by friends of the bill, said: "If the bill is not passed, we are to depend, as we have hitherto done, on the attachment of the States and the good sense and integrity of their executives. That the Constitution makes this dependence necessary, and as we have never yet been disappointed, we are to hope we never shall. But surely its friends never could have considered the extent and danger of giving to this committee, or even to Congress, the right to decide on double returns, or they must immediately have seen the extreme impropriety of attempting it. It is, in short, nothing less than holding out to the minority in all the States a temptation to dispute every election, and to always bring forward double returns. In every State where the election is strongly contested there will, of course, be a minority. It will be easily known by the measures of Congress to which candidate the majority of that body inclines, and whose friends will compose the committee that are to be thus packed and selected. If the minority in a particular State find that the candidate they have unsuccessfully supported is the favorite one with the majority of Congress, or their committees, they will easily discover the means of raising objections to the validity of the return of the electors, insist that they themselves are elected, proceed to the length of meeting and voting,

and transmit to Congress a double return. It will not be difficult for them to accompany their return with plausible reasons, and perhaps with such unfounded assertions, and specious although false documents, as to give to the committee some colorable reason for rejecting the return of the electors certified by the governor, and admitting the other. Knowing the situation of the Union; how differently some States think from others on political questions; how divided Congress have been for some years on certain great and trying subjects; who that is a friend to harmony and the Constitution, and to that easy, tranquil mode of deciding these elections which has hitherto prevailed, can wish to go into a measure so calculated to produce unceasing disputes, and to throw almost every State into scenes which can never arise but from this bill."

The bill passed the Senate by a vote of 16 to 12, and its title is as follows: "An act to prescribe the mode of deciding disputed elections of President and Vice-President of the United States." The vote was as follows:

YEAS—Messrs. Bingham, Chipman, Dayton, Dexter, Foster, Goodhue, Greene, Hillhouse, Latimer, Lloyd, Paine, Read, Ross, Schureman, Tracy, and Wells.

NAYS—Messrs. Anderson, Baldwin, Bloodworth, Brown, Cocke, Franklin, Langdon, Livermore, Marshall, Mason, Nicholas, and Pinckney.

The bill as it passed the Senate is in these words:

A bill prescribing the mode of deciding disputed elections of President and Vice-President of the United States, as agreed to be amended in Senate March 10, and ordered to be engrossed as amended for a third reading on the 21st of March, 1800.

SECTION 1. *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That on the day before the second Wednesday in February, next following the day when a President and Vice-President shall have been voted for by the electors, it shall be the duty of the Senate and House of Representatives of the United States to choose, by ballot, in each house, six members thereof. The Senate, immediately after this choice, shall nominate, by ballot, three of its members, and transmit their names to the House of Representatives, who shall, by ballot, choose one of the three, and the thirteen persons thus chosen shall form a grand committee, and shall have power to examine and finally to decide disputes relative to election of President and Vice-President of the United States, as is hereinafter limited and prescribed: *Provided, always*, That no person shall be capable of serving on this committee who shall be one of the five highest candidates out of whom a President of the United States may be chosen by the House of Representatives, in case no person should be found to have a majority of the whole number of the votes of the electors appointed by the different States.

Section 2 is identical with the same section of the preceding bill.

Section 3 is also identical with the same section of the preceding bill, with the exception that after the word "House," in line three, the following words are inserted, "before it adjourns."

Section 4 is the same as section four of the foregoing bill, with the exception of the oath, which reads as follows:

"I, A. B., do swear (or affirm, as the case may be) that I will impartially examine the votes given by the electors of President and Vice-President of the United States, together with the exceptions and petitions against them, and a true judgment given thereon agreeable to the Constitution and laws, and according to the evidence: so help me God."

SECTION 5. *And be it further enacted*, That after the grand committee shall have been appointed and sworn in the same manner herein directed, the person chosen by the House of Representatives out of the nomination by the Senate, shall act as chairman of the committee; they meet on every day (Sundays excepted) from the time of their appointment until they shall make their final report; they shall sit with closed doors, and a majority of the members may proceed to act, and if any members of the committee appointed by either house should die, or become unable to attend after his appointment, the committee, before they proceed further, shall notify both houses of such death or inability; and the house by which such member was appointed shall immediately proceed to choose another member, by ballot, to supply such vacancy, and the member thus chosen shall be sworn or affirmed by the President of the Senate; and if the chairman of the committee shall die, or become unable to attend after his appointment, the committee, before they proceed further, shall notify both houses of such death or inability; the Senate shall then nominate three of its members, out of whom the House of Representatives shall choose according to the provision of this act, who shall be sworn or affirmed by the President of the Senate, and shall thenceforth be the chairman of the said committee, and the person or persons thus appointed and sworn or affirmed shall henceforth have and exercise the powers necessary to supply such vacancy.

SEC. 6. *And be it further enacted*, That the grand committee shall have power to send for persons, papers, and records, to compel the attendance of witnesses, to administer

oaths or affirmations to all persons examined before them, and to punish contempts of witnesses refusing to answer as fully and absolutely as the Supreme Court of the United States may or can do in causes depending therein; and the testimony of all witnesses examined before the committee shall be reduced to writing by the secretary of the committee, and shall be signed by the witness after his examination is closed. And if any person, sworn and examined before this committee, shall swear or affirm falsely, such person thereof convicted shall incur the pains, penalties, and disabilities inflicted by the laws of the United States upon willful and corrupt perjury.

Section 7 is identical with the same section in the preceding bill.

Section 8 is the same as section eight of the preceding bill, with the exception that after the word "not," in line five, the following is substituted: "or made according to the mode prescribed by the legislature; upon all petitions and exceptions against corrupt, illegal conduct of the electors, or force, menaces, or improper means used to influence their votes, or against the truth of their returns, or the time, place, or manner of giving their votes: *Provided, always,* That no petition or exception shall be granted or allowed by the grand committee which shall have for its object to draw into question the number of votes on which any elector in any of the States shall have been appointed."

Sections 9, 10, and 11 are the same as similar sections of the preceding bill.

SEC. 12. *And be it further enacted,* That it shall be the duty of the executive authority of each State to cause three copies of the law, resolution, or act of the State legislatures, respectively, under which electors are chosen or appointed, to be made, certified, and delivered to the electors in such State before they give their votes, and the electors shall annex one of the said copies to such list of their votes. And it shall hereafter be the duty of the electors to express specially in their certificates the time, the place, and the manner of giving their votes.

Section 13 strikes out of the same section of the preceding bill all after the word "committee," in line six, and inserts the following: "Nor shall any petition against the qualifications of a candidate or elector, or for improper conduct in an elector, be received unless ——— notice thereof be previously given to the person whose qualifications are contested, or whose improper conduct is petitioned against.

Section 14 strikes out of section 14 of the above bill all after the word "States," in line eleven, and adds the following: "On or before the day upon which the certificates of the electors of the President and Vice-President of the United States are to be opened."

IN THE HOUSE OF REPRESENTATIVES, *March 31, 1800.*

This bill was referred to the Committee of the Whole House on April 1. It was acted upon April 16. Mr. John Marshall, afterward Chief-Justice, after speaking of the importance of the subject before the committee and the necessity of some salutary mode being adopted for this object, expressed his doubts as to the propriety of two points in this first section of the bill, to wit: First, that the Senate were to name the chairman of the grand committee, and, secondly, that the opinion of this grand committee was to be final. He therefore moved to strike out of the section so much as related to those principles, and read what he wished to introduce as a substitute. Some debate was had on this motion, when Mr. Nicholas, expressing a desire to acquire all the information that was necessary to digest the new principles, moved the committee to rise; which was done accordingly. April 17, the bill was considered in Committee of the Whole. Mr. Randolph moved to amend the amendment by striking out that part which directs the grand committee to be chosen by ballot, and inserting that they shall be chosen by lot. Mr. Nicholas rose and, after noticing the amendments which had been offered and animadverting at considerable length upon the unconstitutionality of the bill, moved to strike out the first section. He was followed by Mr. Marshall in opposition and Mr. Randolph in support of the motion. On April 18, the bill coming up again, Mr. Harper moved it be postponed until Monday. Mr. Nicholas, after expressing his abhorrence of the principles contained in the bill, moved that it be postponed till the first Monday in December next. The motion was lost—48 to 52; as follows:

YEAS—Willis Alston, Theodorus Bailey, Phaniel Bishop, Robert Brown, Samuel J. Cabell, Gabriel Christie, Matthew Clay, William Charles Cole Claiborne, John Condit, Thomas T. Davis, John Dawson, George Dent, Joseph Eggleston, Lucas Elmendorf, John Fowler, Albert Gallatin, Edwin Gray, Andrew Gregg, John A. Hanna, Thomas Hartley, Joseph Heister, Archibald Henderson, David Holmes, George Jackson, James Jones, Aaron Kitchell, Michael Leib, Matthew Lyon, Nathaniel Macon, Peter Muhlenberg, Anthony New, John Nicholas, Joseph H. Nicholson, John Randolph, John Smiley, John Smith, Samuel Smith, Richard Dobbs Spaight, Richard Stanford, David Stone, Thomas Sumter, Benjamin Taliaferro, John Thompson, Abram Trigg, John Trigg, Philip Van Cortlandt, Joseph B. Varnum, and Robert Williams.

NAYS—George Baer, Bailey Bartlett, James A. Bayard, John Bird, Jonathan Brace, John Brown, Christopher G. Champlin, William Cooper, Samuel W. Dana, Franklin Davenport, John Davenport, John Dennis, Joseph Dickson, William Edmond, Thomas Evans, Abiel Foster, Dwight Foster, Jonathan Freeman, Henry Glenn, Chancey

Goodrich, Elizur Goodrich, William Gordon, Roger Griswold, William Barry Grove, Robert Goodloe Harper, William H. Hill, Benjamin Huger, James H. Inlay, Henry Lee, Silas Lee, Samuel Lyman, James Linn, John Marshall, Lewis R. Morris, Abraham Nott, Robert Page, Josiah Parker, Thomas Pinckney, Jonas Platt, Leven Powell, John Reed, John Rutledge, jr., Samuel Sewall, James Sheafe, William Shepard, George Thatcher, John Chew Thomas, Richard Thomas, Peleg Wadsworth, Robert Wain, Lemuel Williams, and Henry Woods.

Mr. Harper's motion then prevailed—ayes 54. On Monday, April 26, Mr. Harper moved that the Committee of the Whole should be discharged from the further consideration of the bill, for the purpose of committing it to a select committee. He thought some essential alterations were wanting, which could not be incorporated in the present bill in the House. Mr. Marshall supported the motion. Messrs. Gallatin and Nicholas opposed the motion, and hoped, first, the principle would be decided whether there should be a committee at all or not, before its commitment. The motion was carried—ayes 54. Messrs. Marshall, Sewall, Chauncey Goodrich, Harper, Nicholas, Dennis, and Bayard were appointed said committee. Friday, April 25, the bill was reported back by Mr. Marshall, as follows:

REPORT.

The committee to whom was referred a bill from the Senate, prescribing the mode of deciding disputed elections of President and Vice-President of the United States, recommended to the House to agree to the said bill, with the following amendments: Strike out from the word "assembled" in the second line of the first section to the end of the bill, and insert in lieu thereof the following: "That on the next following the day when a President and Vice-President shall have been voted for by electors, it shall be the duty of the Senate and House of Representatives of the United States to choose by ballot, in each house, four members thereof. And the persons thus chosen shall form a joint committee and shall have power to examine into all disputes relative to the election of President and Vice-President of the United States, other than such as might relate to the number of votes by which the electors may have been appointed: *Provided always*, That no person shall be capable of serving on this committee who shall be one of the five highest candidates from among whom a President of the United States may be chosen by the House of Representatives, in case no person should be found to have a majority of the whole number of the votes of the electors appointed by the different States.

SEC. 2. *And be it further enacted*, That the President of the Senate shall deliver to the members of this joint committee appointed from the Senate, all the petitions, exceptions, and memorials against the votes of the electors, or the persons for whom they may have voted, together with the testimony accompanying the same, and all documents relative thereto of which he may be possessed, other than those inclosed in the packets containing the certificates of the votes of the electors; and the Speaker of the House of Representatives shall deliver to the members of the joint committee appointed from that house all the documents relative to the votes for President and Vice-President of which he may be possessed.

SEC. 3. *And be it further enacted*, That the joint committee shall meet on every day (Sundays excepted) from the time of their appointment until they make their report. Six members, of whom there must be three from each house, may proceed to act. If any member of the committee appointed by either house should die, or become unable to attend after his appointment, the committee, before they proceed further, shall notify both houses of such death or inability; and the house by which such member was appointed shall immediately proceed to choose another member, by ballot, to supply such vacancy.

SEC. 4. *And be it further enacted*, That the joint committee shall have power to send for persons and papers, to compel the attendance of witnesses, to administer oaths or affirmations to all persons examined before them, and to punish contempts of witnesses refusing to answer, as fully and absolutely as the Supreme Court of the United States may or can do in causes depending therein; and the testimony of all witnesses examined before the committee shall be reduced to writing by the clerk of the committee, and shall be signed by the witness after his examination is closed. And if any person sworn and examined before this committee shall swear or affirm falsely, such person, being thereof convicted, shall incur the pains, penalties, and disabilities inflicted by the laws of the United States upon willful and corrupt perjury.

SEC. 5. *And be it further enacted*, That it shall be the duty of the marshals of the several districts of the United States, and of their deputies, to serve all process directed to them and signed by the chairman of the joint committee; and for such services they shall receive the fees allowed for services of similar process issued by the Supreme Court of the United States; all witnesses attending the committee in consequence of summons or other process, shall receive the same compensation as witnesses attending the Supreme Court of the United States.

SEC. 6. *And be it further enacted*, That the joint committee shall appoint a clerk who shall keep a journal of their proceedings, under their direction, to be reported to the Senate and House of Representatives.

SEC. 7. *And be it further enacted*, That before the houses shall assemble for the purpose of counting the votes, each house shall choose, by ballot, two members thereof as tellers, whose duty it shall be to receive the certificates of the electors from the President of the Senate, after they shall have been opened and read, and to note in writing the dates of the certificates, the names of the electors, the time of their election, and the time and place of their meeting, the number of votes given, and the names of the persons voted for; and also the substance of the certificates from the executive authority of each State, accompanying the certificates of the electors; and the minutes thus made by the tellers shall be read in the presence of both houses, and a copy thereof entered on the journals of each house.

SEC. 8. *And be it further enacted*, That so soon as the joint committee shall have made the examinations and taken and digested the testimony, a report of their proceedings shall be made both to the Senate and House of Representatives, and shall be inserted on the journals of each house. The said report shall contain all the petitions, exceptions, and memorials against the votes of the electors or the persons for whom they have voted, together with the testimony, and arranging with each petition, exception, memorial, and vote, the testimony relative thereto, but without giving any opinion thereon. The report shall also contain a copy of the law, resolution, or act of the State legislatures, respectively, under which the electors of the President and Vice-President of the United States, whose votes are to be counted, were chosen. So soon as this report shall have been made and entered on the journals, the Senate and House of Representatives shall meet at such place as may be agreed on for the purpose of counting the votes for President and Vice-President of the United States. The names of the several States shall then be written under the inspection of the Speaker of the House of Representatives on separate and similar pieces of paper, and folded up as nearly alike as may be and put into a ballot-box, and taken by a member of the House of Representatives, to be named by the Speaker thereof; out of which box shall be drawn the paper on which the names of the State are written, one at a time, by a member of the Senate, to be named by the President thereof, and so soon as one is drawn the packet containing the certificates from the electors of that State shall be opened by the President of the Senate, and then shall be read, also, the petitions, depositions, and other papers concerning the same, and if no exceptions are taken thereto, all the votes contained in such certificate shall be counted; but if any exception be taken, the person taking the same shall state it directly and not argumentatively, and sign his name thereto; and, if it be founded on any circumstance appearing in the report of the joint committee, and the exception be seconded by one member from the Senate and one from the House of Representatives, each of whom shall sign the said exception as having seconded the same, then each House shall immediately retire without question or debate to its own apartment, and shall take the question on the exception without debate, by ayes and noes. So soon as the question shall be taken in either house a message shall be sent to the other informing them that the house sending the message is prepared to resume the count, and when such message shall have been received by both houses they shall again assemble in the same apartment as before and the count shall be resumed. And if the two houses have concurred in rejecting the vote or votes objected to, such votes or votes shall not be counted; but unless both houses concur such vote or votes shall be counted. If the objection taken as afore mentioned shall arise on the face of the papers opened by the President of the Senate in presence of both houses, and shall not have been noticed in the report of the joint committee, such objection may be referred to the joint committee to be examined and reported on by them in the same manner and on the same principles as their first report was made; but if both houses do not concur in referring the same to the committee, then such objection shall be decided on in like manner as if it had been founded on any circumstance appearing in the report of the committee. The votes of one State being thus counted, another ticket shall be drawn from the ballot-box, and the certificate and the votes of the State thus drawn shall be proceeded on as is hereinbefore directed, and so on, one after another, until the whole of the vote shall be counted. The two houses may adjourn from day to day, passing over Sunday, until the count shall be completed. When a motion for adjournment shall be made by a member of either house, and seconded by a member from each house, the question thereon shall be taken in the two houses separately, and if they do not concur they shall proceed in the count.

SEC. 9. *And be it further enacted*, That when the joint committee shall have been duly formed, according to the directions of this act, it shall not be in the power of either house to dissolve the committee or to withdraw any of its members.

SEC. 10. *And be it further enacted*, That it shall be the duty of the executive authority of each State to cause three copies of the law, resolution, or act of the State legislatures respectively under which electors are chosen or appointed to be made, certified

under the seal of the State and delivered to the electors in such State, before they give their votes, and the electors shall annex one of the said copies to each list of their votes, and it shall be the further duty of the executive authority of each State, as soon as may be, and within — days after the appointment therein of electors of President and Vice-President of the United States, to cause three other copies of the said law, resolution, or act, together with a complete list of the electors appointed and the time of their election, to be made and certified as aforesaid, and to transmit them inclosed, noting on each the contents of the packets, one to the President of the Senate, one to the Speaker of the House of Representatives, and one to the Secretary of State of the United States; and it shall be the duty of the Postmaster-General and postmaster at the seat of Government, to whom or to whose knowledge such packets may come, to deliver them to the officers respectively to whom they may be directed, or in case of the absence from the seat of Government of such officer, to deliver the packet to him directed to the Secretary of the Senate, the Clerk of the House of Representatives, or the chief clerk of the Department of State as the case may be; and it shall hereafter be the duty of the electors to express specially in their certificates the time, the place, and the manner of giving their votes.

SEC. 11. *And be it further enacted*, That all petitions respecting the election of President and Vice-President of the United States shall be presented and read in the Senate of the United States, and then be transmitted to the House of Representatives, where they shall be read and afterward delivered to the joint committee, but no petition shall be received after the —; nor shall any petition against the qualifications of a candidate or elector, or for improper conduct in an elector, be received, unless ten days' notice thereof in writing be previously given to the person whose qualifications are contested, or whose improper conduct is petitioned against.

SEC. 12. *And be it further enacted*, That persons petitioning against any of the votes given by any of the electors of President and Vice-President of the United States, and persons being desirous of supporting such contested votes, may respectively apply to any judge of the courts of the United States, or to any chancellor, justice, or judge of a superior court, or county court, or court of common pleas of any State, or any mayor, or recorder, or intendant of a town or city, who shall thereupon issue his warrant of summons, directed to all such witnesses as shall be named to him by such applicant or his agent duly authorized for that purpose, and requiring the attendance of such witnesses before him, at some convenient time and place, to be expressed in the warrant, in order to be then and there examined, in the manner hereinafter provided, touching the subject-matter of the aforesaid application.

SEC. 13. *And be it further enacted*, That every such witness as is above mentioned shall be duly served with such warrant by a copy thereof being delivered to him or her, or left to his or her usual place of abode; and that such service shall be made a convenient time before the day on which the attendance of such witness is required, which time the magistrate issuing the warrants is hereby authorized and required to fix for each witness at the time of issuing it, having respect to the circumstances of such witness, and the distance of his or her residence from the place of attendance.

SEC. 14. *And be it further enacted*, That any person, being summoned in the manner above directed, and refusing or neglecting to attend, pursuant to such summons, unless in case of sickness or other unavoidable accident, shall forfeit and pay the sum of twenty dollars, to be recovered, with costs of suit, by the party at whose instance the warrant or summons was issued, and for his use, by action of debt, in any court, or before any tribunal of the United States, or any State, having jurisdiction to the amount of such penalty.

SEC. 15. *And be it further enacted*, That persons desirous of taking testimony either to support a petition against any contested votes for President and Vice-President of the United States, or to support any such vote or votes, shall previously advertise the time and place for taking such testimony, together with the points intended to be established thereby, for — weeks successively, in some one of the gazettes published at the seat of government of the State in which the votes to which the testimony is to relate were given, provided there be a gazette published at the seat of government, and in some one of the gazettes near the place at which the testimony is to be taken, if there be any gazette published nearer such place than the seat of government.

SEC. 16. *And be it further enacted*, That all witnesses who shall attend in pursuance of the said summons, and all other witnesses who shall be produced at the time and place aforesaid, shall then and there be examined on oath or affirmation aforesaid, or, in case of his absence, by any other such magistrate as is authorized by this act to issue such warrant, touching all such matters and things respecting the votes about to be contested or supported as may have been suggested in the notice hereinbefore directed to be published; the testimony given on which examination, together with the questions proposed to the witnesses respectively, the said magistrate is hereby authorized and required to cause to be reduced to writing, in his presence, and to be duly attested by the witnesses respectively, after which he shall transmit the said testimony, duly certified under his hand, covered and sealed up, to the President of the Senate, together with a copy of the warrant of summons and notification issued in that behalf and the original affidavit proving the service of such notification.

SEC. 17. *And be it further enacted*, That in case any judge, justice, chancellor, mayor, recorder, or intendant, as aforesaid, to whom the application herein mentioned shall be made shall, by reason of sickness, necessary absence, or unavoidable accident, be rendered unable to attend at the time and place fixed for the examination aforesaid, it shall be lawful for him to certify the matter and the proceedings had by him in that behalf to any other magistrate of any of the descriptions aforesaid, which said magistrate thereupon shall be, and hereby is, authorized to attend, at such time and place, and to proceed touching the said examinations, in all respects, as the magistrate issuing the warrant of summons might have done by virtue of this act.

SEC. 18. *And be it further enacted*, That when no such magistrate as is herein authorized to receive applications as aforesaid and proceed upon, shall reside within any district for which an election about to be contested shall have been held, it shall be lawful to make such application to any two justices of the peace residing within the said district, who are hereby authorized in such case to receive such application, and jointly to proceed upon it in the manner hereinbefore mentioned.

SEC. 19. *And be it further enacted*, That every witness attending by virtue of such warrant of summons as is herein directed to be issued, shall be allowed the sum of seventy-five cents for each day's attendance, and the further sum of five cents for every mile necessarily traveled in going and returning, which allowance shall be ascertained and certified by the magistrate taking the examination, and shall be paid by the party at whose instance such witness was summoned, and such witness shall have an action for the recovery of the said allowance before any court or magistrate having competent jurisdiction according to the laws of the United States, or of any State, in which action the certificate of the magistrate taking the said examination shall be evidence.

SEC. 20. *And be it further enacted*, That each judge, justice, chancellor, mayor, recorder, intendant, and justice of the peace, who shall be necessarily employed, pursuant to the directions of this act, and all sheriffs, constables, or other officers who may be employed to serve any of the warrants of summons, or notifications herein provided for, shall have and receive from the party at whose instance such service shall have been performed such fee or fees as are or may be allowed for similar services in the States wherein such service shall be rendered respectively.

Strike out the whole of the title, and insert in lieu thereof the following: "An act prescribing the mode of counting the votes for President and Vice-President of the United States."

It was committed to the Committee of the Whole House, Monday next, the 28th. The bill came up on the 29th.

Mr. Nicholas saw no use for this committee, whose only business was to examine testimony, which, being next to nothing for them to do, would enable them better to design mischief if they were so inclined; and the great inconvenience that would attend their being empowered to send for testimony, even from the most distant part of the United States, made him think that all the provisions with which this committee were connected should be stricken out. He therefore moved to strike out the first section of the bill. This was negatived—39 to 43. Mr. Gallatin moved to amend a section which provided the means of ascertaining the votes. Mr. Marshall answered. The committee rose without a decision. Next day, April 30, the House resumed the consideration of the bill in the Committee of the Whole. A motion of Mr. Gallatin was under consideration to insert, instead of the principle that in cases of doubt the Houses should divide to their respective Chambers to consider the qualification or disqualification of a vote or votes, from their joint meeting, if such question should arise at counting the votes, the following words: "And the question of the exception shall immediately, and without debate, be taken by yeas and nays, and decided by a majority of the members of both Houses then present." This motion called forth a long debate, and on the division was negatived—44 to 46. The committee rose and reported.

May 1, the House proceeded to consider the amendment reported the day before from the Committee of the Whole House. A motion was made to amend the said amendment by striking out in the first section thereof the words following: "That on the — next following the day when a President and Vice-President shall have been voted for by electors, it shall be the duty of the Senate and House of Representatives of the United States to choose, by ballot in each House, four members thereof; and the persons thus chosen shall form a joint committee, and shall have power to examine into all disputes relative to the election of President and Vice-President of the United States, other than such as may relate to the number of votes by which electors may have been appointed." The motion was negatived—41 to 47—as follows:

YEAS—Willis Alston, Theodorus Bailey, Phannel Bishop, Robert Brown, Samuel J. Cabell, Gabriel Christie, Matthew Clay, William C. C. Claiborne, John Condit, Thomas T. Davis, John Dawson, Joseph Eggleston, Lucas Elmendorf, John Fowler, Albert Gallatin, Edwin Gray, Andrew Gregg, John A. Hanna, David Holmes, George Jackson, James Jones, Aaron Kitchell, Michael Leib, Matthew Lyon, James Linn, Nathaniel Macon, Peter Muhlenberg, Anthony New, John Nicholas, Joseph H. Nicholson, John

Randolph, John Smiley, John Smith, Richard Stanford, David Stone, Thomas Sumter, John Thompson, Abram Trigg, John Trigg, Joseph B. Varnum, and Robert Williams.

YEAS—George Baer, Bailey Bartlett, James A. Bayard, Jonathan Brace, John Brown, Christopher G. Champlin, William Cooper, Samuel W. Dana, Franklin Davenport, John Dennis, George Dent, Joseph Dickson, William Edmond, Thomas Evans, Abiel Foster, Dwight Foster, Jonathan Freeman, Henry Glen, Chauncey Goodrich, Elizur Goodrich, Roger Griswold, Robert Goodloe Harper, William H. Hill, Benjamin Huger, Henry Lee, Silas Lee, Samuel Lyman, John Marshall, Lewis R. Morris, Abraham Nott, Robert Page, Josiah Parker, Thomas Pinckney, Jonas Platt, Leven Powell, John Reed, John Rutledge, jr., Samuel Sewall, James Sheafe, William Shepard, George Thatcher, John C. Thomas, Richard Thomas, Peleg Wadsworth, Robert Waln, Lemuel Williams, and Henry Woods.

A motion was then made to amend the amendment by striking out of the eighth section the following:

“And sign his name thereto, and if it be founded on any circumstance appearing in the report of the joint committee, and the exception be seconded by one member of the Senate and one from the House of Representatives, each of whom shall sign the said exception as having seconded the same, then each House shall immediately retire, without question or debate, to its own apartment and shall take the question on the exception, without debate, by ayes and noes. So soon as the question shall be taken in either House, a message shall be sent to the other, informing them that the House sending the message is prepared to resume the count, and when such message shall have been received by both Houses, they shall again assemble in the same apartment as before, and the count shall be resumed. And if the two Houses have concurred in rejecting the vote or votes objected to, such vote or votes shall not be counted. But unless both Houses concur such vote or votes shall be counted. If the objection taken as aforementioned, shall arise on the face of the papers opened by the President of the Senate, in the presence of both Houses, and shall not have been noticed in the report of the joint committee, such objection may be referred to the joint committee, to be examined and reported on by them, in the same manner and on the same principles as their first report was made; but, if both Houses do not concur in referring the same to the committee, then such objection shall be decided on in the like manner as if it had been founded on any circumstances appearing in the report of the committee,” and insert, in lieu thereof, the following: “And the question on the exception shall immediately, and without debate, be taken by ayes and noes, and decided by a majority of the members of both Houses then present.” The motion was decided in the negative—43 to 46—as follows:

YEAS—Willis Alston, Theodorus Bailey, Phannuel Bishop, Robert Brown, Samuel J. Cabell, Gabriel Christie, Matthew Clay, William C. C. Claiborne, John Condit, Thomas T. Davis, John Dawson, George Dent, Joseph Eggleston, Lucas Elmendorf, John Fowler, Albert Gallatin, Edwin Gray, Andrew Gregg, John A. Hanna, Joseph Heister, David Holmes, George Jackson, James Jones, Aaron Kitchell, Michael Leib, Matthew Lyon, James Linn, Nathaniel Macon, Peter Muhlenberg, Anthony New, John Nichols, Joseph H. Nicholson, John Randolph, John Smilie, John Smith, Richard Stanford, David Stone, Thomas Sumter, John Thompson, Abram Trigg, John Trigg, Joseph B. Varnum, and Robert Williams.

YEAS—George Baer, Bailey Bartlett, James A. Bayard, Jonathan Brace, John Brown, Christopher G. Champlin, William Cooper, Samuel W. Dana, Franklin Davenport, John Dennis, Joseph Dickson, William Edmond, Thomas Evans, Abiel Foster, Dwight Foster, Jonathan Freeman, Henry Glen, Chauncey Goodrich, Elizur Goodrich, Roger Griswold, Robert Goodloe Harper, William H. Hill, Benjamin Huger, Henry Lee, Silas Lee, Samuel Lyman, John Marshall, Lewis R. Morris, Abraham Nott, Robert Page, Josiah Parker, Thomas Pinckney, Jonas Platt, Leven Powell, John Reed, John Rutledge, jr., Samuel Sewall, James Sheafe, William Shepard, George Thatcher, John Chew Thomas, Richard Thomas, Peleg Wadsworth, Robert Waln, Lemuel Williams, and Henry Woods.

The amendment was then amended, in what particular is not stated, and ordered to be read the third time. May 2, the bill was read a third time and passed, 52 to 37, as follows:

YEAS—Messrs. George Baer, Bailey Bartlett, James A. Bayard, Jonathan Brace, John Brown, Christopher G. Champlin, Samuel W. Dana, John Davenport, Franklin Davenport, Thomas T. Davis, John Dennis, George Dent, Joseph Dickson, William Edmond, Thomas Evans, Abiel Foster, Dwight Foster, Jonathan Freeman, Henry Glen, Chauncey Goodrich, Elizur Goodrich, Roger Griswold, William Barry Grove, Robert Goodloe Harper, William H. Hill, Benjamin Huger, James H. Inlay, Henry Lee, Silas Lee, Samuel Lyman, John Marshall, Lewis R. Morris, Abraham Nott, Robert Page, Josiah Parker, Thomas Pinckney, Jonas Platt, Leven Powell, John Reed, John Rutledge, jr., Samuel Sewall, James Sheafe, William Shepard, Samuel Smith, George Thatcher, John Chew Thomas, Richard Thomas, Joseph B. Varnum, Peleg Wadsworth, Robert Waln, Lemuel Williams, and Henry Woods.

YEAS—Messrs. Willis Alston, Theodorus Bailey, Phannuel Bishop, Robert Brown, Samuel

J. Cabell, Gabriel Christie, Matthew Clay, William C. C. Claiborne, John Condit, John Dawson, Joseph Eggleston, Lucas Elmendorf, Albert Gallatin, Edwin Gray, Andrew Gregg, John A. Hanna, Thomas Hartley, Joseph Heister, David Holmes, George Jackson, James Jones, Aaron Kitchell, Michael Leib, James Linn, Nathaniel Macon, Peter Muhlenberg, Anthony New, John Nicholas, John Randolph, John Smilie, John Smith, Richard Stanford, David Stone, John Thompson, Abram Trigg, John Trigg, and Robert Williams.

IN SENATE, *May 2, 1800.*

The Senate took into consideration the amendments of the House of Representatives to the bill for deciding disputed elections of President and Vice-President of the United States, and they were referred to Messrs. Ross, Dexter, and Livermore to report thereon.

May 8, 1800.

Mr. Ross, from the above committee, reported amendments thereto.

The Senate considered the amendments reported by the committee to the House of Representatives on the bill prescribing the mode of deciding disputed elections of President and Vice-President of the United States.

On motion to agree to the following amendment reported by the committee:

Section 8, line 49, strike out the word "rejecting" and insert "admitting," it passed in the affirmative—yeas 15, nays 11; as follows:

YEAS—Messrs. Bingham, Dayton, Dexter, Goodhue, Greene, Gunn, Hillhouse, Latimer, Livermore, Morris, Read, Ross, Schureman, Tracy, and Wells.

NAYS—Messrs. Anderson, Baldwin, Bloodworth, Brown, Cocke, Foster, Franklin, Marshall, Mason, Nicholas, and Pinckney.

On motion to strike out the following words from the first section of the amendment of the House of Representatives, viz: "Other than such as may merely question the number of votes by which the electors may have been appointed," it passed in the negative—yeas 11, nays 16; as follows:

YEAS—Messrs. Dayton, Dexter, Goodhue, Greene, Hillhouse, Latimer, Read, Ross, Schureman, Tracy, and Wells.

NAYS—Messrs. Anderson, Baldwin, Bingham, Bloodworth, Brown, Cocke, Foster, Gunn, Laurance, Livermore, Marshall, Mason, Morris, Nicholas, and Pickney.

On motion to agree to the amendment of the House of Representatives, with the amendments reported, it passed in the affirmative—yeas 16, nays 11; as follows:

YEAS—Messrs. Bingham, Dayton, Dexter, Foster, Goodhue, Greene, Gunn, Hillhouse, Latimer, Laurance, Livermore, Morris, Ross, Schureman, Tracy, and Wells.

NAYS—Messrs. Anderson, Baldwin, Bloodworth, Brown, Cocke, Franklin, Marshall, Mason, Nicholas, Pickney, and Read.

IN THE HOUSE OF REPRESENTATIVES, *May 9, 1800.*

The House received this bill with amendments, one of which, "respecting the election of President," was, instead of the word "rejecting" (in the bill) any vote or votes by a concurrent vote of the two Houses, the word "admitting" was proposed by the Senate.

Mr. Harper and Mr. Bayard hoped the House would not concur, as this amendment very materially changed the principle of the bill, inasmuch as it would put it in the power of one or two members of either House to require the majority of both Houses to admit a vote or votes in default of which the whole votes of a State might be totally rejected. This was contrary to the former will of the House after mature deliberation.

The yeas and nays were called by Mr. Nicholas on the question, "Shall the amendments of the Senate be concurred in?" and decided in the negative—yeas 15, nays 73; as follows:

YEAS—Messrs. John Brown, Samuel W. Dana, Franklin Davenport, Dwight Foster, Chauncey Goodrich, Roger Griswold, James H. Inlay, Samuel Lyman, Jonas Platt, James Sheafe, William Shepard, George Thatcher, Robert Waln, Lemuel Williams, and Henry Woods.

NAYS—Messrs. Willis Alston, George Baer, Theodorus Bailey, Bailey Bartlett, James A. Bayard, Phanael Bishop, Jonathan Brace, Robert Brown, Samuel J. Cabell, Gabriel Christie, Matthew Clay, William C. C. Claiborne, John Condit, William Cooper, William Craik, John Davenport, Thomas T. Davis, John Dawson, George Dent, Joseph Dickson, Joseph Eggleston, Lucas Elmendorf, Thomas Evans, Abiel Foster, John Fowler, Jonathan Freeman, Albert Gallatin, Henry Glen, Elizur Goodrich, Edwin Gray, Andrew Gregg, John A. Hanna, Robert Goodloe Harper, Thomas Hartley, Joseph Heister, William H. Hill, David Holmes, George Jackson, James Jones, Aaron Kitchell, John Wilkes Kittera, Michael Leib, Matthew Lyon, James Linn, Edward Livingston, Nathaniel Macon, Peter Muhlenberg, Anthony New, John Nicholas, Abraham Nott, Robert Page, Thomas Pinckney, Leven Powell, John Randolph, John Reed, John Rutledge, jr., Samuel Sewall, John Smilie, John Smith, Samuel Smith, Richard Dobbs Spaight, Richard Stanford, David Stone, Thomas Sumter, John Chew Thomas, Richard Thomas, John

Thompson, Abram Trigg, John Trigg, Philip Van Cortlandt, Joseph B. Varnum, Peleg Wadsworth, and Robert Williams.

IN SENATE, *May 10, 1800.*

The Senate resumed the consideration of the resolution of the House of Representatives on the amendments to their amendment to the bill prescribing the mode of deciding disputed elections of President and Vice-President of the United States; and on motion to recede from the amendments to the amendment it passed in the negative—yeas 11, nays 16; as follows:

YEAS—Messrs. Anderson, Baldwin, Bloodworth, Brown, Cocke, Foster, Franklin, Marshall, Mason, Nicholas, and Pinckney.

NAYS—Messrs. Bingham, Dayton, Dexter, Greene, Gunn, Hillhouse, Howard, Latimer, Larrance, Livermore, Morris, Read, Ross, Schureman, Tracy, and Wells.

Resolved, That the Senate adhere to their said amendments.

IN THE HOUSE OF REPRESENTATIVES, *May 10, 1800.*

The House “adhered to their disagreement to recede,” and the bill was lost.

PROPOSED AMENDMENT TO THE CONSTITUTION.

IN THE HOUSE OF REPRESENTATIVES, *January 22, 1801.*

In the report of Mr. Nicholas, on a proposed amendment to the Constitution, providing a change in the mode of the appointment of electors, so as to elect them from districts, much the same as Congressmen are now elected, appears the following:

“The votes of the electors of the several States are next to be rendered by ballot, and when so rendered, they are to be transmitted, in the form of certificates giving the result of the ballot, to certain officers of the Government of the United States. When the period arrives for opening these certificates and counting the votes in the presence of the Senate and House of Representatives of the United States, if error or abuse shall have taken place, no means exist (in case the ballot be in favor of more than two persons as Presidents and Vice-Presidents) for discriminating between the votes of those who shall have been duly appointed and returned and those who shall have been defectively appointed and unduly returned as electors. To set aside votes given by persons not duly appointed, and consequently wanting the competent authority of electors, no course presents itself in such case save that of vacating the whole ballot of which the defective vote or votes may be a component part. Thus to deprive a State of all participation in the election of the President and Vice-President of the United States, on account of the defective appointment of one or a few of its electors, would be a serious and painful duty. To vacate such ballot, and thereby to deprive those candidates for whom the sound votes of such ballot may have been given, of the aid of that ballot in order at the same time to destroy the effect of the unsound votes, might result in giving to others a priority to which, if effect could be given to the really sound votes, those others might not be entitled. This also presents an embarrassing consideration.

“The vacation of a ballot composed of sound and defective votes ought to be the result of uniform principle; it ought to take place on all occasions where a discrimination cannot be made or on none. Not to vacate such ballot, but to permit the election of a Chief Magistrate to be carried on any occasion by the aid of one or more defective votes, would be to hazard, in a most eminent degree, the peace of the Union. It is of the last importance to the happiness of the people of the United States that a complete conviction should prevail at all times that the person who may be elected Chief Magistrate of the Union has been really elected by electors duly and really appointed by those having competent authority for that purpose. It were painful to anticipate the consequences which would too probably attend a disputed election to the Presidency. Those consequences might be more calamitous than can be foreseen.”

ELECTION FOR THE FOURTH TERM—1801.

THOMAS JEFFERSON, President.

AARON BURR, Vice-President.

IN SENATE, *January 23, 1801.*

A message from the House of Representatives, by Mr. Oswald, their Clerk:

MR. PRESIDENT: The House of Representatives have passed a resolution for the appointment of a committee, on their part, with such as may be appointed on the part of the Senate, to ascertain and report a mode of examining the votes for President and

Vice-President, and of notifying the persons who shall be elected of their election; and to regulate the time, place, and manner of administering the oath of office to the President; in which they desire the concurrence of the Senate.

January 27, 1801.

The Senate concurred in the foregoing resolution, and appointed Messrs. Morris, Tracy, and Bingham to be the committee on the part of the Senate.

February 9, 1801.

Mr. Morris, from the joint committee, appointed the 27th of January last to ascertain and report the mode of examining the votes for President and Vice-President of the United States, reported that the committee could come to no agreement.

On motion,

Resolved, That the Senate will be ready to receive the House of Representatives in the Senate Chamber on Wednesday next, at twelve o'clock, for the purpose of being present at the opening and counting the votes for President of the United States; that one person be appointed a teller on the part of the Senate to make a list of the votes for President of the United States as they shall be declared, and that the result shall be delivered to the President of the Senate, who shall announce the state of the vote, which shall be entered upon the Journals; and if it shall appear that a choice hath been made agreeably to the Constitution, such entry on the Journal shall be deemed a sufficient declaration thereof.

Ordered, That the Secretary notify the House of Representatives of this resolution.

February, 10, 1801.

Ordered, That Mr. Wells be a teller on the part of the Senate for the purpose expressed in the above resolution.

February 11, 1801.

Ordered, That the Secretary notify the House of Representatives that the Senate is ready to meet them in the Senate Chamber, for the purpose of being present at the opening and counting the votes for President of the United States.

The two Houses of Congress accordingly assembled in the Senate Chamber, and the certificates of the electors of sixteen States were, by the Vice-President, opened and delivered to the tellers appointed for that purpose, who, having examined, and ascertained the number of votes, presented a list thereof to the Vice-President; which was read, as follows:

Number of electors for each State,	States.	Thomas Jefferson, of Virginia.	Aaron Burr, of New York.	John Adams, of Mas- sachusetts.	Charles C. Pinckney, of South Carolina.	John Jay, of New York.
6	New Hampshire			6	6	
16	Massachusetts.....			16	16	
4	Rhode Island			4	3	1
9	Connecticut.....			9	9	
4	Vermont.....			4	4	
12	New York.....	12	12			
7	New Jersey.....			7	7	
15	Pennsylvania.....	8	8	7	7	
3	Delaware.....			3	3	
10	Maryland.....	5	5	5	5	
21	Virginia.....	21	21			
4	Kentucky.....	4	4			
12	North Carolina.....	8	8	4	4	
3	Tennessee.....	3	3			
8	South Carolina.....	8	8			
4	Georgia.....	4	4			
138	.....	73	73	65	64	1

Wherenpon

The Vice-President declared that the result of the votes, as delivered by the tellers, was—

That THOMAS JEFFERSON had.....	73
That AARON BURR had.....	73
That JOHN ADAMS had.....	65
That CHARLES COTESWORTH PINCKNEY had.....	64
That JOHN JAY had.....	1

That the whole number of electors who had voted was one hundred and thirty-eight, of which number THOMAS JEFFERSON and AARON BURR had a majority; but, the number of those voting for them being equal, no choice was made by the people, and that, consequently, the remaining duties devolve upon the House of Representatives.

On which the House of Representatives repaired to their own chamber.

IN THE HOUSE OF REPRESENTATIVES, *January 22, 1801.*

“Resolved, That Mr. Rutledge, Mr. Nicholas, Mr. Griswold, Mr. Macon, and Mr. Bayard be appointed a committee on the part of this House, to join such committee as may be appointed on the part of the Senate, to ascertain and report a mode of examining the votes for President and Vice-President, and of notifying the persons who shall be elected of their election; and to regulate the time, place, and manner of administering the oath of office to the President.”

January 30, 1801.

Mr. Bayard submitted the following resolution, to wit:

“Resolved, That in the event of its appearing upon the counting and ascertaining of the votes given for President and Vice-President, according to the mode prescribed by the Constitution, that an equal number of votes has been given for two persons, that as soon as the same have been duly declared and entered on the Journals of this House, that the Speaker, accompanied by the members of this House, shall return to this chamber, and shall immediately proceed to choose one of the two candidates for President; and in case upon the first ballot there shall not appear to be a majority of the States in favor of one of the candidates, in such case the House shall continue to ballot for President, without interruption by other business, until it shall appear that a President is duly chosen; and if no such choice should be made upon the first day, the House shall continue to ballot from day to day till a choice shall be duly made.”

Ordered, That the consideration of the said motion be postponed until Monday next.

February 2, 1801.

A motion was made and seconded that the House do come to the following resolution, to wit:

“Resolved, That a committee be appointed to prepare and adopt such rules as, in their opinion, are proper to be adopted by this House, to be observed in the choice of a President of the United States, whose term is to commence on the 4th day of March next, if, when the votes which have been given by the electors appointed under the authority of the States shall have been counted, as prescribed by the Constitution, it shall appear that no person for whom the electors shall have voted has a majority, or that more than one person having such majority have an equal number of votes.”

Ordered, That Messrs. Rutledge, Nicholas, Griswold, Macon, Bayard, Taliaferro, Foster, Claiborne, Otis, Davis, Morris, Champlin, Baer, Cooper, Linn, and Woods be appointed a committee, pursuant to the said resolution.

Ordered, That the motion made on Friday last, relative to the mode of commencing and continuing the ballot for the choice of a President of the United States, be referred to the committee last appointed.

Friday, February 6, 1801.

Mr. Rutledge, from the committee appointed on the 2d instant to prepare and report such rules as, in their opinion, are proper to be adopted by this House to be observed in the choice of a President of the United States, made a report; which was ordered to be considered Monday next.

Monday, February 9, 1801.

The House proceeded to consider the above report, whereupon said report was committed to a Committee of the Whole House immediately.

The House resolved itself into a Committee of the Whole on the said report; and after some time spent therein, the chairman reported that the committee had had the said report under consideration, and directed him to report to the House their agreement to the same, with an amendment; which he delivered in at the Clerk's table, where the same was read. The House then proceeded to consider the report, whereupon the amendment reported from the Committee of the Whole House to the said report was, on the question put thereon, agreed to by the House.

Motions to disagree to the fourth and fifth of the rules were made and passed in the negative.

It was then

Resolved, That this House doth agree with the Committee of the Whole House in their agreement to the said report, as amended, in the words following, to wit:

“That the following rules be observed in the choice by the House of Representatives of a President of the United States, whose term is to commence on the 4th day of March next:

“First. In the event of its appearing, upon the counting and ascertaining of the votes given for President and Vice-President, according to the mode prescribed by the

Constitution, that no person has a constitutional majority, and the same shall have been duly declared and entered on the Journals of this House, the Speaker, accompanied by the members of the House, shall return to their chamber.

"Second. Seats shall be provided in this House for the President and members of the Senate; and notification of the same shall be made to the Senate.

"Third. The House, on their return from the Senate Chamber, it being ascertained that the constitutional number of States are present, shall immediately proceed to choose one of the persons from whom the choice is to be made for President; and in case upon the first ballot there shall not appear to be a majority of the States in favor of one of them, in such case the House shall continue to ballot for a President, without interruption by other business, until it shall appear that a President is duly chosen.

"Fourth. After commencing the balloting for President, the House shall not adjourn until a choice is made.

"Fifth. The doors of the House shall be closed during the balloting, except against the officers of the House.

"Sixth. In balloting the following mode shall be observed, to wit: The Representatives of the respective States shall be so seated that the delegation of each State shall be together. The Representatives of each State shall, in the first instance, ballot among themselves, in order to ascertain the vote of that State; and it shall be allowed, where deemed necessary by the delegation, to name one or more persons of the representation to be tellers of the ballots. After the vote of each State is ascertained, duplicates thereof shall be made; and in case the vote of the State be for one person, then the name of that person shall be written on each of the duplicates; and in case the ballots of the State be equally divided, then the word "*divided*" shall be written on each duplicate, and the said duplicates shall be deposited, in manner hereafter prescribed, in boxes to be provided. That for the conveniently taking the ballots of the several Representatives of the respective States, there be sixteen ballot-boxes provided; and that there be, additionally, two boxes provided for receiving the votes of the States; that after the delegation of each State shall have ascertained the vote of the State, the Sergeant-at-Arms shall carry to the respective delegations the two ballot-boxes, and the delegation of each State, in the presence and subject to the examination of all the members of the delegation, shall deposit a duplicate of the vote of the State in each ballot-box; and where there is more than one Representative of a State, the duplicates shall not both be deposited by the same person. When the votes of the States are all thus taken in, the Sergeant-at-Arms shall carry one of the general ballot-boxes to one table, and the other to a second and separate table. Sixteen members shall then be appointed as tellers of the ballots, one of whom shall be taken from each State, and be nominated by the delegation of the State from which he was taken. The said tellers shall be divided into two equal sets, according to such agreements as shall be made among themselves, and one of the said sets of tellers shall proceed to count the votes in one of the said boxes, and the other set the votes in the other box; and in the event of no appointment of teller by any delegation, the Speaker shall in such case appoint. When the votes of the States are counted by the respective sets of tellers, the result shall be reported to the House; and if the reports agree, the same shall be accepted as the true votes of the States; but if the reports disagree, the States shall immediately proceed to a new ballot, in manner aforesaid.

"Seventh. If either of the persons voted for shall have a majority of the votes of all the States, the Speaker shall declare the same; and official notice thereof shall be immediately given to the President of the United States, and to the Senate.

"Eighth. All questions which shall arise after the balloting commences, and which shall be decided by the House voting *per capita* to be incidental to the power of choosing the President, and which shall require the decision of the House, shall be decided by States, and without debate, and in case of an equal division of the votes of States, the question shall be lost."

February 9, 1801.

Mr. Rutledge, from the joint committee appointed the 27th of January last to ascertain and report the mode of examining the votes for President and Vice-President of the United States, reported that the committee could come to no agreement.

February 10, 1801.

Mr. Bayard moved that five hundred tickets be printed on which should be the name of THOMAS JEFFERSON, and five hundred on which should be the name of AARON BURR, and that the members in balloting should be confined exclusively to the use of these. At the suggestion of the Speaker, "of Virginia" was ordered to be printed after THOMAS JEFFERSON, and "of New York" after AARON BURR. The motion was lost.

"Resolved, That this House will attend in the chamber of the Senate on Wednesday next, at 12 o'clock, for the purpose of being present at the opening and counting of the votes for President and Vice-President of the United States; that Messrs. Rutledge and Nicholas be appointed tellers, to act jointly with the teller appointed on the part of

the Senate, to make a list of the votes for President and Vice-President of the United States as they shall be declared; that the result shall be delivered to the President of the Senate, who shall announce the state of the vote, which shall be entered on the journals; and if it shall appear that a choice hath been made agreeably to the Constitution, such entry on the journals shall be deemed a sufficient declaration thereof."

February 11, 1801.

Mr. Speaker, attended by the House, then went into the Senate Chamber and took seats therein, when both Houses being assembled,

The President of the Senate, in the presence of both Houses, proceeded to open the certificates of the electors of the several States, beginning with the State of New Hampshire; and as the votes were read the tellers on the part of each House counted and took lists of the same, which, being compared, were delivered to the President of the Senate, and are as follows:

[Here the table of electoral votes is inserted. It is exactly the same as that appearing in the Senate proceedings.]

The President of the Senate, in pursuance of the duty enjoined upon him, announced the state of the votes to both Houses, and declared that THOMAS JEFFERSON, of Virginia, and AARON BURR, of New York, having the greatest number and a majority of the votes of all the electors appointed, and being equal, it remained to the House of Representatives to determine the choice.

The two Houses then separated, and the House of Representatives being returned to their chamber, proceeded in the manner prescribed by the Constitution to the choice of a President of the United States; and one teller was appointed from each State to examine the ballots of each State, pursuant to the sixth rule, adopted by the House on the 9th instant.

On this day nineteen ballotings were had, in each of which THOMAS JEFFERSON received the votes of eight States, AARON BURR received the votes of six States, and the votes of two States were divided.

February 12, 1801.

On this day nine ballotings were had, making twenty-eight in all, with the same result at each ballot as on the day before.

February 13, 1801.

On this day, one ballot, the twenty-ninth, was had, with the same result as on the two preceding days.

February 14, (Saturday,) 1801.

On this day four ballotings were had, making in all thirty-three, with the same result as on the three preceding days.

February 16, (Monday,) 1801.

On this day, one ballot, the thirty-fourth, was had, with the same result as on the preceding days.

February 17, 1801.

On this day the thirty-fifth ballot was declared with the like result, when, on the thirty-sixth ballot, the Speaker declared to the House that the votes of ten States had been given for THOMAS JEFFERSON; the votes of four States had been given for AARON BURR; and that the votes of two States had been given in blank; and that, consequently, THOMAS JEFFERSON had been, agreeably to the Constitution, elected President of the United States for four years from the 4th day of March next.

Ordered, That Mr. Pinckney, Mr. Tazewell, and Mr. Bayard be appointed a committee to wait upon the President of the United States and notify him that THOMAS JEFFERSON is elected President of the United States for the term commencing on the 4th day of March next.

Ordered, That a message be sent to the Senate to inform them that THOMAS JEFFERSON has been duly elected President of the United States for the term of four years commencing on the 4th day of March next.

IN SENATE, February 18, 1801.

Resolved, That the President of the United States be requested to cause to be transmitted to AARON BURR, esq., of New York, Vice-President of the United States, notification of his election to that office; and that the President of the Senate do make out and sign a certificate in the words following, viz:

Be it known that, the Senate and House of Representatives of the United States of America being convened at the city of Washington on the second Wednesday of February, A. D. 1801, the underwritten, Vice-President of the United States and President of the Senate, did, in the presence of the said Senate and House of Representatives, open all the certificates and count all the votes of the electors for President; whereupon it appeared that THOMAS JEFFERSON, of Virginia, and AARON BURR, of New York, had a majority of the votes of the electors, and an equal number of votes; in consequence of which the House of Representatives proceeded to a choice of a Presi-

dent, and have this day notified to the Senate that THOMAS JEFFERSON has by them been duly chosen President; by all of which it appears that AARON BURR, esq., of New York, is duly elected, agreeably to the Constitution, Vice-President of the United States of America.

In witness whereof I have hereunto set my hand and seal this 18th day of February, 1801.

THOMAS JEFFERSON.

CONSTITUTIONAL AMENDMENT, ARTICLE XII.

EIGHTH CONGRESS OF THE UNITED STATES.

At the first session, begun and held at the city of Washington, in the Territory of Columbia, on Monday the seventh day of October, one thousand eight hundred and three.

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, (two-thirds of both Houses concurring,) That in lieu of the third paragraph of the first section of the second article of the Constitution of the United States the following be proposed as an amendment to the Constitution of the United States, which, when ratified by three-fourths of the Legislatures of the several States, shall be valid to all intents and purposes as part of the said Constitution, to wit:

ARTICLE XII.

The electors shall meet in their respective States and vote by ballot for President and Vice-President, one of whom, at least, shall not be an inhabitant of the same State with themselves; they shall name in their ballots the person voted for as President, and in distinct ballots the person voted for as Vice-President, and they shall make distinct lists of all persons voted for as President, and of all persons voted for as Vice-President, and of the number of votes for each; which lists they shall sign and certify, and transmit sealed to the seat of Government of the United States, directed to the President of the Senate. The President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates and the votes shall then be counted; the person having the greatest number of votes for President shall be the President, if such number be a majority of the whole number of electors appointed; and if no person have such majority, then from the persons having the highest numbers not exceeding three on the list of those voted for as President, the House of Representatives shall choose immediately, by ballot, the President. But in choosing the President, the votes shall be taken by States, the representation from each State having one vote; a quorum for this purpose shall consist of a member or members from two-thirds of the States, and a majority of all the States shall be necessary to a choice. And if the House of Representatives shall not choose a President whenever the right of choice shall devolve upon them, before the 4th day of March, next following, then the Vice-President shall act as President, as in the case of the death or other constitutional disability of the President.

The person having the greatest number of votes as Vice-President shall be the Vice-President, if such number be a majority of the whole number of electors appointed; and if no person have a majority, then from the two highest numbers on the list the Senate shall choose the Vice-President; a quorum for the purpose shall consist of two-thirds of the whole number of Senators, and a majority of the whole number shall be necessary to a choice. But no person constitutionally ineligible to the office of President shall be eligible to that of Vice-President of the United States.

The change in the Constitution necessitated the passage of the following act:

AN ACT supplementary to the act entitled "An act relative to the election of a President and Vice-President of the United States, and declaring the officer who shall act as President in the case of vacancies in the offices both of President and Vice-President."

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That whenever the amendment proposed during the present session of Congress, to the Constitution of the United States, respecting the manner of voting for President and Vice-President of the United States, shall have been ratified by the Legislatures of three-fourths of the several States, the Secretary of State shall forthwith cause a notification thereof to be made to the executive of every State, and shall also cause the same to be published in at least one of the newspapers printed in each State in which the laws of the United States are annually published. The executive authority of each State shall cause a transcript of the said notification to be delivered to the electors appointed for that purpose, who shall first thereafter meet in such State for the election of President and Vice-President of the United States; and whenever the said electors shall have received the said transcript of notification, or whenever they shall meet more than five days subsequent to the publication of the

ratification of the above-mentioned amendment in one of the newspapers, by the Secretary of State, they shall vote for President and Vice-President of the United States, respectively, in the manner directed by the above-mentioned amendment; and having made and signed three certificates of all the votes given by them, each of which certificates shall contain two distinct lists, one of the votes given for President and the other of the votes given for Vice-President, they shall seal up the said certificates, certifying on each that lists of all the votes of such State given for President and of all votes given for Vice-President are contained therein, and shall cause the said certificates to be transmitted and disposed of, and in every other respect act in conformity with the provisions of the act to which this is a supplement. And every other provision of the act to which this is a supplement, and which is not virtually repealed by this act, shall extend and apply to every election of a President and Vice-President of the United States made in conformity to the above-mentioned amendment to the Constitution of the United States.

And whereas the above-mentioned amendment may be ratified by the Legislatures of three-fourths of the States, and thereupon become immediately valid, to all intents and purposes, as part of the Constitution, on a day so near the day fixed by law for the meeting of the electors in several States that the electors shall not in every State be apprised of the said ratification and may vote in a manner no longer conformable with the Constitution as amended, whereby several States might be deprived of their vote in the election of a President and Vice-President: for remedy whereof,

SEC. 2. *Be it further enacted*, That the electors who shall be appointed in each State for the election of a President and Vice-President of the United States shall at every such election, unless they shall have received a transcript of the notification of the ratification of the above-mentioned amendment to the Constitution, or unless they shall meet more than five days subsequent to the publication of the said ratification by the Secretary of State in one of the newspapers of the State, vote for President and Vice-President of the United States in the following manner; that is to say: they shall vote for two persons as President and Vice-President in conformity with the first section of the second article of the Constitution, and in other respects act in conformity with the provisions of the act to which this act is a supplement; and they shall likewise vote for one person as President and for one person as Vice-President, in conformity with the above-mentioned amendment of the Constitution; and in other respects act in conformity with the provisions of the first section of this act. But those certificates only of votes given for President and Vice-President of the United States shall be opened by the President of the Senate for the purpose of being counted which shall contain the list or lists of votes given in conformity with the Constitution as in force on the day fixed by law for the meeting of the electors by whom the said votes shall have been given.

SEC. 3. *And be it further enacted*, That whenever by the provisions of the second section of this act it shall be the duty of the electors for any State to vote in conformity both with the Constitution and of the proposed amendment thereto, the executive authority of such State shall cause six lists of the names of the electors for the State to be made and certified and to be delivered to the said electors on or before the day fixed by law for them to meet and vote for President and Vice-President; and the said electors shall inclose one of the said lists in each of the certificates by them made and sealed in conformity with the provisions of this act and of the act to which this is a supplement.

Approved March 26, 1804.

ELECTION FOR THE FIFTH TERM—1805-1809.

THOMAS JEFFERSON, President.

GEORGE CLINTON, Vice-President.

IN SENATE, February 12, 1805.

Resolved, That the Senate will be ready to receive the House of Representatives in the Senate Chamber on Wednesday, the 13th instant, February, at noon, for the purpose of being present at the opening and counting of the votes for President and Vice-President of the United States; that one person be appointed a teller on the part of the Senate, to make a list of votes for President and Vice-President of the United States as they shall be declared; and that the result shall be delivered to the President of the Senate, who shall announce the state of the vote, which shall be entered on the Journals, and if it shall appear that a choice hath been made agreeably to the Constitution, such entry on the Journals shall be deemed a sufficient declaration thereof.

February 13, 1805.

On motion,

Ordered, That Mr. Smith, of Maryland, be a teller of the votes given for President and Vice-President of the United States on the part of the Senate.

Ordered, That the Secretary acquaint the House of Representatives therewith.

On motion, it was

Resolved, That when the two Houses proceed to open and count the ballots for President and Vice-President, the gallery of the Senate Chamber be open.

Ordered, That the Secretary notify the House of Representatives that the Senate are now ready to meet them in the Senate Chamber, for the purpose of being present at the opening and counting the votes for President and Vice-President of the United States.

About twelve o'clock the Senators took their seats and immediately after the members of the House of Representatives entered, the Speaker and Clerk occupying seats on the floor on the right of the President of the Senate, and the members of the House in front.

Mr. Samuel Smith, teller on the part of the Senate, and Mr. Joseph Clay and Mr. Roger Griswold, tellers on the part of the House, took seats at a table placed in front of the Chair in the area between the Senate and House.

The Secretary of the Senate read the resolutions previously agreed to.

The President [Mr. Burr] stated that pursuant to law there had been transmitted to him several packets, which, from the indorsements upon them, appeared to be the votes of the electors of a President and Vice-President; that the returns forwarded by mail as well as the duplicates sent by special messengers had been received by him in due time. You will now proceed, gentlemen, said he, to count the votes as the Constitution and laws direct, adding that, perceiving no cause for preference in the order of opening the returns, he would pursue a geographical arrangement, beginning with the Northern States.

The President then proceeded to break the seals of the respective returns, handing each return and its accompanying duplicate as the seals of each were broken to the tellers through the Secretary, Mr. S. Smith reading aloud the returns and the attestations of the appointment of the electors, and Mr. J. Clay and Mr. R. Griswold comparing them with the duplicate return lying before them.

According to which enumeration the following appeared to be the result:

Number of electors of each State.	States.	For President.		For Vice-President.	
		Thomas Jefferson.	Charles C. Pinckney.	George Clinton.	Rufus King.
7	New Hampshire.....	7	.....	7	.....
19	Massachusetts.....	19	.....	19	.....
4	Rhode Island*.....	4	.....	4	.....
9	Connecticut.....	.....	9	.....	9
6	Vermont.....	6	.....	6	.....
19	New York.....	19	.....	19	.....
8	New Jersey.....	8	.....	8	.....
20	Pennsylvania.....	20	.....	20	.....
3	Delaware.....	.....	3	.....	3
11	Maryland.....	9	2	9	2
24	Virginia.....	24	.....	24	.....
14	North Carolina.....	14	.....	14	.....
10	South Carolina.....	10	.....	10	.....
6	Georgia†.....	6	.....	6	.....
5	Tennessee.....	5	.....	5	.....
8	Kentucky.....	8	.....	8	.....
3	Ohio‡.....	3	.....	3	.....
176	.....	162	14	162	14

* In this return, after stating the whole number of votes given for Thomas Jefferson and George Clinton, each elector certifies distinctly his vote for Thomas Jefferson as President and for George Clinton as Vice-President.

† The return certifies the votes to have been given as stated in an inclosed paper.

‡ In this return the votes are not certified to have been given by ballot, but agreeably to law.

After the returns had been all examined, without any objection having been made to receiving any of the votes, Mr. S. Smith, on behalf of the tellers, communicated to the President the foregoing result, which was read from the Chair; when the Vice-President said, Upon this report it becomes my duty to declare, agreeably to the Constitution, that THOMAS JEFFERSON is elected President of the United States for the

term of four years from the 3d day of March next, and that GEORGE CLINTON is elected Vice-President of the United States for the term of four years from the 3d day of March next."

[Previous to the above proceedings, a short debate arose in the Senate on the keeping the doors open or shut during the counting of the votes. Mr. Wright submitted a motion for their being kept open; which, after some opposition, was agreed to.]

February 14, 1805.

On motion,

Resolved, That the President of the United States be requested to cause to be transmitted to GEORGE CLINTON, esq., of New York, Vice-President elect of the United States, notification of his election to that office; and that the President of the Senate do make out and sign a certificate in the words following, viz:

Be it known, That the Senate and House of Representatives of the United States, being convened in the city of Washington, on the second Wednesday in February, in the year of our Lord one thousand eight hundred and five, the underwritten, Vice-President of the United States and President of the Senate, did, in the presence of the Senate and House of Representatives, open all the certificates and count all the votes of the electors for a President and Vice-President of the United States; whereupon, it appeared that THOMAS JEFFERSON, of Virginia, had a majority of the votes of the electors as President, and GEORGE CLINTON, of New York, had a majority of the votes of the electors as Vice-President; by all which it appears that THOMAS JEFFERSON, of Virginia, has been duly elected President, and GEORGE CLINTON, of New York, has been duly elected Vice-President of the United States, agreeably to the Constitution.

In witness whereof I have hereunto set my hand and seal this 14th day of February, 1805.

IN THE HOUSE OF REPRESENTATIVES, February 12, 1805.

On motion, it was

Resolved, That a committee be appointed on the part of this House, to join such committee as may be appointed on the part of the Senate, to ascertain and report a mode of examining the votes for President and Vice-President, and of notifying the persons who shall be elected of their election, and to regulate the time, place, and manner of administering the oath of office to the President.

February 13, 1805.

Resolved, That this House will attend in the Chamber of the Senate this day at noon, for the purpose of being present at the opening and counting the votes for President and Vice-President of the United States, that Mr. Joseph Clay and Mr. Roger Griswold be appointed tellers to act jointly with the teller who may be appointed on the part of the Senate, to make a list of the votes for President and Vice-President of the United States, as they shall be declared; that the result shall be delivered to the President of the Senate, who shall announce the state of the vote, which shall be entered on the Journals; and if it shall appear that the choice has been made agreeably to the Constitution, such entry on the Journals shall be deemed a sufficient declaration thereof.

A message was received from the Senate informing the House that Mr. Smith, of Maryland, has been appointed a teller of the votes of President and Vice-President of the United States on the part of the Senate, conformably with their vote of the 12th instant, and are now ready, in the Senate Chamber, to proceed therein; whereupon

Mr. Speaker, attended by the House, proceeded to the Senate Chamber and took seats therein, when both Houses being assembled the President of the Senate, in the presence of both Houses, proceeded to open the certificates of the electors of the several States, beginning with the State of New Hampshire; and as the votes were read the tellers on the part of each House counted and took lists of the same, which, being compared, were delivered to the President of the Senate, and are as follows:

[Here is inserted an exact copy of the table appearing in the Senate proceedings.]

The President of the Senate, in pursuance of the duty enjoined on him, announced the State of the votes to both Houses, and declared that THOMAS JEFFERSON, of Virginia, having the greatest number, and a majority of the votes of the electors appointed, is duly elected President of the United States for the term commencing on the 4th day of March next; and that GEORGE CLINTON, of New York, having also received the greatest number, and a majority of the votes of all the electors appointed, was duly elected Vice-President of the United States for the term commencing on the 4th day of March next.

THE MASSACHUSETTS ELECTORS.

IN THE HOUSE OF REPRESENTATIVES, December 26, 1808.

Mr. Barker presented a representation of sundry inhabitants of Hanover, in the county of Plymouth, and State of Massachusetts, stating that the late appointment of

electors of President and Vice-President of the United States by the Legislature of that State is irregular and unconstitutional, in consequence of the failure of the Legislature to lay the same before the governor of that State for his approbation, as the law thereof directs, and praying that the Congress of the United States, when the electoral votes are opened and counted, will take the subject into their consideration and prevent the establishment of so dangerous a precedent.

Ordered to lie on the table.

January 10, 1809.

The Speaker presented to the House a representation of sundry inhabitants of Townsend, in the county of Middlesex, and State of Massachusetts, stating certain objections to the manner of appointing electors for President and Vice-President of the United States by the senate and house of representatives of said State of Massachusetts, and praying the interference of the powers vested by the Constitution in the two Houses of Congress to prevent the establishment of a precedent which, in their opinion, will have a dangerous tendency; which was ordered to lie on the table.

IN THE HOUSE OF REPRESENTATIVES, January 31, 1809.

Messrs. Varnum, Seaver, Cook, Ilsey, Barker, Cutts, and Green presented petitions from various towns in the State of Massachusetts, remonstrating against the mode in which the late election of electors was conducted in that State.

Mr. Cutts moved, as the time was fast approaching when it would be necessary to decide upon the subject of these petitions, a reference of all the petitions on this subject to a joint committee of the two Houses; which was withdrawn to make way for a resolution to the same effect offered by Mr. Bacon, which was agreed to in the following words:

Resolved, That a committee on the part of this House, jointly with such as the honorable Senate may join, be appointed for the purpose of taking into consideration the several memorials from sundry of the citizens of the State of Massachusetts, remonstrating against the mode in which the electors for President and Vice-President has been proceeded to on the part of the Legislature of said State as irregular and unconstitutional, and praying for the interference of the Senate and House of Representatives of the United States for the purpose of preventing the establishment of so dangerous a precedent; and that said committee do examine the matter of said memorials and report their opinion thereupon to both Houses.

The memorials were ordered to be sent to the Senate and the concurrence of Senate asked to the above joint resolution.

It was further ordered that the proposed resolution and order lie upon the table.

February 2, 1809.

Mr. Bacon called for the consideration of the above resolution, offered by him on Monday.

Mr. Randolph wished the resolution to lie on the table that the members of the House might have an opportunity to take it into their most serious consideration. He said it appeared to him that, under color of redress of grievances, the resolution might go in a very alarming and dangerous manner to enlarge the sphere of action of the General Government at the expense of the dearest rights of the States. In what manner, asked he, is the General Government constituted? We, as one of the branches of the Legislature, are unquestionably the judges of our own qualifications and returns. The Senate, the other branch of the Legislature, is in like manner the judge without appeal of the qualifications of its own members. But with respect to the appointment of President on whom is that authority devolved in the first instance? On the electors, who are to all intents and purposes, according to my apprehension, as much the judges of their own qualifications as we are of ours; and it appears to me as competent to the people of any part of this country to prefer a petition to the electoral college to set aside the returns of any members of Congress as to prefer petitions to this House to set aside the qualifications of electors. True it is that for the convenience of the thing, and also for the prevention of cabals and intrigue, the electors assemble in separate divisions in the respective States; but they are to be considered, to all intents and purposes, as a body of men equal in number to the Senate and House of Representatives, charged with the election of President and Vice-President of the United States, and judges in the last resort of their own qualifications and returns. If not, they are a mere nullity. * * * This is a delicate subject; one which is agreed on all hands there is no occasion to touch. The election is not only undisputed but indisputable. * * * If we do away the decision of the electoral body, which is as independent of us as we are of them, the Constitution is in my opinion verging to its dissolution.

Mr. Bacon said he certainly should consent that the resolution should lie on the table. He was by no means certain that this House or both Houses had the power of acting on the subject; but he thought it an attention due to the memorials to give them a

reference to a select committee. He did not wish to commit himself or the House on the subject.

The resolution was ordered to lie on the table.

February 6, 1809.

Several petitions having been presented in addition to those heretofore stated against the mode in which the late election in the State of Massachusetts was conducted,

Mr. Bacon offered the following resolution :

Resolved, That the Clerk of this House do carry to the Senate the several memorials from sundry citizens of the State of Massachusetts, remonstrating against the mode in which the appointment of electors for President and Vice-President has been proceeded to on the part of the senate and house of representatives of said State as irregular and unconstitutional, and praying for the interference of the Senate and House of Representatives of the United States *for the purpose of preventing the establishment of so dangerous a precedent.*

Mr. J. G. Jackson said he saw no objection to the resolution, or even to going further than it proposed. The Constitution had declared that the election of electors in each State should be held in such manner as the Legislature should direct; and he said he would never consent to the doctrine that any set of men, without the authority of law, could make an election of electors. He believed that the case was not provided for; and as the present case could not vary the general result of the presidential election, gentlemen appeared not to be disposed to interfere in it. But he hoped it would operate on the House to induce them to consider the propriety of providing some mode of hereafter distinguishing between legal and illegal or surreptitious elections.

Mr. Van Horn moved to strike out the words in italic, as he understood them as committing the House to express an opinion on the subject of the petitions. Motion lost.

Mr. Rowan was opposed to the resolution. He contended that the Constitution having provided that each State shall choose, in such manner as the Legislature shall direct, a number of electors equal to the number of their Senators and Representatives, it was improper that this House should interfere in it. Why might it not as well interfere in the election of Senators? He said that Congress did not possess a superintending power over the acts of the States in general cases; if they did in this particular instance, he wished it to be shown. He thought that an interference by Congress would be an assumption of power on their part forming a dangerous precedent. The House was called upon to say that the Legislature of the State of Massachusetts had improperly directed the manner of election. Was Congress to form for the States a model of the manner in which they should direct their elections to be held? Congress had no power to act on the subject. Why, then, send the memorials to the Senate? He said he was against taking any order in relation to them. In his opinion it was improper to give the petitions a place on the files of the House, because they related to a subject on which the House had no power to legislate. Having been received, he wished them to lie on the table.

Mr. Bacon observed that the adoption of the resolution would not commit the House at all. He was aware that there was a difficulty in acting on this subject, and he only wished to give an intimation to the Senate that such petitions had been received.

The resolution was agreed to—yeas 51, nays 24.

[The memorials went to the Senate the next day, where it was ordered that they lie on the table.]

ELECTION FOR THE SIXTH TERM—1809.

JAMES MADISON, President.

GEORGE CLINTON, Vice President.

IN SENATE, February 3, 1809.

Mr. Smith, of Maryland, submitted the following motion; which was read and agreed to:

Resolved, That a committee be appointed, to join such committee as may be appointed by the House of Representatives, to ascertain and report a mode of examining the votes for President and Vice-President, and of notifying the persons elected of their election, and for regulating the time, place, and manner of administering the oath of office to the President.

Mr. Smith, of Maryland, and Mr. Gaillard, of South Carolina, were appointed the committee on the part of the Senate.

February 7, 1809.

Mr. Smith, from the joint committee, reported the following resolution; which was agreed to:

Resolved, That the two Houses shall assemble in the Chamber of the House of Representatives on Wednesday next, at twelve o'clock; that one person be appointed a teller

on the part of the Senate, to make a list of the votes as they shall be declared; that the result shall be delivered to the President of the Senate, who shall announce the state of the vote, and the persons elected, to the two Houses assembled as aforesaid, which shall be deemed a declaration of the persons elected President and Vice-President, and, together with a list of the votes, to be entered on the Journals of the two Houses.

Ordered, That Mr. Smith, of Maryland, be appointed teller on the part of the Senate, agreeably to the foregoing resolution.

February 8, 1809.

A message from the House of Representatives informed the Senate that the House is now ready to attend the Senate in opening the certificates and counting the votes of the electors of the several States in a choice of a President and Vice-President of the United States, in pursuance of the resolutions of the two Houses of Congress of the seventh instant, and that the President of the Senate will be introduced to the Speaker's chair by the Speaker of the House of Representatives.

The two Houses of Congress, agreeably to the joint resolution, assembled in the Representatives' Chamber, and the certificates of the electors of the several States were, by the President of the Senate, opened and delivered to the tellers appointed for the purpose, who, having examined and ascertained the number of votes, presented a list hereof to the President of the Senate which was read; as follows:

Number of electors of each State.	States.	For President.			For Vice-President.				
		James Madison, of Virginia.	George Clinton, of New York.	C. C. Pinckney, of South Carolina.	George Clinton, of New York.	James Madison, of Virginia.	James Monroe, of Virginia.	John Langdon, of New Hampshire.	Rufus King, of New York.
7	New Hampshire.....	.....	.....	7	.....	.....	.....	.....	7
19	Massachusetts.....	.....	.....	19	.....	.....	.....	.....	19
4	Rhode Island.....	.....	.....	4	.....	.....	.....	.....	4
9	Connecticut.....	.....	.....	9	.....	.....	.....	.....	9
6	Vermont.....	6	.....	.....	.....	.....	.....	6	.....
19	New York.....	13	6	.....	13	3	3	.....	.....
8	New Jersey.....	8	.....	.....	8	.....	.....	.....	.....
20	Pennsylvania.....	20	.....	.....	20	.....	.....	.....	.....
3	Delaware.....	.....	.....	3	.....	.....	.....	.....	3
11	Maryland.....	9	.....	2	9	.....	.....	.....	2
24	Virginia.....	24	.....	.....	24	.....	.....	.....	.....
14	North Carolina.....	11	.....	3	11	.....	.....	.....	3
10	South Carolina.....	10	.....	.....	10	.....	.....	.....	.....
6	Georgia.....	6	.....	.....	6	.....	.....	.....	.....
7	Kentucky*.....	7	.....	.....	7	.....	.....	.....	.....
5	Tennessee.....	5	.....	.....	5	.....	.....	.....	.....
3	Ohio.....	3	.....	.....	.....	.....	.....	3	.....
175	.....	122	6	47	113	3	3	9	47

* One of the votes of Kentucky lost, from the non-attendance of one of the electors.

The whole number of votes being 175, of which 88 make a majority.

Whereupon,

The President of the Senate declared JAMES MADISON elected President of the United States for four years, commencing with the 4th day of March next; and GEORGE CLINTON Vice-President of the United States for four years, commencing with the 4th day of March next.

The Senate having returned to its Chamber, the following resolution was adopted:

Resolved, That the President of the United States be requested to cause to be delivered to JAMES MADISON, esq., of Virginia, now Secretary of State of the United States, a notification of his election to the office of President of the United States, and to be transmitted to GEORGE CLINTON, esq., of New York, Vice-President of the United States, notification of his election to that office; and that the President of the Senate do make out and sign a certificate in the words following, viz:

Be it known, That, the Senate and House of Representatives of the United States of America, being convened in the city of Washington on the second Wednesday in February, in the year of our Lord one thousand eight hundred and nine, the undersigned, President of the Senate *pro tempore*, did, in the presence of the said Senate and House of Representatives, open all the certificates and count all the votes of the elect-

ors for a President and Vice-President of the United States. Whereupon it appeared that JAMES MADISON, of Virginia, had a majority of the votes of the electors as President, and GEORGE CLINTON, of New York, had a majority of the votes of the electors as Vice-President. By all of which it appears that JAMES MADISON, of Virginia, has been duly elected President, and GEORGE CLINTON, of New York, has been duly elected Vice-President, of the United States, agreeably to the Constitution.

In witness whereof I have hereunto set my hand and caused the seal of the Senate to be affixed this — day of February, 1809.

And that the President of the Senate do cause the certificate aforesaid to be laid before the President of the United States with this resolution.

IN THE HOUSE OF REPRESENTATIVES, *February 4, 1809.*

The House proceeded to consider the resolution of the Senate of the 3d instant for the appointment of a committee on their part, jointly, with such committee as may be appointed on the part of this House, to ascertain and report a mode of examining the votes for President and Vice-President, and of notifying the persons who shall be elected of their election, and to regulate the time, place, and manner of administering the oath of office to the President; whereupon,

Resolved, That this House doth agree to the said resolution; and that Mr. Nicholas, Mr. Brown, and Mr. Cutts be appointed a committee on the part of this House, pursuant thereto.

February 7, 1809.

Mr. Nicholas, from the above committee, made a report; which was read and agreed to, as follows:

Resolved, That the two Houses shall assemble in the Chamber of the House of Representatives on Wednesday next at twelve o'clock; that two persons be appointed tellers on the part of this House, to make a list of the votes as they shall be declared; that the result shall be delivered to the President of the Senate, who shall announce the state of the vote, and the persons elected, to the two Houses, assembled as aforesaid, which shall be deemed a declaration of the persons elected President and Vice-President, and, together with a list of the votes, be entered on the Journals of the two Houses.

February 8, 1809.

Mr. Nicholas offered the following order:

Ordered, That a message be sent to the Senate to inform them that this House is now ready to attend them in opening the certificates and counting the votes of the electors of the several States in the choice of a President and Vice-President of the United States, in pursuance of the resolution of the two Houses of Congress of the 7th instant, and that the Clerk of the House do go with the said message.

Mr. Randolph said it now was proposed that the President of the Senate was to take the Chair of this House, without any vote of this House for the purpose. He objected. He did not wish the privileges of this House any way diminished. After some discussion the matter was settled on motion of Mr. Nicholas, that when the members of the Senate were introduced the Speaker should relinquish the Chair to the President of the Senate.

On the suggestion of Mr. Van Dyke, it was agreed that the members should receive the Senate standing and uncovered.

The time for counting the votes having arrived, the members of the Senate, preceded by their Sergeant-at-Arms, entered the Representatives' Chamber, Mr. Milledge, the President *pro tempore*, took the Speaker's chair, and the members took their seats on the right of the chair. The tellers were ranged in front, and the clerks of each House on the right and left of the tellers. The President of the Senate opened the electoral returns, one copy of which was handed to the teller of the Senate, Mr. S. Smith, who read it; the tellers of the House, Messrs. Nicholas and Van Dyke, comparing the duplicate returns handed to them.

When this business, which occupied about two hours, was concluded, the tellers handed their report to the President of the convention, who was proceeding to read it; when

Mr. Hillhouse observed that the returns from one of the States appeared to be defective, the governor's certificate not being attached to it. He thought that this might be as proper a time to notice it as any.

Nothing further being said upon the subject, however, the President of the Senate read the following statement of the votes, as reported by the tellers:

[Here follows the table, which is an exact copy of the one appearing in the Senate proceedings, except that there is added a recapitulation of the votes.]

The President of the Senate, pursuant to the joint resolution of the two Houses of the 7th instant, then announced the state of the votes to both Houses of Congress, and declared "That JAMES MADISON was duly elected President of the United States for four years, to commence on the 4th day of March next; and that GEORGE CLINTON was

duly elected Vice-President of the United States, for the like term of four years, to commence on the said 4th day of March next."

February 9, 1809.

Mr. Macon moved to amend the Journal of yesterday's proceedings by inserting the letter of Mr. Walton, the elector from the State of Kentucky who did not attend to give his vote, stating the reason thereof. He stated his object to be to state on the Journal the reason why one vote was deficient from the State of Kentucky, that it might serve as a precedent on similar occasions. For, if hereafter, in consequence of the sickness or inability to attend of any one or more electors, there should be a tie between any two candidates for the Presidency, it would be made a matter of question whether their votes, although unable to attend at the time, ought not to be counted.

Some discussion took place on this point, it being contended by some gentlemen that the House had no concern with the causes why any vote was not received, but merely to count those which came to hand. And that, if it was intended to fix a precedent to govern future proceedings on this subject, it ought to be done with great deliberation.

Mr. Macon's motion was negatived—ayes 20.

ELECTION FOR THE SEVENTH TERM—1813.

JAMES MADISON, President.

ELBRIDGE GERRY, Vice-President.

IN SENATE, February 8, 1813.

Resolved, That a committee be appointed, to join such committee as may be appointed by the House of Representatives, to ascertain and report a mode of examining the votes for President and Vice-President of the United States, and of notifying the persons elected of their election.

Ordered, That Messrs. Gaillard and Smith, of New York, be the committee on the part of the Senate.

February 9, 1813.

Mr. Gaillard, from the joint committee, reported the following resolution; which was agreed to:

Resolved, That the two Houses shall assemble in the Chamber of the House of Representatives on Wednesday next at twelve o'clock; that one person be appointed a teller on the part of the Senate, to make a list of the votes as they shall be declared; that the result shall be delivered to the President of the Senate, who shall announce the state of the vote, and the persons elected, to the two Houses, assembled as aforesaid, which shall be deemed a declaration of the persons elected President and Vice-President, and, together with a list of the votes, be entered on the Journals of the two Houses.

On motion,

Ordered, That Mr. Gaillard be appointed a teller of the ballots, on the part of the Senate, agreeably to the foregoing resolution.

February 10, 1813.

Ordered, That Mr. Franklin be appointed teller of the ballots for President and Vice-President of the United States, on the part of the Senate, in place of Mr. Gaillard, absent from indisposition.

A further message from the House of Representatives announced that the House is now ready to attend the Senate in opening the certificates and counting the votes of the electors of the several States in the choice of a President and Vice-President of the United States, in pursuance of the resolution of the two Houses of Congress, and informing the Senate that the President of the Senate will be introduced to the Speaker's chair by the Speaker of the House of Representatives.

Whereupon,

The two Houses of Congress, agreeably to the joint resolution, assembled in the Representatives' Chamber, and the certificates of the electors of the several States were, by the President of the Senate, opened and delivered to the tellers appointed for the purpose, who, having examined and ascertained the number of votes, presented a list thereof to the President of the Senate; which was read, as follows:

Number of electors of each State.	States.	For President.		For Vice-President.	
		James Madison.	De Witt Clinton.	Elbridge Gerry.	Jared Ingersoll.
8	New Hampshire.....	.....	8	1	7
22	Massachusetts.....	.....	22	12	20
4	Rhode Island.....	.....	4	.....	4
9	Connecticut.....	.....	9	.....	9
8	Vermont.....	8	.....	8	.....
29	New York.....	.....	29	.....	29
8	New Jersey.....	.....	8	.....	8
25	Pennsylvania.....	25	.....	25	.....
4	Delaware.....	.....	4	.....	4
11	Maryland.....	6	5	6	5
25	Virginia.....	25	.....	25	.....
15	North Carolina.....	15	.....	15	.....
11	South Carolina.....	11	.....	11	.....
8	Georgia.....	8	.....	8	.....
12	Kentucky.....	12	.....	12	.....
8	Tennessee.....	8	.....	8	.....
7	Ohio.....	7	.....	7	.....
3	Louisiana.....	3	.....	3	.....
217	.....	123	89	131	86

The whole number of votes being 217, of which 109 make a majority, JAMES MADISON had, for President of the United States, 123 votes, and ELBRIDGE GERRY had, for Vice-President of the United States, 131 votes.

Whereupon,

The President of the Senate declared JAMES MADISON elected President of the United States for four years, commencing with the 4th day of March next, and ELBRIDGE GERRY Vice-President of the United States for four years, commencing on the 4th day of March next.

February, 11, 1813.

Resolved, That a committee be appointed, to join such committee as may be appointed by the House of Representatives, to wait on the President of the United States and to notify him of his re-election to the office of President of the United States.

Ordered, That Messrs. Smith, of New York, and Franklin, be the committee on the part of the Senate.

Resolved, That the President of the United States be requested to cause to be transmitted to ELBRIDGE GERRY, esq., of Massachusetts, Vice-President elect of the United States, notification of his election to that office; and that the President of the Senate do make and sign a certificate in the following words, to wit:

Be it known, That the Senate and House of Representatives of the United States of America, being convened in the city of Washington on the second Wednesday of February, in the year of our Lord one thousand eight hundred and thirteen, the underwritten, President of the Senate *pro tempore*, did, in the presence of the said Senate and House of Representatives, open all the certificates and count all the votes of the electors for a President and Vice-President of the United States; whereupon it appeared that JAMES MADISON, of Virginia, had a majority of the votes of the electors as President, and ELBRIDGE GERRY, of Massachusetts, had a majority of the votes of the electors as Vice-President; by all which it appears that JAMES MADISON, of Virginia, has been duly elected President, and ELBRIDGE GERRY, of Massachusetts, has been duly elected Vice-President of the United States, agreeably to the Constitution.

In witness whereof I have herewith set my hand and caused the seal of the Senate to be affixed this — day of February, 1813.

And that the President of the Senate do cause the certificate aforesaid to be laid before the President of the United States, with this resolution.

do duly
certify

IN THE HOUSE OF REPRESENTATIVES, February

A message from the Senate announced that the Senate had passed a resolution, on the appointment of a joint committee to ascertain and report a mode of electing the votes for President and Vice-President of the United States, and of laying before the persons elected of their election. The said resolution was read and

the House, and Messrs. Macon, Bassett, and Milnor were appointed the committee on the part of the House.

February 9, 1813.

Resolved, That the Houses shall assemble in the chamber of the House of Representatives on Wednesday next, at twelve o'clock; that two persons be appointed tellers on the part of this House, to make a list of the votes as they shall be declared; that the result shall be delivered to the President of the Senate, who shall announce the state of the vote, and the persons elected, to the two Houses assembled as aforesaid, which shall be deemed a declaration of the persons elected President and Vice-President, and together with a list of the votes be entered on the Journals of the two Houses.

Messrs. Macon and Tallmadge were appointed tellers on the part of the House.

February 10, 1813.

The hour of twelve having arrived, the Senate entered the Hall of Representatives, preceded by their President, Secretary, Sergeant-at-Arms, and Doorkeeper, and proceeded to seats prepared for them—the members of the House having risen to receive them, and remained standing until all entered. The President of the Senate took a seat which had been prepared for him at the Speaker's right hand, and the Secretary of the Senate was placed beside the Clerk of the House. The tellers were seated at a table in front of the Speaker's chair.

The President of the Senate then proceeded to open and hand to the tellers the sealed returns from each State, which were severally read aloud by one of the tellers, and noted down and announced by the Secretaries of each House.

The votes having all been opened and read, the following result was announced from the chair by the President of the Senate, viz:

[Here follows the table, which is an exact copy of the one appearing in the Senate proceedings, except there is added a recapitulation of the votes.]

The President of the Senate, in pursuance of the joint resolutions of the two Houses, then announced the state of the votes to both Houses of Congress, and declared "That JAMES MADISON, of the State of Virginia, was duly elected President of the United States, for four years, to commence on the 4th day of March next, and that ELBRIDGE GERRY was duly elected Vice-President of the United States for the like term of four years, to commence on the said 4th day of March next."

February 13, 1813.

The resolution from the Senate of the 11th instant, for the appointment of a committee to wait upon the President of the United States, and inform him of his re-election to the Presidency of the United States, was read and concurred in by the House, and Mr. Macon, Mr. Tallmadge, and Mr. Sevier were appointed the said committee.

ELECTION FOR THE EIGHTH TERM—1817.

JAMES MONROE, President.

DANIEL D. TOMPKINS, Vice-President.

IN SENATE, February 10, 1817.

Resolved, That a committee be appointed, to join such committee as may be appointed by the House of Representatives, to ascertain and report a mode of examining the votes for President and Vice-President of the United States, and of notifying the persons elected of their election.

Ordered, That Mr. Macon and Mr. Tait be the committee on the part of the Senate.

February 11, 1817.

Resolved, That the two Houses shall assemble in the chamber of the House of Representatives on Wednesday next, at twelve o'clock; that one person be appointed teller on the part of the Senate, to make a list of votes as they shall be declared; that the result shall be delivered to the President of the Senate, who shall announce the state of the votes, and the persons elected, to the two Houses assembled as aforesaid, which shall be deemed a declaration of the persons elected President and Vice-President, and, together with a list of the votes, be entered on the Journals of the two Houses.

Ordered, That Mr. Macon be appointed teller on the part of the Senate, agreeably to the foregoing resolution.

February 12, 1817.

A message from the House of Representatives informed the Senate that the House is now ready to attend the Senate and proceed in opening the certificates and counting

the votes of the electors of the several States for a President and Vice-President, in pursuance of the resolution of the two Houses of Congress.

The two Houses of Congress, agreeably to the joint resolution, assembled in the Representatives' chamber, and the certificates of the electors of the several States, beginning with the State of New Hampshire, were, by the President of the Senate, opened and delivered to the tellers appointed for the purpose, who, having examined and ascertained the number of votes, presented a list thereof to the President of the Senate, which was read, as follows :

Number of electors of each State.	States.	For President.		For Vice-President.				
		James Monroe, of Virginia.	Rufus King, of New York.	Daniel D. Tompkins, of New York.	John E. Howard, of Maryland.	James Ross, of Pennsylvania.	John Marshall, of Virginia.	Robert G. Harper, of Maryland.
6	New Hampshire.....	α		α				
22	Massachusetts.....		22		22			
4	Rhode Island.....	4		4				
9	Connecticut.....		9			5	4	
α	Vermont.....	α		α				
29	New York.....	29		29				
α	New Jersey.....	α		α				
25	Pennsylvania.....	25		25				
3	Delaware.....		3					3
α	Maryland.....	α		α				
25	Virginia.....	25		25				
15	North Carolina.....	15		15				
11	South Carolina.....	11		11				
α	Georgia.....	α		α				
12	Kentucky.....	12		12				
α	Tennessee.....	α		α				
α	Ohio.....	α		α				
3	Louisiana.....	3		3				
3	Indiana.....	3		3				
217	.....	183	34	183	22	5	4	3

The whole number of votes 217, of which 109 make a majority ;

Whereupon

The President of the Senate declared JAMES MONROE elected President of the United States for four years, commencing with the 4th day of March next ; and DANIEL D. TOMPKINS Vice-President of the United States, commencing with the 4th day of March next.

February 13, 1817.

Resolved, That the President of the United States be requested to cause to be delivered to JAMES MONROE, esq., of Virginia, now Secretary of State of the United States, a notification of his election to the office of President of the United States ; and to be transmitted to DANIEL D. TOMPKINS, esq., of New York, a notification of his election to the office of Vice-President of the United States : and that the President of the Senate do make out and sign a certificate in the words following, viz :

“ Be it known, That the Senate and House of Representatives of the United States of America, being convened in the city of Washington on the second Wednesday in February, in the year of our Lord one thousand eight hundred and seventeen, the underwritten, President of the Senate *pro tempore*, did, in the presence of the said Senate and House of Representatives, open all the certificates and count all the votes of the electors for President and Vice-President of the United States ; whereupon it appeared that JAMES MONROE, of Virginia, had a majority of the electors as President, and DANIEL D. TOMPKINS, of New York, had a majority of the votes of the electors as Vice-President. By all of which it appears that JAMES MONROE, of Virginia, has been duly elected President, and DANIEL D. TOMPKINS, of New York, has been duly elected Vice-President of the United States, agreeably to the Constitution.

“ In witness whereof I have hereunto set my hand this — day of February, one thousand eight hundred and seventeen.”

And that the President of the Senate do cause the certificate aforesaid to be laid before the President of the United States, with this resolution.

IN THE HOUSE OF REPRESENTATIVES, *February 10, 1817.*

A message from the Senate informed the House that the Senate have passed a resolution for the appointment of a joint committee to ascertain and report a mode of examining the votes for President and Vice-President of the United States, and for notifying the persons elected of their election; and have, conformably thereto, appointed a committee on their part.

The said resolution was read and concurred in by the House; and Messrs. Jackson, Irving of New York, and Pitkin were appointed of the committee on the part of the House.

February 11, 1817.

Mr. Jackson, from the committee above mentioned, reported the following resolution: *Resolved*, That the two Houses shall assemble in the Chamber of the House of Representatives on Wednesday next, at twelve o'clock; that two persons be appointed tellers, on the part of this House, to make a list of the votes as they shall be delivered; that the result shall be delivered to the President of the Senate, who shall announce the state of the vote, and the persons elected, to the two Houses assembled as aforesaid, which shall be deemed a declaration of the persons elected President and Vice-President, and, together with a list of the votes, be entered on the Journals of the Houses.

Messrs. Jackson and Pitkin were appointed tellers on the part of the House.

Wednesday, February 12, on motion of Mr. Jackson, a message was sent to the Senate, informing them that the House of Representatives were ready to proceed, agreeably to the mutual resolution of yesterday, to open and count the votes for President and Vice-President of the United States.

The Senate, soon after, entered the House of Representatives, preceded by their President, who was received by the Speaker at the chair of the House, in which the President of the Senate took his seat. The tellers of the two Houses occupied seats in front of the chair.

The seals of the votes were broken by the President of the Senate, and by him handed to the tellers, by whom they were read aloud, and recorded on the Journals of the Senate and House of Representatives by the Secretary of the Senate and the Clerk of the House, respectively.

The votes of all the States being read with the exception of Indiana,

Mr. Taylor, of New York, arose, and (addressing himself to the Speaker of the House) expressed his unfeigned regret at being compelled, by his sense of duty, to interrupt the proceedings of the two Houses. Mr. Taylor was then going on to state his reasons for objecting to the votes from Indiana being read and recorded, when

The Speaker interrupted him, and said that the two Houses had met for the purpose—the single specified purpose—of performing the constitutional duty which they were then discharging, and that while so acting, in joint meeting, they could consider no proposition, nor perform any business not prescribed by the Constitution.

Mr. Varnum, of the Senate, (addressing the President of the Senate,) expressed his concurrence in the propriety of what had been stated by the Speaker, and for the purpose of allowing the House of Representatives to deliberate on the question which had been suggested, he moved that the Senate withdraw to their Chamber.

The motion was seconded by Mr. Dana, of the Senate, and the question being put by the President to the members of the Senate, it was unanimously agreed to; and the Senate withdrew accordingly.*

*[From the National Intelligencer]

MESSRS. GALES & SEATON:

In your paper this morning, in detailing the proceedings of the two Houses of Congress relating to counting the votes for President and Vice-President, you state that the motion made by Mr. Varnum, and seconded by Mr. Dana, that the Senate should withdraw, "was unanimously agreed to." This, gentlemen, was a mistake. There were several negatives, distinctly and audibly given, and a division being called for, it is doubtful how the question would have been decided. The writer of this is one of those who voted against the motion, believing that the two Houses ought not to separate until they had discharged the duty which brought them together, and that in counting the votes it was for them to decide what were votes in the meaning of the Constitution. Reflection has confirmed him in this opinion; and regarding the precedent as set by the Senate's withdrawing as one which it would be inconvenient and dangerous to follow, he is not willing to see it recorded as a unanimous act, when the reverse is the case, and thereby a weight and importance given which do not in reality belong to it.

WASHINGTON CITY, *February 14, 1817.*

[No doubt whatever is entertained of the correctness of the above statement, for which we are much indebted to the writer, but the reporter certainly heard not a single negative.

Having stated the proceedings of the House of Representatives on the question referred to in the above note, it may be proper to notice what, we learn, took place in the Senate after that body withdrew from the House.

On retiring to their Chamber, some conversation took place in the Senate on the subject that had produced the separation of two Houses, when

Mr. Barbour moved the adoption of a resolution that the State of Indiana had a right, by her electors, to vote for President and Vice-President, on the first Monday in December last.

This resolution was supported by Messrs. Talbot, Mason of New Hampshire, Barbour, Dana, and Daggett, and opposed by Messrs. Campbell and Fromentin.

Before any decision took place on the resolution, the message from the House of Representatives, announcing their readiness to proceed in counting the votes, was received; when

Mr. Barbour stated that, as the question which had interrupted the proceedings of the joint meeting

The Speaker having stated to the House that it now remained for them to consider the subject which had interrupted the forms of the Constitution,

Mr. Taylor, of New York, said that although the question, as regarded the present election, was of no consequence yet the time might arrive when it would be of the greatest importance in the election of President of the United States, and that it would be better to settle it now, when its decision would not affect the election. He then proceeded with his objection to receiving the votes of Indiana, contending that the joint resolution of December last, admitting that State into the Union, was not a matter of form merely, but a great constitutional prerogative, to be exercised by Congress; until which a sister-State could not be admitted into the Union upon an equal footing. If this was not so where was the use of passing upon the form of government adopted by the State and sanctioning her admission, if she was admitted to an equal footing already? The electors of President and Vice-President having been elected in Indiana before she was declared to be admitted into the Union by Congress, he thought the votes of that State were no more entitled to be counted than if they had been received from Missouri or any other Territory of the United States. He acknowledged he did not know what would be the most proper course of proceeding in the business, but believed it would be best to adopt a joint resolution that the votes of Indiana, having been given previous to her admission into the Union, were illegal and ought not be received.

Mr. Cady, of New York, thought the matter had been settled by the admission of Senators and Representatives from Indiana to their seats, and that it was too late on that account to question her right to participate in the election of President; and that from the moment the constitution of the State was assented to, she was entitled to all the privileges of an independent member of the Union.

Mr. Sharp, of Kentucky, to settle the question, offered a joint resolution, "That the votes for electors for the State of Indiana for President and Vice-President of the United States were properly and legally given, and ought to be counted."

Mr. Bassett, of Virginia, thought the resolution ought not to be a joint one, as it might establish a precedent which might in time, in the case of a tie, &c., deprive this House of one of its powers, by permitting the Senate to participate in this question.

Mr. Calhoun suggested to Mr. Sharp if it would not be better to offer his resolution in the negative form. He did not believe the votes improper, but the question would be put to rest with more certainty, he thought, by rejecting it in a negative shape than it would by agreeing to it in its present form.

Mr. Taylor, of New York, moved to amend the resolution by substituting therefor a motion declaring the votes illegal, &c.

The discussion was continued at some length, the question turning upon the fact as to whether or not Indiana was a State in the Union after it had adopted its constitution and before it was admitted by a formal act of Congress. No one appeared to question the power of Congress to reject the vote of Indiana if that State was not a State in the Union at the time the electoral votes were cast. Mr. Ingham, of Pennsylvania, moved the resolution and amendment be indefinitely postponed; which motion was agreed to almost unanimously; and then,

On motion of Mr. Jackson, a message was sent to the Senate informing them of the readiness of this House to proceed in counting the votes.

The Senate soon after entered the Representatives' Hall; when •

The Speaker informed them that the House had not seen it necessary to come to any resolution or to take any order on the subject which had produced the separation of the two Houses.

The reading of the votes was then concluded; and the tellers handed a statement thereof to the President of the Senate, who announced to the joint meeting the following as the state of the votes:

[Here follows the table, which is an exact copy of the one appearing in the Senate proceedings, except there follows a recapitulation of the votes.]

The President of the Senate declared that JAMES MONROE, of the State of Virginia, was duly elected President of the United States for four years, to commence on the 4th day of March next; and that DANIEL D. TOMPKINS, of the State of New York, was duly elected Vice-President of the United States for the like term of four years, to commence on the said 4th day of March next.

originated in the other House, and they having announced their readiness to resume the business which had called the two Houses together, it was unnecessary, he thought, to take any order on the resolution he had submitted, and therefore withdrew it.

The Senate then again proceeded to the Representatives' Hall.

On Thursday, the next morning, there was a considerable discussion on the question of how the proceeding of the preceding day should be stated on the Journal of the Senate, since, being novel in its character, the proceeding might be drawn into precedent on occasions of more importance than the present. It was finally resolved that the Journal shall be made "according to former precedents."—EDITORS NATIONAL INTELLIGENCER.]

ATTEMPT TO REMEDY THE UNCERTAINTY AS TO COUNTING THE
ELECTORAL VOTE BY LEGISLATION.

IN SENATE, December 12, 1820.

Mr. Wilson, of New Jersey, submitted the following resolution :

Resolved, That the Committee on the Judiciary be instructed to inquire whether any, and, if any, what provisions are necessary or proper to be made by law to meet contingencies which may arise from unlawful, disputed, or doubtful votes under that part of the twelfth article of amendments to the Constitution of the United States which relates to counting the votes of the electors for the President and Vice-President of the United States."

Mr. Wilson said it would be found, on referring to the article in the Constitution alluded to in this resolution, that the provision in relation to counting the votes for President and Vice-President is very general. The words are, "The President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates, and the votes shall then be counted." It is not said who shall count the votes, nor who shall decide what votes shall be counted. In consequence of this defect, as the Senate will well remember, some difficulty occurred four years ago, in relation to the votes of Indiana. Objections were made to receiving these votes; the counting was interrupted; the two houses separated; and although on that occasion they again came together and proceeded on and completed their business before them, so happy a result might not always be produced. Cases might occur where stronger doubts might exist or more excitement prevail, debates be protracted, decisions deferred, and serious inconveniences or evils follow. Was it not probable that such a case would occur during the present session? Would it not at least be prudent to guard against danger from such contingency? Congress has unquestionably the power, under the last clause under the eighth section of the first article of the Constitution, and he thought they ought to exercise it by vesting the authority to decide upon doubtful, disputed, or unlawful votes, either in the President of the Senate, the Senate itself, the House of Representatives, or the two houses conjointly or separately. At least he deemed the subject of sufficient importance to justify the inquiry proposed in the resolution which he had submitted.

Mr. Wilson submitted also the following resolution :

Resolved, That the Committee on the Judiciary be instructed to inquire whether any, and, if any, what, amendments are necessary and proper to be made to the act entitled 'An act relative to the election of the President and Vice-President of the United States, and declaring the officer who shall act as President in case of vacancies in the offices both of President and Vice-President,' passed March 1, 1792."

FEBRUARY 1, 1821.

Mr. Smith, from the Committee on the Judiciary, to which was referred the resolution to inquire, whether any, and, if any, what, provisions are necessary or proper to be made by law to meet contingencies which may arise from unlawful, disputed, or doubtful votes, under that part of the twelfth article of amendments to the Constitution of the United States which relates to counting the votes of the electors for President and Vice-President of the United States, made the following report :

"That the committee have had the resolution under their consideration, and are of opinion that it is inexpedient at this time to legislate on this subject."

Mr. Smith, from the Committee on the Judiciary, to which was referred the resolution to inquire whether any, and, if any, what, amendments are necessary and proper to be made to the act entitled "An act relative to the election of President and Vice-President of the United States, and declaring the officer who shall act as President in case of vacancies in the offices both of President and Vice-President," passed March 1, 1792, made the following report :

"That the committee have duly considered the resolution, and are of opinion that it would be inexpedient to legislate further on this subject at this time."

ELECTION FOR NINTH TERM—1821.

JAMES MONROE, President.

DANIEL D. TOMPKINS, Vice-President.

IN SENATE, February 6, 1821.

Resolved, That a committee be appointed, to join such committee as may be appointed by the House of Representatives, to ascertain and report a mode of examining the votes for President and Vice-President of the United States, and of notifying the persons elected of their election.

February 7, 1821.

The above resolution was considered and agreed to; and Mr. Barbour and Mr. Mason were appointed the committee on the part of the Senate.

February 13, 1821.

Mr. Barbour, from the joint committee, reported the following resolutions; which were read, considered, and agreed to:

Resolved, That the two Houses shall assemble in the Chamber of the House of Representatives on Wednesday next, at twelve o'clock, and the President of the Senate shall be the presiding officer; that one person be appointed a teller on the part of the Senate, to make a list of the votes as they shall be declared; that the result shall be delivered to the President of the Senate, who shall announce the state of the vote, and the persons elected, to the two Houses, assembled as aforesaid, which shall be deemed a declaration of the persons elected President and Vice-President of the United States, and, together with a list of votes, be entered on the Journals of the two Houses.

Resolved, That if any objection be made to the votes of Missouri, and the counting or omitting to count which shall not essentially change the result of the election, in that case they shall be reported by the President of the Senate in the following manner: Were the votes of Missouri to be counted, the result would be, for A B for President of the United States, ——— votes. If not counted for A B for President of the United States, ——— votes. But in either event A B is elected President of the United States. And in the same manner for Vice-President.

Mr. Barbour explained, in detail, the reasons which influenced the committee in adopting the resolutions which it recommended.

Mr. King, of New York, spoke in particular reference to what he deemed the correct course of proceeding in joint meetings; thinking it consistent with the Constitution, and with propriety, that the House should come to the Senate if the apartment had not rendered it inconvenient; and that when a convenient plan should be completed for joint meetings, he hoped the practice heretofore prevailing would not be considered in the light of a precedent, but that they should repair thither, and the President of the Senate preside in joint meeting, &c. He was opposed to the settlement of any litigated question in joint meeting, where the Senate, as a body, would be lost; and argued that whenever any such should arise, it would be always proper that the two Houses should separate.

Mr. Macon offered some remarks explanatory of the views of the committee on the points before them; some thinking the votes of Missouri ought to be received and counted, and others that they ought to be rejected; that they had agreed on the second resolution as the most likely course to reconcile any difficulty. As to the place of meeting, the Chamber of the Senate would have been recommended but for the reason it could not comfortably accommodate the two Houses.

The question being put on the first resolution, it was agreed to *nem. con.*

On the second resolution a long debate took place. It was opposed by Messrs. Smith, Talbot, Williams of Tennessee, and Lanman on various grounds; principally for the reason that it was not competent in the Senate to decide such a question in anticipation; that the proper time to consider and settle it was the day appointed by the Constitution; that the two Houses would not be bound to-morrow by this report; that it was useless to touch the question now whether Missouri was a State or not, or had a right to vote: that her votes could not be legally known now, &c.

The resolution was defended by Messrs. Barbour, Otis, and Johnson of Kentucky, on the ground that, as the question would certainly arise to-morrow in joint meeting, it was much better to adjust it now, and prevent all difficulty and trouble.

Mr. King, of New York, in accordance with the opinions he had submitted, wished some amendment introduced to prevent the mode of proceeding from being quoted as a precedent hereafter—an amendment declaring that if any question should arise relative to any votes in joint meeting, the two Houses would separate to consider the case, and not decide it jointly.

Mr. Barbour said that on the present occasion, as the election could not be affected by the votes of any one State, no difficulty could arise, and that it was his intention hereafter to bring the subject up, to remedy what he considered a *casus omissus* in the Constitution, either by an act of Congress, if that should appear sufficient, or, if not, by an amendment to the Constitution itself.

The second resolution was then also agreed to.

February 14, 1821.

A message from the House of Representatives informed the Senate that the House of Representatives concur in the report of the joint committee appointed to make arrangements upon the subject of counting the votes for President and Vice-President of the United States, and have appointed tellers on their part, and are now ready to receive the Senate to perform that ceremony.

Whereupon the two Houses of Congress, agreeably to the joint resolution, assembled in the Representatives' chamber, and the certificates of the electors of the several States,

beginning with the State of New Hampshire, were by the President of the Senate opened and delivered to tellers appointed for that purpose, by whom they were read, except the State of Missouri; and when the certificates of the electors of that State were opened, objection was made by Mr. Livermore, a member of the House of Representatives from New Hampshire, to counting said votes. Whereupon, on motion by Mr. Williams of Tennessee, the Senate returned to their own chamber.

A message from the House of Representatives informed the Senate that the House was ready to receive the Senate in the chamber of the House for the purpose of continuing the enumeration of the votes for President and Vice-President, according to the joint resolutions agreed upon between the two Houses.

On motion of Mr. Barbour, it was

Resolved, That the Senate proceed to meet the House of Representatives, in order to conclude the counting of the votes for President and Vice-President of the United States, according to the last of the joint resolutions adopted for that purpose.

Whereupon the two Houses, having again assembled in the Representatives' chamber, the certificates of the electors of the State of Missouri was, by the President of the Senate, delivered to the tellers, who read the same, and who, having examined and ascertained the whole number of votes, presented a list thereof to the President of the Senate, by whom it was read, as follows:

Number of electors of each State.	States.	For President.		For Vice-President.				
		James Monroe, of Virginia.	John Quincy Adams, of Massachusetts.	Daniel D. Tompkins, of New York.	Richard Stockton, of New Jersey.	Robert G. Harper, of Maryland.	Richard Rush, of Pennsylvania.	Daniel Rodney, of Delaware.
8	New Hampshire.....	7	1	7	.....	.....	1	.....
15	Massachusetts.....	15	.....	7	8	.....	.....	.....
4	Rhode Island.....	4	.....	4	.....	.....	.....	.....
9	Connecticut.....	9	.....	9	.....	.....	.....	.....
8	Vermont.....	8	.....	8	.....	.....	.....	.....
29	New York.....	29	.....	29	.....	.....	.....	.....
8	New Jersey.....	8	.....	8	.....	.....	.....	.....
25	Pennsylvania.....	24	.....	24	.....	.....	.....	.....
4	Delaware.....	4	.....	.....	.....	.....	.....	4
11	Maryland.....	11	.....	10	.....	1	.....	.....
25	Virginia.....	25	.....	25	.....	.....	.....	.....
15	North Carolina.....	15	.....	15	.....	.....	.....	.....
11	South Carolina.....	11	.....	11	.....	.....	.....	.....
8	Georgia.....	8	.....	8	.....	.....	.....	.....
12	Kentucky.....	12	.....	12	.....	.....	.....	.....
8	Tennessee.....	7	.....	7	.....	.....	.....	.....
8	Ohio.....	8	.....	8	.....	.....	.....	.....
3	Louisiana.....	3	.....	3	.....	.....	.....	.....
3	Indiana.....	3	.....	3	.....	.....	.....	.....
3	Mississippi.....	2	.....	2	.....	.....	.....	.....
3	Illinois.....	3	.....	3	.....	.....	.....	.....
3	Alabama.....	3	.....	3	.....	.....	.....	.....
9	Maine.....	9	.....	9	.....	.....	.....	.....
3	Missouri.....	3	.....	3	.....	.....	.....	.....
235	.....	231	1	218	8	1	1	4

The whole number of electors appointed by the several States was 235. One elector in each of the States of Pennsylvania, Tennessee, and Mississippi having died before the meeting of the electoral college of which he was a member, made the whole number of votes actually cast 232, including the vote of Missouri, of which 117 make a majority; or, excluding the vote of Missouri, 229, of which 115 make a majority; but in either event JAMES MONROE is elected President, and DANIEL D. TOMPKINS, Vice-President.

Whereupon,

The President of the Senate declared JAMES MONROE, of Virginia, duly elected President of the United States, commencing with the 4th day of March next; and DANIEL D. TOMPKINS Vice-President of the United States, commencing with the 4th day of March next.

February 20, 1821.

Mr. Barbour submitted the following motions for consideration:

Resolved, That a committee be appointed, to join such committee as may be appointed

by the House of Representatives, to wait on the President of the United States, and to notify him of his re-election to the office of President of the United States.

Resolved, That the President of the United States be requested to cause to be transmitted to DANIEL D. TOMPKINS, esq., of New York, Vice-President of the United States, a notification of his re-election to that office.

February 21, 1821.

The resolutions above, being under consideration, were adopted, and Messrs. Barbour, and King of New York, were appointed the committee on the part of the Senate.

IN THE HOUSE OF REPRESENTATIVES, *February 8, 1821.*

A message from the Senate informed the House that the Senate have passed a resolution for the appointment of a joint committee to ascertain and report a mode of examining the votes for President and Vice-President of the United States, and of notifying the persons elected of their election; in which they ask the concurrence of this House.

The resolution was read and concurred in by the House. Mr. Clay, Mr. Sergeant, and Mr. Van Rensselaer were appointed the committee on the part of the House.

February 14, 1821.

Mr. Clay, from the joint committee, to whom the subject had been referred, reported the following resolution:

Resolved, That the two Houses shall assemble in the chamber of the House of Representatives on Wednesday, the 14th of February, 1821, and the President of the Senate, seated on the right of the Speaker of the House, shall be the presiding officer of the Senate, and the Speaker shall be the presiding officer of the House; that two persons be appointed tellers on the part of the House to make a list of the votes as they shall be declared; that the result shall be delivered to the President of the Senate, who shall announce the state of the vote, and the persons elected to the two Houses assembled as aforesaid, which shall be deemed a declaration of the persons elected President and Vice-President of the United States, and together with a list of the votes be entered on the Journals of the two Houses.

Resolved, That if any objection be made to the votes of Missouri, and the counting or omitting to count which shall not essentially change the result of the election, in that case they shall be reported by the President of the Senate in the following manner: Were the votes of Missouri to be counted, the result would be, for A B for President of the United States, ——— votes. If not counted for A B for President of the United States, ——— votes. But in either event A B is elected President of the United States. And in the same manner for Vice-President.

Mr. Barbour explained, in detail, the reasons which influenced the committee in adopting the resolutions which it recommended.

Mr. Clay offered some remarks explanatory of the considerations which governed the committee in recommending the resolutions which had been reported. As convenience rendered it necessary for the Senate to meet this House here, in its own hall, it was due to that body, by courtesy and propriety, that the President should be invited to preside, he being the officer designated by the Constitution to perform a certain duty appertaining to the occasion which called the Houses together. As to the second resolution, the state of the votes for President and Vice-President was well known, though unofficially, and, as the votes of Missouri could not affect the result, it was considered by the committee, to obviate the unpleasant difficulty which would otherwise arise in the joint meeting, better to provide for the case in the manner proposed. This course was deemed by the committee the most expedient, under all the circumstances, and he hoped the House would adopt it, the more especially as the Senate had already concurred in it.

The question was taken on the first resolution and agreed to without a division, though several nays were heard.

The question being stated on the second resolution,

Mr. Randolph said he could not consent to this special verdict, as it had been called, in the case of Missouri. He could not recognize in this house or the other house, singly or conjointly, the power to decide on the votes of any State. * * * He maintained that the electoral college was as independent of Congress as Congress of them; and we have no right, said he, to judge of their proceedings. He would rather see an interregnum, or see no votes counted at all, than to see a principle adopted which went to the very foundation on which the presidential office rested. Suppose a case, in which some gentleman of one house or the other should choose to turn up his nose at the vote of some State, and say that if it be so and so, such a person is elected; and if so and so, what-you-call-'im is elected—did not everybody see the absurdity of such a proposition? Mr. R. added other remarks illustrative of his opinion of the course proposed by the resolution, deeming it not only erroneous, but erroneous in a matter of vital importance, in the ascertainment of the person who had been elected by the people Chief

Magistrate of this nation, the most important officer under the Constitution—the monarch—for whoever, in any country, commands the army and navy and collects and distributes the revenue is a king, call him what you will. The time of this House was precious, and he would not consume it by saying all he thought and felt on the subject.

Mr. Trimble was far from desiring to consume the time of the House, but he could not give his consent to this resolution. If anything was due to State rights, this resolution ought not to be adopted, as it would, however immaterial in the present case, be cited hereafter as a precedent. It was about to declare, not what was the true vote for President of the United States, but to state it hypothetically. It was the duty of the two Houses to enunciate the true state of the vote for President and Vice-President, and the proposed enunciation would not be the fact. He would rather the votes of Missouri were left out altogether than adopt the course proposed.

Mr. Randolph observed that the gentleman was under some mistake on one point. The Constitution of the United States provides, not that the person having a majority of votes should be President, but a majority of the votes of the electors appointed. Now, he desired to know whether the electors of Missouri were appointed or not.

Mr. Floyd was aware that to agree to the resolution was tantamount to a motion to reject, but he would prefer the latter shape for the question to show more strongly his opinion of it. If they had any power over the votes of Missouri at all, it was when her votes were first received; but no such power existed. He protested against this assumption of authority on the part of Congress, and wished to show his disapprobation of the resolution in the strongest manner.

Mr. Clay said the Constitution required of the two Houses to assemble and perform the highest duty that could devolve on a public body—to ascertain who had been elected by the people to administer their national concerns. In a case of votes coming forward which could not be counted, the Constitution was silent; but, fortunately, the end in that case carried with it the means. The two Houses were called on to enumerate the votes for President and Vice-President; of course they were called on to decide what are votes. It being obvious that a difficulty would arise in the joint meeting concerning the votes of Missouri, some gentlemen thinking they ought to be counted and others dissenting from that opinion, the committee thought it best to prevent all difficulty by waiving the question in the manner proposed, knowing that it could not affect the result of the election.

Mr. Rhea said the Constitution had in it neither waiving or elasticity, and it would not bend to circumstances of expediency. The Constitution had declared the duty of Congress in ascertaining the votes for President; it was not competent for them to mend the Constitution, nor to decide such a question as this proposed, and he was opposed to the resolution.

Mr. Culbreth discussed the resolution at some length, but his argument was directed to proving Missouri a State in the Union, and that therefore her votes should be counted.

Mr. Tracy was opposed to the resolution because he did not believe that Missouri was a State in the Union, and therefore her votes should not be counted.

Mr. Clay would merely observe that the difficulty is before us; that we must decide it when the Houses meet, or avoid it by some previous arrangement. The committee being morally certain that the question would arise on the votes in joint meeting, thought it best to give it the go-by in this way. Suppose this resolution not adopted, the President of the Senate will proceed to open and count the votes; and would the House allow that officer, singly and alone, thus virtually to decide the question of the legality of the votes? If not, how then were they to proceed? Was it to be settled by the decision of the two Houses conjointly or of the Houses separately? One House would say the votes ought to be counted, the other that they ought not; and then the votes would be lost altogether. In fact there was no mode pointed out in the Constitution of settling litigated questions arising in the discharge of this duty; it was a *casus omissus*; and he thought it would be proper, either by some act of derivative legislation or by an amendment to the Constitution itself, to supply the defect.

Mr. Rhea took the ground that it was not in the power of this House, or of both Houses, by resolution, to remedy a defect in the Constitution.

The resolution was then agreed to—yeas 90, nays 67.

On motion of Mr. Clay, it was then ordered that a message be sent to the Senate, informing that body that this House, on its part, concurs in the report of the joint committee, and is now prepared to proceed, with the Senate, in the performance of its constitutional duty.

It was determined by general consent, on motion of Mr. Clay, that the members of the House should receive the Senate, on their entrance into the House, standing and uncovered. In the same manner it was determined that a sufficient number of seats on the right hand of the chair should be set apart for the Senators.

Mr. Clay moved that a committee of two members be appointed to receive the Senate and conduct the President of the Senate to the Chair and the members to the seats assigned them.

Mr. Clay's motion was agreed to, not without some opposition, and Messrs. Clay and Hill were appointed accordingly.

Soon after, the Senate came into the hall, preceded by its President and attended by its Secretary and Sergeant-at-Arms; and the President was conducted to the Speaker's chair, the Speaker occupying a chair at his left hand.

The President of the Senate then delivered the votes of the States, in the following order, to the committee for counting the votes, (Mr. Barbour, of the Senate, and Messrs. Smith, of Maryland, and Sergeant, of this House,) and the official authentications, &c., were each of them twice read in an audible tone and the votes recorded by the Secretary of the Senate and Clerk of the House of Representatives, as follows:

Number of electors of each State.	States.	President.	Vice-President.
		James Monroe, of Virginia.	Daniel D. Tompkins, of New York.
8	New Hampshire	7	7
15	Massachusetts	15	7
4	Rhode Island	4	4
9	Connecticut	9	9
8	Vermont	8	8
29	New York	29	29
8	New Jersey	8	8
25	Pennsylvania	24	24
4	Delaware	4	-----
11	Maryland	11	10
25	Virginia	25	25
15	North Carolina	15	15
11	South Carolina	11	11
8	Georgia	8	8
12	Kentucky	12	12
8	Tennessee	7	7
8	Ohio	8	8
3	Louisiana	3	3
3	Mississippi	2	2
3	Indiana	3	3
3	Illinois	3	3
3	Alabama	3	3
9	Maine	9	9

The scattering votes were as follows: For President, in New Hampshire, there was John Quincy Adams, 1 vote. For Vice-President, there were, in New Hampshire, for Richard Rush, 1 vote; in Massachusetts, for Richard Stockton, 8 votes; in Delaware, for Daniel Rodney, 4 votes; in Maryland, for Robert Goodloe Harper, 1 vote.

When the votes of the electors for Missouri were announced by the President of the Senate and handed to the tellers,

Mr. Livermore, of New Hampshire, rose and said: Mr. President and Mr. Speaker, I object to receiving any votes for President and Vice-President from Missouri, because Missouri is not a State of this Union.

A motion was then made by a member of the Senate that the Senate do now withdraw to its Chamber; and the question, having been put, was decided in the affirmative.

The House was then called to order.

Mr. Floyd, of Virginia, then rose and submitted the following resolution:

Resolved, That Missouri is one of the States of this Union, and her votes for President and Vice-President of the United States ought to be received and counted.

Mr. Floyd followed in an argument that Missouri was a State in the Union, and that her vote should be counted.

Mr. Archer, of Maryland, said that, entertaining the same sentiments as the gentleman from Virginia with respect to the refusal to admit Missouri into the Union, he felt himself bound to move, as he now did, to postpone the further consideration of the resolution indefinitely. He was opposed to this House undertaking to proceed in any manner as to the legality of the electoral votes. He could recognize no power in the House of Representatives on this subject separate from the Senate. The expressions in the Constitution in regard to the counting of the votes of electors, &c., he con-

sidered as imperative. All questions arising out of it, according to his construction, must be settled in joint meeting of the two Houses. He could not agree that this House had a right to determine whether any vote should be received or rejected. What are the words of the Constitution? "The President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates, and the votes shall then be counted." Does it not follow that the votes must be counted in the presence of the two Houses? For what purpose do they assemble together unless it be to determine on the legality of the votes? If not for this purpose, the joint meeting is for form and show and nothing else. We must, in my apprehension, determine the question in joint meeting, and in no other way.

Mr. Randolph argued that to reject the vote of Missouri or to state it hypothetically was not in the power of the House, as Missouri was a State in the Union. He also went back to first principles. The electoral colleges are as independent of this House as this House is of them. "Your office," said he, "in regard to the electoral vote is merely ministerial. It is to count the votes, and you undertake to reject votes." * * *

To what will this lead? Do you ever expect to see the time when there shall be in the presidential chair a creature so poor, so imbecile, not only not worthy of being at the head of the nation, but not worthy of being at the head of a petty corporation? Do you ever expect to see in that office an animal so poor as not to have in this House retainers enough to enable him to reject the vote of any State which, being counted, might prevent his continuance, and their continuance, and that of their friends, in office? He spoke not of the present incumbent; he was not so wanting in common decency and decorum as to do so; he spoke in reference not only to what is past, but to that which is prospective and which every man who looks the least into futurity must know will happen, and in all probability will very shortly happen. He undertook to say that if this House should, by a vote of indefinite postponement—for the form was immaterial—or in any other way—and it would be observed for the first instance in the person of Missouri, of this much-injured, long-insulted, and trampled-upon member of this confederacy, was this example to be set—"if," said he, "you do, for the first time, now receive the votes of a State, it will be created into a precedent, and that in the life-time of some of those who now hear me, for the manufacture of Presidents by this House. The wisest men may make constitutions, on paper, as they please."

What was the theory of this Constitution? It is that this House, except upon a certain contingency, has nothing at all to do with the appointment of President and Vice-President of the United States. What was to be the practice of the Constitution, as now proposed? That an informal meeting of this and the other house is to usurp the initiative, the nominative power, with regard to the two first officers of the Government, in despite and contempt of their decision. Is there to be no limit to the power of Congress? no mound or barrier to stay their usurpation? Why were the electoral bodies established? The Constitution has wisely provided that they shall assemble each by itself, and not in one great assembly. By this means assuredly that system of intrigue which was matured into a science, or rather into an art here, was guarded against. But Mr. R. ventured to say that the electoral college of this much-despised Missouri, acting conformably to law and to the genius and nature of our institutions, if it were composed of but one man, was as independent of this House as this House was of it. If, however, said he, *per fas aut nefas*, the point is to be carried; if the tocsin is to be sounded; if the troops are to be rallied, and Missouri is to be expelled with scorn from our august presence—how august, Mr. Speaker, I leave it for you to decide—there are those who will be willing to take her to their arms.

Mr. Archer, of Virginia, said he was willing to go to as great lengths as any man, in this House to support the rights of Missouri. But he could not maintain, what he would do by voting for this resolution, that Missouri is now a State in the Union. * *

* He was a little surprised at one ground that had been taken on this occasion: that the House had no power to pass any judgment on any return. He always thought that, wherever was lodged the power to receive a return, there was also a power to pass judgment on the validity of that return. Suppose any Territory not within the limits of the United States at the time, Florida, for example, to send votes here for electors; was there no authority by which these votes could be rejected? Suppose a State entitled to twenty-seven votes should send thirty-seven votes, would any gentleman contend that there was no power in this House to judge of the proper number? Could there ever be a pure election—could it ever be ascertained who was elected—in the event of the establishment of a doctrine of that sort?

Mr. Randolph said it was highly probable that the few remarks which he had made might give rise to misapprehensions in the minds of other gentlemen as they had done in the mind of his colleague. He therefore wished to explain. His position he said was misunderstood. It had been said, and pertinently said, that Missouri might be admitted into the Union in more ways than one. His position then was that this is the first instance in which Missouri has knocked at the door and demanded her rights. It is now for us, said Mr. R., by permitting her to come in, or rather, by refraining from extruding her from this hall, to determine whether she shall now be one of our Com-

monwealth, or, as the fashion is to call it, of our empire. Mr. R. said he had no doubt that Congress might drive Missouri into the wilderness like another son of Hager. If we do, said he, we drive her at our own peril. If either of the worthy Senators and Representatives from Missouri, whose long forbearance had excited surprise in no man's breast more than that of Mr. R.—he did not mean to blame them for pursuing the counsel of cooler heads than his—had presented themselves here, would you (addressing the Speaker) have felt yourself bound to exclude them from the communion with more than papal power; not only from the cup of wine, but from the bread of life itself? Let me tell my friend before me [Mr. Archer] we have not the power which he seems to think we possess; and if this be a *casus omissus* in the Constitution, I want to know where we acquire the power to supply the defect? You may keep Missouri out of the Union by violence, but here the issue is joined. She comes forward in the person of her presidential and vice-presidential electors, instead of that of her Representative: and she was thus presented in a shape as unquestionable as that of New York, Pennsylvania, Massachusetts, or the proudest and oldest State in the Union. She comes forward by her attorneys—her electors. Will you deny them admittance? Will you thrust her electors, and her's only, from this hall? Mr. R. said his friend had not given to this subject the sort of consideration which he knew him to be capable of giving it. I made no objection, said Mr. R., to the votes of New Hampshire, Maine, or Vermont. I have had as good a right to object to the votes of New Hampshire as the gentleman from New Hampshire has to object to the votes of Missouri. Who made thou, Cain, thy brother's keeper? Who put Missouri into custody of the honorable gentleman from New Hampshire? The electors of Missouri are as much *homines probi et legales* as the electors of New Hampshire. This, Mr. R. said, was no skirmish, as it had been called. This was the battle when Greek meets Greek; it was a conflict not to be decided between the phalanx and the legion, whether the impenetrability of the one or the activity of the other shall prevail. Let us buckle on our armor, said Mr. R.: let us put aside all this flummery, these metaphysical distinctions, these legal technicalities, these special pleadings, this dry minuteness, this unprofitable drawing of distinctions without difference; let us say now, as we have said on another occasion, we will assert, maintain, and vindicate our rights, or put to every hazard what you pretend to hold in such high estimation.

Mr. R. said he recollected perfectly well, in the celebrated election of Thomas Jefferson and Aaron Burr—they live, said he, illustrious examples of the merits of their respective partisans—what were we then told? Why, that we must withdraw our opposition, or there would be no election; that a dissolution of the Union impended; that volcanoes began to play; that earthquakes yawned beneath us; and recollect, sir, we had a President in the chair who had a majority in the House, small as it was. He treated the idea of giving away with derision and scorn. We said we will not give away, and you must take the consequences. We appealed, said Mr. R., to the good sense of the nation; and I do now appeal to this nation, said he, whether this pretended sympathy for the rights of free negroes and mulattoes is to supersede the rights of the free white citizens, of ten times their whole number. They gave way, sir, said Mr. R.; the sheep is the most timid and helpless of all animals; it retreats before any attack is offered to it. The President of the United States, said Mr. R., possesses great powers and highly responsible functions, and should be looked up to with veneration and deference, because he is the Chief Magistrate of a people, legally appointed by their suffrages. But a President of the United States appointed by the exclusion of the votes of those who are the same flesh and blood as ourselves—for the people of Missouri are not natives of Missouri, with the exception of a few French and still fewer Spaniards—is no more the Chief Magistrate of this country than that thing, that pageant which the majorities of the two houses proposed to set up just twenty years ago—a President made by law—no, by the form and color of law against the principles of the Constitution, and in violation of the rights of the freemen of this country. Sir, said Mr. R., I would not give a button for him. On his personal account and for his personal qualities I might treat him with respect as an individual, but as Chief Magistrate of this country he would be more odious to my judgment than one of the house of Stuart attempting to seat himself on a throne of England in defiance of the laws of succession and of the opinion of the people. We have, I am afraid, so long basked in the impure atmosphere, not of this House, but of this court, that—

Mr. Clay here claimed the floor, which he had yielded to the gentleman only for the purpose of making explanation.

Mr. Randolph took his seat, saying he would give way to the honorable gentleman in everything but one.

Mr. Clay made a short speech, showing that when objection was made at the joint meeting the President of the Senate ought not to have put the motion to withdraw, but should have held that the adoption of the joint resolution in regard to counting the vote of Missouri settled the matter, and that no objection could be entertained. He

moved to lay the subject under consideration on the table, in order to resume the business which had been interrupted by the retirement of the Senate; which motion was adopted.

A message was sent to the Senate that the House was now ready to receive the Senate in the Chamber of the former, for the purpose of continuing the enumeration of the votes of the electors for President and Vice-President.

The Senate again appeared and took their seats in the House as before.

The President of the Senate, in the presence of both Houses, proceeded to open the certificate of the electors of the State of Missouri, which he delivered to the tellers, by whom it was read and who registered the same.

And the votes of all the States having been thus counted, registered, and the lists thereof compared, they were delivered to the President of the Senate, by whom they were read as already printed.

The President of the Senate then, in pursuance of the resolution adopted by the two Houses, proceeded to announce the state of the vote to the two Houses, of Congress, in joint meeting assembled, as follows:

"Were the votes of Missouri to be counted the result would be: For JAMES MONROE, of Virginia, for President of the United States, 231 votes; if not counted, for JAMES MONROE, of Virginia, 228 votes. For DANIEL D. TOMPKINS, of New York, for Vice-President of the United States, 218 votes; if not counted, for DANIEL D. TOMPKINS, of New York, for Vice-President of the United States, 215 votes. But, in either event, JAMES MONROE, of Virginia, has a majority of the votes of the whole number of electors for President; and DANIEL D. TOMPKINS, of New York, has a majority of the votes of the whole number of electors for Vice-President of the United States."

The President of the Senate had proceeded thus far when Mr. Floyd, of Virginia, addressed the Chair, and inquired whether the votes of Missouri were or were not counted.

Cries of "Order!" "Order!" were so loud as to drown Mr. Floyd's voice.

Mr. Randolph rose, and was addressing the Chair when loud cries of "Order!" "Order!" resounded from many voices.

The Speaker pronounced Mr. Randolph to be out of order, and invited him to take his seat.

Mr. Brush demanded that Mr. Randolph should be allowed to proceed, and declared his determination to sustain his right to do so. Mr. Brush was also loudly called to order.

Mr. Floyd demanded of the Chair whether he was considered in order or not.

The Speaker determined that he was not in order at this time, the only business being at that present time that presented by the rule of this morning.

There was considerable murmuring at this decision; but order was restored; when the President of the Senate concluded his annunciation, as follows:

"I therefore declare that JAMES MONROE, of Virginia, is duly elected President of the United States for four years, to commence on the fourth day of March, 1821; and that DANIEL D. TOMPKINS, of New York, is duly elected Vice-President of the United States for the like term of four years, to commence on the said fourth day of March, 1821."

As the President concluded,

Mr. Randolph addressed the Chair, but was required to take his seat.

The Senate retired to their Chamber.

The House being called to order,

Mr. Randolph said he had seen every election of President of the United States except that of the present Chief Magistrate, and he never before heard any other form of proclamation than that such was the *whole* number of votes given; that such a person A or B had so many, and was therefore elected President or Vice-President of the United States. He closed his remarks by offering resolutions that the election was illegal, as follow:

"1. *Resolved*, That the electoral votes of the State of Missouri have this day been counted, and do constitute a part of the majority of two hundred and thirty-one votes given for President, and of two hundred and eighteen votes given for Vice-President.

"2. *Resolved*, That the whole number of electors appointed, and of votes given for President and Vice-President, has not been announced by the presiding officer of the Senate and House of Representatives, agreeably to the provision of the Constitution of the United States, and that therefore the proceeding has been irregular and illegal."

While he was reducing his resolutions to writing, a motion was made to adjourn; which was carried—95 to 50.

CONSTITUTIONAL AMENDMENTS.

Resolutions amending the Constitution as to the manner of choosing electors and to prevent the election of President by the House of Representatives were presented in

both sessions of the Eighteenth Congress, as well as in previous sessions of Congress. Many were considered at length, but none of the speakers, as reported in the Annals of Congress, discussed the power of Congress over the electoral vote. The only one who referred to it directly was Senator Thomas H. Benton, of Missouri, who said :

"Two questions of great delicacy now present themselves :

"1. If electors are not appointed according to the Constitution, can their votes be counted?

"2. If objected to, who shall judge them?

"It is the duty of the two houses of Congress to count the votes. Can they count unconstitutional votes? If they cannot, shall they not judge every vote before it is counted?"

He began the next paragraph by saying he would not debate these questions.

ANOTHER BILL ON THE SUBJECT PASSES THE SENATE.

IN SENATE, December 16, 1823.

The following resolution was offered in the Senate by Mr. Eaton, of Tennessee :

Resolved, That the Judiciary Committee inquire if any, and what, amendments are necessary to an act entitled "An act relative to the election of a President and Vice-President of the United States, and declaring the officer who shall act as President in case of vacancies in the offices of both President and Vice-President," passed the 1st of March, 1792.

This resolution was agreed to.

MARCH 4, 1824.

Mr. VAN BUREN, from the Committee on the Judiciary, to whom the subject was referred, reported the following bill, which was twice read by unanimous consent :

A BILL in addition to the act relative to the election of a President and Vice-President of the United States.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That before the houses shall assemble for the purpose of counting the votes, as directed by the act to which this is an addition, each house shall choose, by ballot, two members thereof as tellers, whose duty it shall be to receive the certificates of the electors from the President of the Senate, after they shall have been opened and read, and to note, in writing, the dates of the certificates, the names of the electors, the time of their election, and the time and place of their meeting, the number of votes given, and the names of the persons voted for, and also the substance of the certificate from the executive authority of each State accompanying the certificate of the electors; and the minutes thus made by the tellers shall be read in the presence of both houses, and a copy thereof entered on the Journals of each house.

SEC. 2. *And be it further enacted*, That on the day appointed for counting the votes for President and Vice-President, the Senate and House of Representatives shall meet at such place as may be agreed on for the purpose, the names of the several States shall then be written, under the inspection of the Speaker of the House of Representatives, on separate and similar pieces of paper, and folded up, as nearly alike as may be, and put into a ballot-box and shaken by a member of the House of Representatives, to be named by the Speaker thereof, out of which box shall be drawn the paper on which the names of the States are written, one at a time, by a member of the Senate, to be named by the President thereof; and so soon as one is drawn, the packet containing the certificates from the electors of that State shall be opened by the President of the Senate, and if no exceptions are taken thereto all the votes contained in such certificate shall be counted; but if any exception be taken, the person taking the same shall state it directly, and not argumentatively, and sign his name thereto; and if the exception be seconded by one member from the Senate and one member from the House of Representatives, and each of whom shall sign the said exception as having seconded the same, then each house shall immediately retire, without question or debate, to its own apartment, and shall take the question on the exception, without debate, by ayes and noes. So soon as the question shall be taken in either house, a message shall be sent to the other, informing them that the house sending the message is prepared to resume the count; and when such message shall have been received by both houses they shall again assemble in the same apartment as before, and the count shall be resumed. And if the two houses have concurred in rejecting the vote or votes objected to, such vote or votes shall not be counted; but unless both houses concur, such vote or votes shall be counted. The vote of one State being thus counted, another ticket

shall in like manner be drawn from the ballot-box, and the certificate of the votes of the State, thus drawn, shall be proceeded on as is hereibefore directed, and so on, one after another, until the whole of the votes shall be counted.

APRIL 12, 1824.

The bill, in addition to the act relative to the election of a President and Vice-President of the United States, being under consideration, Mr. Van Buren proposed the following as an amendment thereto :

SEC. 3. *And be it further enacted*, That the time allowed by the second section of the act, to which this is an addition, for the delivery of the certificates of the votes of the respective States, for President and Vice-President of the United States, to the President of the Senate, be, and the same is hereby, extended from the first Wednesday in January to the first Wednesday in February next ensuing after the day when the same shall have been given ; and if the certificates by that section directed to be sent by a special messenger be delivered to the President of the Senate, or the certificate therein directed to be sent through the post-office be received by him before the said first Wednesday in February, the votes contained in such certificate shall be counted in like manner as if the same had been received by the first Wednesday in January, as provided by that section.

SEC. 4. *And be it further enacted*, That the person appointed by the electors to deliver the lists of votes to the President of the Senate shall be allowed, on the delivery of the said lists, twenty-five cents for every mile of the estimated distance, by the most usual roads from the place of meeting of the electors, to the seat of Government of the United States, going and returning.

SEC. 5. *And be it further enacted*, That in all cases where the election of President and Vice-President of the United States shall have been made by the electors, the same shall be declared and communicated to the persons elected in such manner as the Senate shall direct. In every case in which the President shall be chosen by the House of Representatives the choice shall be declared and communicated to the person chosen in such manner as the House of Representatives shall direct ; and in every case in which the Vice-President shall be chosen by the Senate, the choice shall be declared and communicated to the person chosen in such manner as the Senate shall direct.

APRIL 13, 1824.

The following amendment was proposed by Mr. Eaton to the bill in addition to the act relative to the election of a President and Vice-President of the United States :

SEC. 3. *And be it further enacted*, That the fourth section of an act passed the first of March, one thousand seven hundred and ninety-two, entitled "An act relative to the election of a President and Vice-President of the United States, and declaring the officer who shall act as President in case of vacancies in the offices both of President and Vice-President," be, and the same is hereby, repealed, and the Secretary of State shall dispatch a messenger for the vote of any State which may not have arrived at Washington City by the first Wednesday in January, provided, in his opinion, there be sufficient time for him to go and return by the second Wednesday in February, otherwise the messenger shall not be sent : *Provided always*, That the vote of any State which may be received before the count is closed shall be counted, subject, however, to any exception which may be taken to their legality or correctness.

FRIDAY, April 16, 1824.

Mr. NATHANIEL MACON, of North Carolina, objected to the general principles of the bill ; on the ground that it was not necessary, and would, as he thought, have a tendency to create the very difficulties it proposed to remedy. He thought, too, that Congress had no power to legislate upon the subject.

APRIL 19, 1824.

This bill was read a third time and passed, as follows :

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the electors shall meet and give their votes for President and Vice-President of the United States, in the manner prescribed by the Constitution, on the first Wednesday in December in every fourth year next succeeding the last election, at the place in each State directed by the legislature thereof ; and the electors of each State shall make and sign five certificates of all the votes given by them, each of which certificates shall contain two distinct lists ; one, of the votes given for President, and the other of the votes given for Vice-President ; and shall seal up the same, certifying on each that lists of all the votes of said State given for President, and of all the votes given for Vice-President, are contained therein, and shall by writing under their hands, or under the hands of a majority of them, appoint a person to take charge of and deliver

to the President of the Senate, at the seat of Government, before the first Wednesday in January, then next ensuing, one of the said certificates; and the said electors shall forthwith forward, by the post-office, to the President of the Senate, at the seat of Government, one other of the said certificates, and shall deposit two other of said certificates, directed as aforesaid, in the post-office, and it shall be the duty of the postmaster to forward the same, separately, in the two next successive mails after the departure of the first certificate; and the said electors shall forthwith cause the other of said certificates to be delivered to the judge of the district in which the said electors shall assemble; and, if either of the said certificates shall not be received by the President of the Senate before the second Wednesday in February, the votes contained therein shall be counted, subject, however, to the exceptions and objections hereinafter mentioned.

SEC. 2. *And be it further enacted*, That the executive authority of each State shall cause five lists of the names of the electors of such State to be made and certified, and to be delivered to the electors on or before the said first Wednesday in December; and the said electors shall annex one of the said lists to each of their said certificates of votes.

SEC. 3. *And be it further enacted*, That if any person appointed to deliver the votes of the electors to the President of the Senate shall, after accepting said appointment, neglect to perform the services thereby required, he shall forfeit to the United States a sum not exceeding three thousand dollars; and if any postmaster, or other person employed in the post-office, shall neglect to forward the certificates, as hereinbefore directed, he shall forfeit to the United States the sum of three thousand dollars; and if any person or persons whatsoever shall, knowingly, destroy, suppress, hinder, delay, or prevent, the transmission of said certificates, or shall cause or procure the same to be done, or in any way aid or abet the same, he or they shall forfeit to the United States a sum not exceeding five thousand dollars, and be subject to imprisonment, at the discretion of the court, for a period not exceeding three years, nor less than six months; either or both of said punishments according to the aggravation of the offense.

SEC. 4. *And be it further enacted*, That, before the Senate and House of Representatives shall assemble for the purpose of counting the votes, as hereinafter directed, each house shall choose, by ballot, two members thereof as tellers, whose duty it shall be to receive the certificates of the electors from the President of the Senate after they shall have been opened, and to read, and note in writing, the dates of the certificates, the names of the electors, the time of their election, and the time and place of their meeting, the number of votes given, and the names of the persons voted for, and, also, the substance of the certificate from the executive authority of each State accompanying the certificate of the electors; and the minutes thus made by the tellers shall be read in the presence of both houses and a copy thereof entered on the Journals of each house.

SEC. 5. *And be it further enacted*, That, at twelve o'clock of the day appointed for counting the votes that may be given at the next election for President and Vice-President, the Senate and House of Representatives shall meet in the hall of the House of Representatives, and on all future occasions in the center room of the Capitol, at which meetings the President of the Senate shall be the presiding officer, but no debate shall be had nor question taken. The packet containing the certificates from the electors of each State shall then be opened by the President of the Senate, beginning with the State of New Hampshire and going through to Georgia, in the order in which the thirteen original States are enumerated in the Constitution, and afterwards through the other States in the order in which they were respectively admitted into the Union; and if no exceptions are taken thereto, all the votes contained in such certificate shall be counted; but, if any exceptions be taken, the person taking the same shall state it in writing, directly, and not argumentatively, and sign his name thereto; and if the exception be seconded by one member from the Senate and one member from the House of Representatives, and each of whom shall sign the said exception, as having seconded the same, the exception shall be read by the President of the Senate, and then each house shall immediately retire, without question or debate, to its own apartment, and shall take the question on the exception, without debate, by ayes and noes. So soon as the question shall be taken in either house, a message shall be sent to the other, informing them of the decision of the question and that the house sending the message is prepared to resume the count; and when such message shall have been received by both houses, they shall again meet in the same room as before, and the count shall be resumed. And if the two houses have concurred in rejecting the vote or votes objected to, such vote or votes shall not be counted; but unless both houses concur, such vote or votes shall be counted. The vote of one State being thus counted, another shall, in like manner, be called, and the certificates of the votes of the State thus called shall be proceeded on as is hereinbefore directed; and so on, one after another, in the order above mentioned, until the count shall be completed.

SEC. 6. *And be it further enacted*, That the person appointed by the electors, to deliver the lists of votes to the President of the Senate, shall be allowed, on the delivery of the

said lists, twenty-five cents for every mile of the estimated distance, by the most usual road, from the place of meeting of the electors, to the seat of Government of the United States, going and returning, to be paid out of any money in the Treasury not otherwise appropriated.

SEC. 7. *And be it further enacted*, That, in all cases where the election of President and Vice-President of the United States shall have been made by the electors, the same shall be declared, and communicated to the persons elected, in such manner as the Senate shall direct. In every case in which the President shall be chosen by the House of Representatives, the choice shall be declared and communicated to the person chosen, in such manner as the House of Representatives shall direct; and in every case in which the Vice-President shall be chosen by the Senate, the choice shall be declared, and communicated to the person chosen, in such manner as the Senate shall direct.

SEC. 8. *And be it further enacted*, That it shall be the duty of the Secretary of State, as soon as may be, to transmit, by mail, a copy of this act to the Executive authority of each State, to be laid before the electors, at their meeting, on the said first Wednesday in December; and that all such parts of acts as are inconsistent with the provisions of this act, be, and the same hereby are, repealed.

April 19, 1824—passed the Senate.

IN THE HOUSE OF REPRESENTATIVES, *April 21, 1876.*

This bill was referred to the Committee on the Judiciary. May 10, Mr. Webster reported it back without amendment, and it was committed to the Committee of the Whole House, where it was never considered.

RULES FOR ELECTION OF PRESIDENT BY THE HOUSE OF REPRESENTATIVES.

IN THE HOUSE OF REPRESENTATIVES, *January 26, 1825.*

Mr. WRIGHT, from the select committee appointed to prepare rules to be observed in case the election of President and Vice-President shall devolve on this House, made a report.

The rules recommended in the report were similar to those adopted by the House in 1801, when the House elected Mr. Jefferson President of the United States. A long discussion, lasting several days, was had on the proposition in the third rule, to exclude persons from the galleries at the request of the delegation from any one State.

The rules were adopted substantially as recommended by the committee.

ELECTION FOR THE TENTH TERM—1825.

JOHN QUINCY ADAMS, President.
JOHN C. CALHOUN, Vice-President.

IN SENATE, *February 1, 1825.*

Resolved, That a committee be appointed, to join such committee as may be appointed by the House of Representatives, to ascertain and report a mode of examining the votes for President and Vice-President of the United States, and of notifying the persons elected of their election.

Mr. Tazewell, Mr. Van Dyke, and Mr. King, of Alabama, were appointed of the said committee on the part of the Senate.

IN THE HOUSE OF REPRESENTATIVES, *February 2, 1825.*

The above resolution of the Senate proposing the appointment of a joint committee, was taken up, read, and concurred in.

Mr. Taylor, Mr. Archer, and Mr. Thompson, of Pennsylvania, were appointed of the said joint committee on the part of the House.

IN SENATE, *February 7, 1825.*

Mr. TAZEWELL, from the committee, reported, *in part*, the agreement of the joint committee to the following resolution:

Resolved, That the two houses shall assemble in the chamber of the House of Representatives on Wednesday, the 9th day of February, 1825, at 12 o'clock; that one person be appointed teller on the part of the Senate, and two persons be appointed tellers on

the part of the House, to make a list of the votes as they shall be declared; that the result shall be delivered to the President of the Senate, who shall announce to the two houses assembled, as aforesaid, the state of the vote, and the person or persons elected, if it shall appear that a choice hath been made agreeably to the Constitution of the United States; which annunciation shall be deemed a sufficient declaration of the person or persons elected, and, together with the list of the votes, shall be entered on the journals of the two houses.

Mr. Tazewell went, at some length, into an explanation and justification of the course adopted by the committee. In some points, in which the committee on the part of the Senate would have preferred a different arrangement, they were overruled by the committee on the part of the House, which had its rights as well as the Senate. The mode reported by the committee was precisely, however, the same as that adopted by the Senate and agreed on by the two houses on similar occasions from the year 1805 to 1817, inclusive.

Mr. EATON then moved to add the following:

"If any objection shall arise to the vote or votes of any State, it shall be filed in writing, and entered on the journals of the Senate and House of Representatives; but the two houses shall not separate until the entire votes are counted and reported; which report shall be liable to be controlled and altered by the decision to be made by the two houses after their separation relative to any objections that may be made and entered on the journals: *Provided*, No objection taken shall be considered valid unless concurred in by the two houses."

This amendment was opposed by Mr. Hayne and Mr. Van Buren, on the ground that it was now too late to attempt to provide in anticipation for such an occurrence; that the Senate had at the last session passed a bill providing for every possible contingency for which the Constitution prescribed no rule, which bill the House of Representatives had not acted on; that, therefore, if any difficulty should arise on the present occasion, the Senate could not be reproached for it; that, as it was now too late to expect the two houses to concur in any regulations of the kind in time for the government of the proceedings to take place to-morrow, it was better to leave the remedy to be provided for in any case of difficulty that might unexpectedly arise, &c.

The amendment was negatived, and the resolution passed.

Mr. Tazewell was appointed teller on the part of the Senate.

IN THE HOUSE OF REPRESENTATIVES, *February 8, 1825.*

Mr. TAYLOR, from the joint committee appointed to ascertain and report a mode of examining the votes for President and Vice-President of the United States and of notifying the persons elected of their election, reported in part the same resolution reported to and adopted by the Senate: which was passed.

Mr. P. P. Barbour and Mr. Taylor were appointed tellers on the part of the House.

FEBRUARY 9, 1825.

The House sent a message to the Senate that this House is ready to receive them, in pursuance of the resolutions of the two houses of yesterday.

IN THE PRESENCE OF THE SENATE AND HOUSE OF REPRESENTATIVES, *February 9, 1825.*

At 12 o'clock precisely the members of the Senate entered the hall, preceded by their Sergeant-at-Arms, and having the President of the Senate at their head, who was invited to a seat on the right hand of the Speaker of the House.

Seats were then assigned the Senators, who took their seats together in front of the Speaker's chair, and toward the right hand of the entrance.

The President of the Senate (Mr. Gaillard) then rose and stated that the certificates forwarded by the electors from each State would be delivered to the tellers.

Mr. Tazewell, of the Senate, and Messrs. John W. Taylor and Philip P. Barbour, on the part of the House, took their seats as tellers at the Clerk's table. The President of the Senate then opened two packets, one received by messenger and the other by the mail, containing the certificates of the votes of the State of New Hampshire. One of these was then read by Mr. Tazewell, while the other was compared with it by Messrs. Taylor and Barbour. The whole having been read, and the votes of New Hampshire declared, they were set down by the clerks of the Senate and House of Representatives, seated at different tables. Thus the certificates from all the States were gone through with.

The tellers then left the Clerk's table, and, presenting themselves in front of the Speaker, Mr. Tazewell delivered their report of the votes given; which was then handed to the President of the Senate, who again read it to the two houses, as follows:

Number of electors of each State.	States.	President.				Vice-President.				
		Andrew Jackson, of Tennessee.	John Q. Adams, of Massachusetts.	William H. Crawford, of Georgia.	Henry Clay, of Kentucky.	John C. Calhoun, of South Carolina.	Nathan Sanford, of New York.	Nathaniel Macon, of North Carolina.	Andrew Jackson, of Tennessee.	Martin Van Buren, of New York.
8	New Hampshire .....	.....	8	.....	.....	7	.....	.....	1	.....
15	Massachusetts .....	.....	15	.....	.....	15	.....	.....	.....	.....
4	Rhode Island .....	.....	4	.....	.....	3	.....	.....	.....	.....
8	Connecticut .....	.....	8	.....	.....	.....	.....	.....	8	.....
7	Vermont .....	.....	7	.....	.....	7	.....	.....	.....	.....
36	New York	1	26	5	4	29	7	.....	.....	.....
8	New Jersey	8	.....	.....	.....	8	.....	.....	.....	.....
28	Pennsylvania	28	1	.....	.....	28	.....	.....	.....	.....
3	Delaware .....	.....	1	2	1	1	.....	.....	.....	2
11	Maryland	7	3	1	.....	10	.....	.....	1	.....
24	Virginia .....	.....	.....	24	.....	.....	.....	24	.....	.....
15	North Carolina	15	.....	.....	.....	15	.....	.....	.....	.....
11	South Carolina	11	.....	.....	.....	11	.....	.....	.....	.....
9	Georgia .....	.....	.....	9	.....	.....	.....	.....	.....	9
14	Kentucky .....	.....	.....	.....	14	7	7	.....	.....	.....
11	Tennessee	11	.....	.....	.....	11	.....	.....	.....	.....
16	Ohio .....	.....	.....	.....	16	.....	16	.....	.....	.....
5	Louisiana	3	2	.....	.....	5	.....	.....	.....	.....
5	Indiana	5	.....	.....	.....	5	.....	.....	.....	.....
3	Mississippi	3	.....	.....	.....	3	.....	.....	.....	.....
3	Illinois	2	1	.....	.....	3	.....	.....	.....	.....
5	Alabama	5	.....	.....	.....	5	.....	.....	.....	.....
9	Maine .....	.....	9	.....	.....	9	.....	.....	.....	.....
3	Missouri .....	.....	.....	.....	3	.....	.....	.....	3	.....
261	.....	99	84	41	37	182	30	24	13	9
										2

The President of the Senate then rose and declared that no person had received a majority of the votes given for President of the United States; that ANDREW JACKSON, JOHN QUINCY ADAMS, and WILLIAM H. CRAWFORD were the three persons who had received the highest number of votes, and that the remaining duties in the choice of President now devolved on the House of Representatives. He further declared that JOHN C. CALHOUN, of South Carolina, having received 182 votes, was duly elected Vice-President of the United States, to serve four years from the 4th of March next.

The members of the Senate then retired.

IN THE HOUSE OF REPRESENTATIVES, *February 9, 1825.*

The Speaker directed the roll of the House to be called by States, and the members of the respective delegations to take their seats in the order in which the States should be called, beginning at the right hand of the Speaker.

The delegations took their places accordingly, ballot-boxes were distributed to each delegation by the Sergeant-at-Arms, and the Speaker directed that the balloting should proceed.

The ballots having all been deposited in the boxes, tellers were named by the respective delegations, being one from each State in the Union.

Mr. Webster, of Massachusetts, was appointed by those tellers who sat at one table, and Mr. Randolph, of Virginia, by those at the other, to announce the result at the balloting. After the ballots were counted out, Mr. Webster rose and said:

MR. SPEAKER: The tellers of the votes at this table have proceeded to count the ballots contained in the box set before them. The result they find to be that there are—

For JOHN QUINCY ADAMS, of Massachusetts	13 votes.
For ANDREW JACKSON, of Tennessee	7 votes.
For WILLIAM H. CRAWFORD, of Georgia	4 votes.

Mr. Randolph, from the other table, made a statement corresponding with that of Mr. Webster in the facts, but varying in the phraseology so as to say that Mr. Adams, Mr. Jackson, and Mr. Crawford had received the votes of so many States, instead of so many votes.

The Speaker then stated the result to the House, and announced that John Quincy Adams, having a majority of the votes of these United States, was duly elected President of the same for four years, commencing with the 4th day of March next.

On motion of Mr. Taylor, of New York, a committee was ordered to be appointed, to notify the President of the United States and the President-elect the result of the ballot.

IN SENATE, February 11, 1825.

Resolved, That the President of the United States be requested to cause to be transmitted to John C. Calhoun, of South Carolina, Vice-President-elect of the United States, notification of his election to that office, and that the President of the Senate do make and sign certificate in the following words, viz:

"*Be it known*, That the Senate and House of Representatives of the United States of America being convened at the city of Washington on the second Wednesday of February, in the year of our Lord one thousand eight hundred and twenty-five, the underwritten, President of the Senate *pro tempore*, did, in the presence of the said Senate and House of Representatives, open all the certificates and count all the votes of the electors for a President and for a Vice-President of the United States; whereupon it appeared that John C. Calhoun, of South Carolina, had a majority of the votes of the electors as Vice-President; by all which it appears that John C. Calhoun, of South Carolina, has been duly elected Vice-President of the United States, agreeably to the Constitution.

"In witness whereof I have hereunto set my hand this — day of February, 1825."

And that the President of the Senate do cause the certificate aforesaid to be laid before the President of the United States, with this resolution.

A PROPOSITION TO INQUIRE INTO THE LEGALITY OF THE CERTIFICATES OF THE VOTES OF THE PREVIOUS PRESIDENTIAL ELECTION.

IN THE HOUSE OF REPRESENTATIVES, May 10, 1828.

Mr. Wilde moved the following resolution, which was referred:

"*Resolved*, That a message be sent to the Senate of the United States respectfully requesting that body to transmit to this House, if in their possession, copies of the several certificates and lists of all the votes given for President and Vice-President on the first Wednesday of December, 1824, or of so many thereof as were received, opened, and counted in this House on the second Wednesday in February, 1825, when the persons who fill the offices of President and Vice-President were ascertained and declared."

Mr. Wilde said, upon submitting this resolution, a word or two of explanation might be expected from him, and perhaps was necessary. He would be as brief as possible. At the last election of President he had the honor to be a member of that House. While the certificates and lists of the votes were in the act of being read it struck him that, in some of them, it did not appear the requisitions of the Constitution had been complied with. The twelfth article, it would be borne in mind, provided that the election shall be by ballot, and the electors shall name in their ballots the persons voted for as President, and, on distinct ballots, the persons voted for as Vice-President. It had then appeared to him that the certificates from some of the States did not set forth, or, at least, did not explicitly set forth a vote by ballot, and by distinct ballots.

He did not mean to create a sensation here or elsewhere. Nothing could be further from his intention than to controvert the validity of that election. He rose, not to lament over the past, nor to indulge gloomy forebodings for the future, but to state facts; to draw from events gone by, warning and security for the time to come. It was a grave question how far the vote of a State might be affected by a departure from the forms of voting prescribed by the Constitution. It was also an interesting and delicate inquiry, worthy of much calm and serious thought, to whom the power and duty of determining the fact of such a departure belonged. Into these questions he did not now propose to enter. He would not profess that his mind was made up. He intended studiously to avoid indicating any opinion at this time. They were, he considered, of some magnitude and difficulty, and he felt them to be so at the period alluded to, when they had first occurred to him. He did not then venture to take upon himself the responsibility of causing them to be agitated; neither his confidence nor his experience in public affairs warranted him in presenting a suggestion, the ultimate consequences of which it was difficult to foresee. He communicated his impressions, however, to two gentlemen near him, one of them then his colleague, now the governor of Georgia; the other—a friend he hoped he might call him, for he had found him such—for whose talents and character he had the highest respect; a gentleman who had since been translated to the Senate, (Mr. McLane.) The probable results of such a suggestion were considered during the very short interval during which deliberation was possible. It was imagined that, if the difficulty were

presented, a protracted discussion would arise, public feeling might become highly excited, and all the evils of a contested election for Chief Magistrate be felt throughout the Union. His uncertainty was increased in consequence of some of the certificates having been already read before they had attracted his notice. These could not be obtained for inspection. The bearing of such a question upon the election, therefore, was, in every respect, matter of doubtful conjecture. Under all the circumstances his friends did not encourage him to introduce the subject. He would not say they advised him against it. Whatever responsibility attached to his silence on that occasion belonged to himself. He did not seek to conceal or to divide it. He admitted that he hesitated, doubted, and, in the interval, the event of the election was announced.

Had the objections apparent on these certificates been then urged—supposing them to be well founded, and this House to be the constitutional judge of their sufficiency, and the validity of the votes, the issue of that election might have been different. He had not, in this instance, framed a theory and then sought out facts to support it. He had collected facts, and if he was not mistaken, they were worthy of a passing notice and might lead to something practical. Since the commencement of the present session he had examined these certificates with as much attention as his other duties would allow; and if the House should indulge him in calling for them, they would be believed to be found, although exhibiting almost every variety of form, to agree substantially with the abridged statement which he should present.

The return from Delaware did not certify that the electors voted by ballot, but specified the vote of each elector thus:

“A. B. votes for C. D. as President.

“E. F. votes for G. H. as President,” &c.;

fairly authorizing the inference, as he apprehended, that the vote was *viva voce*.

The return from New York specifies that the electors voted by ballot, and named, in distinct ballots, the persons voted for as President and Vice-President.

The return of Rhode Island agrees in effect with that of New York.

The return of Missouri did not, Mr. W. believed, certify that the electors voted by ballot or by distinct ballots.

That of Vermont he conceived did not exhibit a vote by ballot, and by distinct ballots.

That of Tennessee presented distinct ballots, and so also of Connecticut, New Hampshire, Maine, and Maryland.

The electors of Mississippi seem to have voted by ballot; but it did not appear that they gave distinct ballots for each office.

From the returns of Ohio, Pennsylvania, New Jersey, and Kentucky, enough appeared to warrant the inference that they voted by ballot, and by distinct ballots.

Illinois seemed to have voted by ballot, but not by distinct ballots.

The return of South Carolina does not state explicitly that the electors voted by ballot, and by distinct ballots; but it shows a separate vote, and the ballots themselves are forwarded.

Indiana seems to have voted by ballot; but the return does not allege distinct ballots.

The return of Alabama says the electors proceeded to vote pursuant to the law and Constitution; but does not specify the mode of voting in direct terms, whether by distinct ballotings or otherwise.

That of Massachusetts appears to be strictly correct and formal. It says the electors voted by ballot for President and Vice-President, having named in distinct ballots the person voted for as President and the person voted for as Vice-President.

The return of Virginia did not specify that the electors voted by ballot. Separate returns were made of the votes for President and Vice-President; but it did not appear in terms that either vote was by ballot.

The return of Georgia was similar to that of Virginia, except that the electors used the word ballot.

The electors of North Carolina seemed to have voted by ballot, but did not aver that it was by distinct ballots, and perhaps the fairest inference from the language of the return was, that only one balloting was had.

The return of Louisiana was, in effect, like that of North Carolina.

Mr. W. did not wish to be understood as asserting that the votes he had taken from these documents to assist his memory were free from error, nor that the construction be put upon the language used in them was the correct one. The phraseology was so different as to admit of a great variety of interpretation. He protested likewise, that he did not intend to say or to insinuate anything against the mode in which the electors had endeavored to discharge their duty. They had, doubtless, acted according to established usage in their respective States. Many, perhaps all of them, were much his superiors in sagacity and experience, and he was among the last who could be capable of treating them with any disrespect. He did not mean to intimate that the

votes thus given were in fact invalid by the Constitution, or that any tribunal had been created having power to declare them so. Upon that subject he forbore expressing an opinion. What he wished to say was this: A great diversity among these certificates existed. Some of them were open to exception. When the Constitution prescribed a particular mode of doing an act, he took it for granted that mode ought to be followed. If it was departed from, there might be room to impugn the act done; and the mere discussion of such a question, in particular cases, might disturb the public tranquillity and lead to tumult and confusion.

If, upon the occasion referred to, the votes of those States which, as he supposed, were liable to exception, had, in fact, been objected to, and this House had undertaken to pronounce them null, the votes of Delaware, Mississippi, Vermont, Missouri, Virginia, North Carolina, Louisiana, Indiana, and Illinois, might, by possibility, have been lost. In that event, if a hasty calculation of his were not correct, the result would have been to take from one candidate twenty-eight votes, leaving him with seventy-one; to take from another candidate eleven votes, leaving him with seventy-three; to deprive a third candidate of twenty-six votes, leaving him only fifteen, and thus excluding him from the House, while the fourth candidate, losing on three, and being left with thirty-four votes, would have been brought into it as one of the three from whom the choice was to be made. It was impossible to reflect an instant, without perceiving how momentous, at that time, must have been the investigation of such questions. He desired, if possible, to prevent in future the occurrence of such a state of things. He was, he trusted, no political agitator. He desired not to disturb men's minds as to the past, but to seek a preventive against prospective, and he hoped distant, but not improbable evils.

How it was to be sought, he might not then be prepared to say. The wisdom of that House would, no doubt, find it, if they thought proper to commence the search. The first step was to obtain the information those certificates would afford. He asked for them by a resolution, which gentlemen of skill and experience in parliamentary precedent had kindly enabled him to place in what he conceived to be the established and respectful form of asking for papers in the possession of the Senate. He regretted, even on this subject, having so long occupied the floor. Other gentlemen might not, perhaps, attach to it the same importance he did, but he should not feel justified in withholding this information any longer, and, unless he deceived himself, the people of the United States and future electors would find in it matter of sufficient pith and moment to secure him from the imputation of wasting any portion of that valuable time, so much of which had been devoted to presidential questions of another character. This was no party measure. He intended to provoke no discussion. It was at least doubtful whether any act of legislation was necessary or expedient. But the information might be at once curious and useful, and gentlemen would vote to obtain or refuse it as they thought proper. Without the warning it would afford, such returns might be made again, and some wiser or bolder politician be found to challenge them exactly at the right moment of a crisis decisive of the fate of men, and deeply affecting even the destinies of the republic.

Mr. Little thought there was no need of agitating this subject, particularly at so late a period in the session. The elections in the States were not subject to the revision of Congress, and if the certificates stated truly the result of such elections, it was to be inferred that they were held according to the law and Constitution, unless the contrary were made to appear. He therefore moved that the resolution be laid upon the table, which motion prevailed—ayes 80, noes 37.

ELECTION FOR THE ELEVENTH TERM.

ANDREW JACKSON, President.
JOHN C. CALHOUN, Vice-President.

IN SENATE, *February 2, 1829.*

Mr. TAZEWELL offered the following, which was adopted:

Resolved, That a committee be appointed, to join such committee as may be appointed by the House of Representatives, to ascertain and report a mode of examining the votes of President and Vice-President of the United States, and of notifying the persons elected of their election.

Ordered, That Mr. Tazewell, Mr. Sanford, and Mr. Webster be the committee on the part of the Senate.

IN THE HOUSE OF REPRESENTATIVES, *February 4, 1829.*

The resolution from the Senate, proposing the appointment of a joint committee "to ascertain and report a mode of examining the votes of the President and Vice-President of the United States, and of notifying the persons elected of their election," was then called up, read, and adopted by the House; and

Mr. Philip P. Barbour, Mr. Ingham, Mr. Hoffman, Mr. Moore of Kentucky, and Mr. Bell were appointed the committee on the part of the House.

IN SENATE, *February 9, 1829.*

Mr. TAZEWELL, from the joint committee appointed for the purpose, reported, in part, the following resolution:

Resolved, That the two houses shall assemble in the chamber of the House of Representatives on Wednesday, the 11th day of February, 1829, at 12 o'clock; that one person be appointed teller on the part of the Senate, and two persons be appointed tellers on the part of the House, to make a list of votes for President and Vice-President of the United States, as they shall be declared; that the result shall be delivered to the President of the Senate, who shall announce to the two houses, assembled as aforesaid, the state of the vote, and the person or persons elected, if it shall appear that a choice hath been made agreeably to the Constitution of the United States; which announcement shall be deemed a sufficient declaration of the person or persons elected, and, together with a list of the votes, shall be entered upon the journals of the two houses.

The report was read and agreed to, and Mr. Tazewell was elected teller on the part of the Senate.

IN THE HOUSE OF REPRESENTATIVES, *February 9, 1829.*

Mr. PHILIP P. BARBOUR, from the joint committee appointed "to ascertain and report a mode of examining the votes for President and Vice-President of the United States, and of notifying the persons elected of their election," reported, in part, the resolution above given.

The resolution was read, and concurred in by the House; and Mr. P. P. Barbour and Mr. Van Rensselaer were appointed tellers on the part of the House.

IN SENATE, *February 11, 1829.*

A message from the House of Representatives, by Mr. Clarke, their Clerk:

Mr. President: The House of Representatives have, in pursuance of the resolution of the 7th instant, in relation to the mode of examining and counting the votes of President and Vice-President of the United States, appointed tellers on their part; and are now ready to receive the Senate, and to proceed in opening the certificates and counting the votes of the electors for President and Vice-President.

At 12 o'clock the members of the Senate repaired to the House of Representatives.

IN THE HOUSE OF REPRESENTATIVES, *February 11, 1829.*

It being 12 o'clock, the Speaker announced the special order of the day, which was the opening and counting the votes for President and Vice-President of the United States; whereupon

Mr. P. P. BARBOUR moved that the Clerk announce to the Senate that the House was ready on its part to proceed to that duty.

The motion was agreed to.

IN THE PRESENCE OF THE SENATE AND HOUSE OF REPRESENTATIVES,

February 11, 1829.

The Clerk left the House, and seats having been prepared for the Senate in the vacant space in front of the Clerk's table, they soon after entered the hall, with the Vice-President at their head, preceded by the Secretary and Sergeant-at-Arms of the Senate.

When the Senators had taken the seats assigned to them, and the Vice-President had seated himself at the right hand of the Speaker, the tellers took their places at the Clerk's table.

The Vice-President then, having before him the packets received, one copy by express and one through the post-office, from the several States, took up those from the State of Maine, and announcing to the Senators and Representatives that those packets had been certified, by the delegation from Maine, to contain the votes of that State for President and Vice-President, proceeded to break the seals, and then handed over the packets to the tellers, who opened and read them at length. The same process was repeated until all the packets had been opened and read; when

Mr. TAZEWELL, retiring to some distance from the chair, read the following report :

Number of electors appointed by each State.	States.	For Presi- dent.		For Vice-Presi- dent.	
		Andrew Jackson, of Tennessee.	John Quincy Adams, of Massachusetts.	John C. Calhoun, of South Carolina.	Richard Rush, of Pennsylvania.
9	Maine	1	8	1	8
8	New Hampshire	1	8	1	8
15	Massachusetts	15	15	15	15
4	Rhode Island	4	4	4	4
8	Connecticut	8	8	8	8
7	Vermont	7	7	7	7
36	New York	20	16	20	16
8	New Jersey	8	8	8	8
28	Pennsylvania	28	28	28	28
3	Delaware	3	3	3	3
11	Maryland	5	6	5	6
24	Virginia	24	24	24	24
15	North Carolina	15	15	15	15
11	South Carolina	11	11	11	11
9	Georgia	9	9	9	9
14	Kentucky	14	14	14	14
11	Tennessee	11	11	11	11
16	Ohio	16	16	16	16
5	Louisiana	5	5	5	5
3	Mississippi	3	3	3	3
5	Indiana	5	5	5	5
3	Illinois	3	3	3	3
5	Alabama	5	5	5	5
3	Missouri	3	3	3	3
261	.....	178	83	171	83

The Vice-President of the United States then announced to the two houses the state of the vote for President of the United States as delivered by the tellers to be—

For Andrew Jackson, of Tennessee.....	178
For John Quincy Adams, of Massachusetts.....	83
and the state of the vote for Vice-President of the United States as delivered by the tellers to be—	
For John C. Calhoun, of South Carolina.....	171
For Richard Rush, of Pennsylvania.....	83
For William Smith, of South Carolina.....	7

The Vice-President of the United States then declared that Andrew Jackson, of Tennessee, having a majority of the whole number of the electoral votes, was duly elected President of the United States for four years, commencing with the 4th day of March, 1829; and that John C. Calhoun, of South Carolina, having a majority of the whole number of the electoral votes, was duly elected Vice-President of the United States for four years, commencing with the 4th day of March, 1829.

IN SENATE, *February 11, 1829.*

Mr. TAZEWELL, from the joint committee, reported that the joint committee, in further execution of the duties with which they were charged by the two houses of Congress have agreed to the following resolution; in which resolution their committee recommend to the Senate to concur:

Resolved, That a committee of one member of the Senate be appointed by that body, to join a committee of two members of the House of Representatives, to be appointed by that house, to wait on Andrew Jackson, of Tennessee, and to notify him that he has been duly elected President of the United States for four years, commencing with the 4th day of March, 1829.

The Senate proceeded to consider the said resolution; and

Resolved, That they concur therein.

Ordered, That Mr. Tazewell be the committee on the part of the Senate.

IN THE HOUSE OF REPRESENTATIVES, *February 12.*

The above resolution was concurred in, and Messrs. Hamilton and Bell were appointed a committee on the part of the House.

The joint committee reported to each house, February 17, that they had discharged the duty for which they were appointed, to notify Andrew Jackson of his election as President of the United States, and that the President-elect had, in signifying his acceptance of that office, expressed his deep sense of its responsibilities and his gratitude to his country for this recent proof of its confidence. He had, moreover, requested the committee to convey to their respective houses the assurances of his high consideration and regard.

ELECTION FOR THE TWELFTH TERM.

ANDREW JACKSON, President.

MARTIN VAN BUREN, Vice-President.

IN SENATE, *February 1, 1833.*

The following motion, submitted by Mr. Grundy, was considered and agreed to :

Resolved, That a committee be appointed, to join such committee as may be appointed by the House of Representatives, to ascertain and report a mode of examining the votes for President and Vice-President of the United States, and of notifying the persons elected of their election.

Ordered, That Mr. Grundy, Mr. Rives, and Mr. Wright be the committee on the part of the Senate.

Ordered, That the Secretary request the concurrence of the House of Representatives in said resolution.

IN THE HOUSE OF REPRESENTATIVES, *February 2, 1833.*

The above resolution from the Senate was read and agreed to ; and Mr. Speight, Mr. Taylor, Mr. Clay, Mr. Muhlenberg, and Mr. Sewall were appointed the committee on the part of the House.

IN SENATE, *February 6, 1833.*

Mr. GRUNDY, from the committee on the part of the Senate, appointed to join such committee as might be appointed on the part of the House of Representatives, to ascertain and report a mode of examining the votes for President and Vice-President of the United States, and of notifying the persons elected of their election, reported that the joint committee, *in part* execution of the duties with which they were charged by the two houses of Congress, have agreed to the following resolution, in which resolution their committee recommend to the Senate to concur :

Resolved, That the two houses shall assemble in the chamber of the House of Representatives on Wednesday, the 13th day of February, 1833, at 1 o'clock ; that one person be appointed teller on the part of the Senate and two persons be appointed tellers on the part of the House, to make a list of the votes for President and Vice-President of the United States as they shall be declared ; that the results shall be delivered to the President of the Senate, who shall announce to the two houses, assembled as aforesaid, the state of the vote, and the person or persons elected, if it shall appear that a choice hath been made agreeably to the Constitution of the United States ; which announcement shall be deemed a sufficient declaration of the person or persons elected ; and, together with a list of the votes, shall be entered on the journals of the two houses.

The Senate proceeded by unanimous consent to consider the said report and resolution ; and

Resolved, That they concur therein.

Ordered, That Mr. Grundy be the teller on the part of the Senate.

IN THE HOUSE OF REPRESENTATIVES, *February 7*

Mr. SPEIGHT, from the joint committee appointed to ascertain and report a mode of examining the votes for President and Vice-President of the United States, and of notifying the persons elected of their election, reported the following resolution :

[The resolution, which is here given in the House proceedings, is identical with the one given in the Senate proceedings of February 6.]

This resolution was read and agreed to by the House ; and Mr. Drayton and Mr. Hubbard were appointed tellers on the part of the House.

IN SENATE, *February 13, 1833*

A message was received from the House of Representatives, by their Clerk, stating that the House was ready to proceed to the counting of the votes for President and Vice-President, and were waiting to receive the Senate.

Mr. GRUNDY then moved that the Senate proceed to the House of Representatives for the purpose of performing the duties referred to in the message; which motion was agreed to.

IN THE HOUSE OF REPRESENTATIVES, *February 13, 1833.*

It was ordered that the Clerk inform the Senate that the House is now ready to receive the Senate, and to proceed in opening the certificates and in counting the votes of the electors for President and Vice-President.

The Clerk accordingly delivered the message above alluded to.

IN THE PRESENCE OF THE SENATE AND HOUSE OF REPRESENTATIVES,

February 13, 1833.

The Senate attended in the hall of the House; the President of the Senate *pro tempore* was invited to a seat on the right of the Speaker, which he occupied; and the Senators having taken the seats set apart for their accommodation,

The President of the Senate *pro tempore*, in the presence of the two houses of Congress, proceeded to open the certificates of the electors of President and Vice-President of the United States, beginning with those of the State of Maine and ending with the State of Missouri; and the tellers—Mr. Grundy, on the part of the Senate, and Mr. Drayton and Mr. Hubbard, on the part of the House—having read, counted, and registered the same, making duplicate lists thereof, and the lists being compared, they were delivered to the President of the Senate *pro tempore*, and are as follows:

Number of electors of each State.	States.	President.				Vice-President.				
		Andrew Jackson, of Tennessee.	Henry Clay, of Kentucky.	John Floyd, of Virginia.	William Wirt, of Maryland.	M. Van Buren, of New York.	John Sergeant, of Pennsylvania.	William Wilkins, of Pennsylvania.	Henry Lee, of Massachusetts.	Amos Ellmaker, of Pennsylvania.
10	Maine	10				10				
7	New Hampshire	7				7				
14	Massachusetts		14				14			
4	Rhode Island		4				4			
3	Connecticut		3				3			
7	Vermont				7					7
42	New York	42				42				
3	New Jersey	3				3				
30	Pennsylvania	30						30		
3	Delaware		3				3			
10	Maryland	3	5			3	5			
23	Virginia	23				23				
15	North Carolina	15				15				
11	South Carolina			11					11	
11	Georgia	11				11				
15	Kentucky		15				15			
15	Tennessee	15				15				
21	Ohio	21				21				
5	Louisiana	5				5				
4	Mississippi	4				4				
9	Indiana	9				9				
5	Illinois	5				5				
7	Alabama	7				7				
4	Missouri	4				4				
283		219	49	11	7	189	49	30	11	7

The President of the Senate then announced to the two houses the state of the vote for President of the United States, as delivered by the tellers, to be:

For Andrew Jackson, of Tennessee	219
For Henry Clay, of Kentucky	49
For John Floyd, of Virginia	11
For William Wirt, of Maryland	7

And the state of the vote for Vice-President of the United States, as delivered by the tellers, to be:

For Martin Van Buren, of New York	189
For John Sergeant, of Pennsylvania	49
For William Wilkins, of Pennsylvania	30
For Henry Lee, of Massachusetts	11
For Amos Ellmaker, of Pennsylvania	7

Whereupon the President of the Senate proclaimed that Andrew Jackson, of Tennessee, having a majority of the whole number of votes, was elected President of the United States for four years from the 4th day of March next, and that Martin Van Buren, of New York, having a majority of the votes therefor, was elected Vice-President of the United States for the same time.

IN SENATE, *February 13, 1833.*

Mr. GRUNDY offered the following resolution, which was passed :

Resolved, That a committee of one member of the Senate be appointed to join a committee of two members of the House of Representatives, to be appointed by that House, to wait on Andrew Jackson, of Tennessee, and to notify him that he has been duly elected President of the United States for four years, commencing with the 4th day of March next; and also to notify Martin Van Buren, of New York, that he has been duly elected Vice-President of the United States for four years, commencing with the 4th day of March next.

Ordered, That Mr. Grundy be the committee on the part of the Senate.

IN THE HOUSE OF REPRESENTATIVES, *February 15, 1833.*

Mr. Speight offered a similar resolution, which was adopted; and Messrs. Speight and Hubbard were appointed as the committee on the part of the House.

IN SENATE, *February 26, 1833.*

Mr. GRUNDY, from the joint committee appointed on the 13th instant, reported that, in part performance of the duty assigned them, they had waited upon Andrew Jackson, and informed him of his election to the office of President of the United States for four years, commencing on the 4th day of March next; and received from him, in answer to the communication made by the committee, that he felt grateful for this manifestation of the continued public confidence and favor, and would endeavor to merit a continuance of the approbation of his fellow-citizens by constant efforts so to discharge his duties as to promote the welfare of our common country.

MARCH 1, 1833.

Mr. GRUNDY, from the joint committee appointed on the 13th instant, further reported that they had waited upon Martin Van Buren, and informed him that he had been duly elected Vice-President of the United States for four years, commencing on the 4th day of March instant; that Mr. Van Buren stated, in reply, that he sensibly felt the manifestation of the public confidence which the committee had communicated; that, in obedience to the public will, he should enter upon the duties of the office, and endeavor, to the best of his abilities, to discharge them.

IN THE HOUSE OF REPRESENTATIVES, *February 26, 1833.*

Mr. Hubbard, from the joint committee appointed on the subject, made a similar report to that of Mr. Grundy to the Senate on February 26.

MARCH 2, 1833.

Mr. Hubbard made a report to the House similar to that of Mr. Grundy to the Senate on the same day.

ELECTION FOR THE THIRTEENTH TERM—1837.

MARTIN VAN BUREN, President.

RICHARD M. JOHNSON, Vice-President.

IN SENATE, *January 26, 1837.*

Resolved, That a committee be appointed, to join such committee as may be appointed by the House of Representatives, to ascertain and report a mode of examining the votes of President and Vice-President of the United States, and of notifying the persons of their election.

This resolution laid over until the next day.

FEBRUARY 27, 1837.

The above resolution was taken up, amended, on motion of Mr. Clay, by adding the following, and was then adopted: And, also, to inquire into the expediency of ascertaining whether any votes were given at the recent election contrary to the prohibition contained in the second section of the second article of the Constitution; and, if

any such votes were given, what ought to be done with them; and whether any, and what, provision ought to be made for securing the faithful observance, in future, of that section of the Constitution.

Mr. Grundy, Mr. Clay, and Mr. Wright were appointed the committee on the part of the Senate.

FEBRUARY 1, 1837.

The House of Representatives concurred in the foregoing resolution, and appointed Mr. Thomas, Mr. Cambreling, Mr. Reed, Mr. Connor, and Mr. Lyon the committee on the part of the House.

IN SENATE, *February 4, 1837.*

Mr. Grundy, from the committee on the part of the Senate, "appointed to join such committee as might be appointed on the part of the House of Representatives, to ascertain and report a mode of examining the votes for President and Vice-President of the United States, of notifying the persons elected of their election; and also to inquire into the expediency of ascertaining whether any votes were given at the recent election contrary to the prohibition contained in the second section of the second article of the Constitution; and, if any such votes were given, what ought to be done with them; and whether any, and what, provision ought to be made for securing the faithful observance in future of that section of the Constitution," submitted the following report and accompanying resolutions:

That the short period at which they were appointed, before the day on which the votes for President and Vice-President of the United States have to be counted, has prevented them from investigating the facts submitted to their examination as fully as might have been done had more time been allowed. The correspondence which has taken place between the chairman of the committee and the heads of the different Departments of the executive branch of the Government accompanies this report, from which it appears that Isaac Waldron, who was an elector in New Hampshire, was, at the time of his appointment as elector, president of a deposit-bank at Portsmouth, and was appointed and acting as pension-agent, without compensation, under the authority of the United States; that in two cases persons of the same names with the individuals who were appointed and voted as electors in the State of North Carolina, held the offices of deputy postmasters under the General Government. It also appears that in New Hampshire there is one case; in Connecticut there is one case; in North Carolina there is one case, in which, from the report of the Postmaster-General, it is probable that, at the time of the appointment of electors in these States, respectively, the electors or persons of the same name were deputy postmasters. The committee have not ascertained whether the electors are the same individuals who held or are presumed to have held the offices of deputy postmasters at the time when the appointment of electors was made; and this is the less to be regretted as it is confidently believed that no change in the result of the election of either the President or Vice-President would be effected by the ascertainment of the fact in either way, as five or six votes only would in any event be abstracted from the whole number, for the committee cannot adopt the opinion entertained by some that a single illegal vote would vitiate the whole electoral vote of the college of electors in which it was given, particularly in cases where the vote of the whole college has been given for the same persons.

The committee are of opinion that the second section of the second article of the Constitution, which declares that "no Senator or Representative, or person holding an office of trust or profit under the United States, shall be appointed an elector," ought to be carried in its whole spirit into rigid execution in order to prevent officers of the General Government from bringing their official power to influence the elections of President and Vice-President of the United States. This provision of the Constitution, it is believed, excludes and disqualifies deputy postmasters from the appointment of electors; and the disqualification relates to the time of the appointments, and that a resignation of the office of deputy postmaster after his appointment as elector would not entitle him to vote as elector under the Constitution.

Should a case occur in which it became necessary to ascertain and determine upon the qualifications of electors of President and Vice-President of the United States, the important question would be presented, what tribunal would, under the Constitution, be competent to decide? Whether the respective colleges of electors in the different States should decide upon the qualifications of their own members, or Congress should exercise the power, is a question which the committee are of opinion ought to be settled by a permanent provision upon the subject.

The committee at present, and in part, report the following resolutions:

Resolved, That the two houses shall assemble in the chamber of the House of Representatives on Wednesday next, at 12 o'clock, and the President of the Senate shall be the presiding officer; that one person be appointed a teller on the part of the Senate and two on the part of the House of Representatives, to make a list of the votes as they shall be declared; that the result shall be delivered to the President of the Sen-

ate, who shall announce the state of the vote and the persons elected to the two houses assembled as aforesaid, which shall be deemed a declaration of the persons elected President and Vice-President of the United States; and, together with a list of votes, be entered on the Journal of the two houses.

Resolved, That, in relation to the votes of Michigan, if the counting or omitting to count them shall not essentially change the result of the election, they shall be reported by the President of the Senate in the following manner: Were the votes of Michigan to be counted the result would be, for A B for President of the United States, ——— votes; if not counted, for A B for President of the United States, ——— votes; but in either event A B is elected President of the United States. And in the same manner for Vice-President.

MR. NORVELL called for a division of the question. He objected to the second resolution because Michigan was now a State in the Union, acknowledged to be such by the Congress of the United States.

MR. GRUNDY observed that the committee were unanimous in reporting the second resolution objected to by the gentleman from Michigan. The same course had been pursued with regard to the State of Missouri, and under the like circumstances; and when Senators recollected that this was the very place where the rock lies which may destroy this Government, they would perceive that the committee had good reasons for recommending the resolution objected to. Suppose the two houses should differ and separate, and suppose the House should refuse to send for the Senate again, where will be your President or Vice-President? Though he had been one of the most anxious for the admission of Michigan, yet he thought it better, under the circumstances, that her vote should not be counted except in the way provided for by the second resolution. To count the vote could do no good, inasmuch as it would not vary the result, and it might do harm. No man was more anxious than he was for the admission of Michigan, yet he must express the opinion that she was not a State of this Union when she gave her vote.

MR. NORVELL again rose and reiterated his arguments at greater length. He cited the case of Indiana as exactly analogous to that of Michigan, and said that Missouri had not been received into the Union when the electoral vote was counted. His object in getting up was not to provoke debate, but to protest against the principle of the second resolution and ask for himself and his colleague the privilege of recording their names against it.

MR. CLAY said the committee had followed exactly the course adopted in the case of Missouri, and the Senators from Michigan would see that there was to be no exclusion of their votes, though no use might be made of them. Whether they were counted or not, the result would be the same. Now, when gentlemen reflected a moment upon the operations of this Government, the difficulties to be settled, the important questions pending, and especially the one as to the election of the Chief Magistrate, they would see at once the necessity of avoiding doing anything which would have the effect of creating excitement or throwing any difficulty in the way at this particular juncture, when they were about to decide on so very important a question as would have to be disposed of on Wednesday next.

He went on to show the case of Michigan was not exactly like that of Missouri nor that of Indiana.

MR. CALHOUN said Michigan was a State *de facto* at the time she formed her constitution; and if her electors were not legally appointed, neither were her Senators, who were admitted upon this floor. He did not believe that doubtful questions of this kind should be waived, and this question should be settled at once. He should vote against the resolution.

MR. LYON asked what course would have been pursued if the vote of Michigan had varied the result? Would Michigan, in such a case, be deprived of her vote? He contended that Michigan was as much entitled to count her vote as was the State of Indiana.

MR. GRUNDY replied that the gentleman could not expect him to answer a question which the wisest of their predecessors had purposely left undetermined. What might be done, under the circumstances adverted to by the Senator from Michigan, should they ever occur, the wisdom of the day must decide.

The first resolution was adopted without division; the second, by a vote of 34 to 9.

IN THE HOUSE OF REPRESENTATIVES, February 6, 1837.

On motion of Mr. Thomas, the House took up the report made by the joint committee of the houses relative to counting the votes for President and Vice-President of the United States.

A message having arrived from the Senate at that moment, informing the House that that body had agreed to the same report and resolutions,

MR. THOMAS moved it be taken up and concurred in.

[The report and resolutions were the same as heretofore given in the Senate proceedings.]

Mr. MERCER was understood to make an inquiry whether any votes have been given by persons not competent, under the Constitution of the United States, to vote as electors of President and Vice-President.

Mr. Thomas's answer was, in substance, the same as the report of the joint committee. He concluded: The committee, however, had expressed a very decided disapprobation of any officer of the General Government participating, in the manner these gentlemen had done, in the election of President and Vice-President of the United States, and they had proposed a remedy, by either giving the power to reject to the college or to Congress, as might be deemed most expedient.

Mr. CAMBRELING stated, in addition, what had been omitted by the gentleman from Maryland, that it appeared, from examining the list of re-appointments of deputy postmasters, that the gentlemen referred to had probably all resigned before they gave in their votes for President and Vice-President.

Mr. THOMAS had not adverted to that fact because the committee came unanimously to the conclusion that they were not eligible at the time they were elected; and, therefore, the whole proceeding was vitiated *ab initio*.

Mr. CRARY, of Michigan, asked a division of the question. He thought the position of his State was analogous to that of Indiana, and that her vote should be received and counted.

The resolutions were adopted without division, and Mr. Thomas and Mr. Ingersoll appointed tellers on its part.

IN SENATE, February 8, 1837.

A message from the House of Representatives announced that the House had appointed Levi Lincoln a teller on its part in the place of Mr. Ingersoll, excused; and that it was ready to receive the Senate and to proceed in opening the certificates and counting the votes of the electors for President and Vice-President of the United States.

IN THE HOUSE OF REPRESENTATIVES, February 8.

This being the day specially set apart by a joint resolution for the two houses to convene in joint meeting for the purpose of opening and counting the electoral votes given by the several States for President and Vice-President of the United States,

Mr. HAYNES said, as the hour had nearly elapsed, he begged to propound an inquiry to the Chair in relation to the order in which the Senate should be received by the House on occasions like the present.

The CHAIR stated, in reply, that the usual course had heretofore been for the House, some short time before the arrival of the hour, to send a message to the Senate informing that body that the House was in readiness to receive them and count the votes. The Chair stated further that, so far as he had been informed, the mode of receiving the Senate by the House was for the members to stand, uncovered.

Mr. PATTON moved that while the votes were being counted ladies be admitted to the privilege of the floor of the hall.

Mr. JARVIS objected.

Mr. CALHOUN, of Massachusetts, moved a suspension of the rules. Agreed to, and Mr. Patton's motion was agreed to without a division.

Mr. ANTHONY inquired if it was necessary to move that a committee wait upon the Senate, and if so, whether the chairman of the select committee on the subject should appoint a subcommittee, or the Speaker of the House.

The CHAIR stated in reply that upon every occasion of this kind, with a single exception, the invariable course had been to send a message to the Senate by the Clerk. In one instance only the message had been transmitted by a committee of two members of the House, who were also appointed to conduct the Senate into the hall, but that was a departure from the former practice.

Mr. ANTHONY moved that a message be then sent to the Senate by the Clerk, notifying that body that the House was in readiness to receive them, and count the votes for President and Vice-President of the United States.

The CHAIR stated before putting the question that the seats on the right of the Speaker's chair had been provided for the accommodation of the Senate, and others provided for the members to which they belonged.

Mr. Anthony's motion was then put and agreed to.

The Clerk accordingly left the House. The Senate shortly after entered the hall, with the President of the Senate, Hon. William R. King, of Alabama, at their head, preceded by the Secretary and Sergeant-at-Arms of the Senate, and were received at the door of the hall and conducted to the seats assigned them by the Sergeant-at-Arms of the House of Representatives, and the members being uncovered and rising in their places.

IN THE PRESENCE OF THE SENATE AND HOUSE OF REPRESENTATIVES,

February 8, 1837.

When the Senators had taken the seats assigned them, and the President of the Senate had seated himself on the right of the Speaker, the tellers took their seats at the Clerk's

table. The tellers were: for the Senate, the Hon. Felix Grundy; for the House of Representatives, the Hon. Francis Thomas and the Hon. Levi Lincoln.

The PRESIDENT OF THE SENATE then rose and said: The two houses being now convened for the purpose of counting the electoral vote of the several States for President and Vice-President of the United States, the President of the Senate will, in pursuance of the provisions of the Constitution, proceed to open the votes and deliver them to the tellers, in order that they may be counted. I now present to the tellers the electoral vote of the State of Maine.

The tellers then counted the votes, and announced them as follows, severally, in their order, the same form having been observed in every case, the tellers also reading the qualification of the electors and the certificates of their elections:

Number of electors appointed by each State.	States.	For President.					For Vice-President.			
		Martin Van Buren, of New York.	Daniel Webster, of Massachusetts.	William H. Harrison, of Ohio.	Willie P. Mangum, of North Carolina.	Hugh L. White, of Tennessee.	Richard M. Johnson, of Kentucky.	Francis Granger, of New York.	John Tyler, of Virginia.	William Smith, of Alabama.
10	Maine	10					10			
7	New Hampshire.....	7					7			
14	Massachusetts.....		14					14		
4	Rhode Island	4					4			
9	Connecticut	8					8			
7	Vermont			7				7		
42	New York	42					42			
8	New Jersey			8				8		
30	Pennsylvania	30					30			
3	Delaware			3				3		
10	Maryland			10					16	
23	Virginia	23								23
15	North Carolina	15					15			
11	South Carolina.....				11				11	
11	Georgia					11			11	
15	Kentucky			15				15		
15	Tennessee					15			15	
21	Ohio			21				21		
5	Louisiana	5					5			
4	Mississippi	4					4			
9	Indiana			9				9		
5	Illinois	5					5			
7	Alabama	7					7			
4	Missouri	4					4			
3	Arkansas	3					3			
3	Michigan	3					3			
294	Whole number of electors were the votes of Michigan counted	170	14	73	11	26	147	77	47	23
148	Necessary were the votes of Michigan counted									
291	Whole number of electors were the votes of Michigan not counted.....	167	14	73	11	26	144	77	47	23

The PRESIDENT then announced to the two houses the state of the vote for President of the United States, as delivered by the tellers, to be:

For MARTIN VAN BUREN, of New York, {	Were Michigan counted.....	170
	Were Michigan not counted.....	167
For WILLIAM H. HARRISON, of Ohio.....		73
For HUGH LAWSON WHITE, of Tennessee.....		26
For DANIEL WEBSTER, of Massachusetts.....		14
For WILLIE P. MANGUM, of North Carolina.....		11

And the state of the vote for Vice-President of the United States, as delivered by the tellers, to be:

For RICHARD M. JOHNSON, of Kentucky, {	Were Michigan counted.....	147
	Were Michigan not counted.....	144
For FRANCIS GRANGER, of New York.....		77
For JOHN TYLER, of Virginia.....		47
For WILLIAM SMITH, of Alabama.....		23

That it therefore appeared that, were the votes of Michigan to be counted, the result would be :

For MARTIN VAN BUREN, of New York, for President of the United States, 170 votes ; if not counted, for MARTIN VAN BUREN, of New York, for President, 167 votes ; but, in either event, MARTIN VAN BUREN is elected President of the United States.

And thereupon,

He declared that Martin Van Buren, of New York, having received a majority of the whole number of electoral votes, was duly elected President of the United States for four years, commencing with the 4th of March, 1837.

That it also appeared that, were the votes of Michigan to be counted, the highest number of votes for Vice-President of the United States would be 147 ; and, if not counted, the highest number would be 144 votes ; but, in either event, no person had a majority of the electoral votes as Vice-President of the United States ; he thereupon declared that no person having a majority of the whole number of electoral votes as Vice-President of the United States, an election to that office had not been effected ; that Richard M. Johnson of Kentucky, and Francis Granger, of New York, were the two highest on the lists of electoral votes ; and that it devolved on the Senate of the United States, as provided in the Constitution, to choose from these persons a Vice-President of the United States.

The Senate then returned to their chamber.

IN SENATE, February 8, 1837.

Mr. GRUNDY, from the joint committee, reported that the joint committee, in further execution of the duties with which they were charged by the two houses of Congress, have agreed to the following resolution ; in which their committee recommend the Senate to concur :

Resolved, That a committee of one member of the Senate be appointed by that body, to join a committee of two members of the House of Representatives, to be appointed by that House, to wait on Martin Van Buren, of New York, and to notify him that he has been duly elected President of the United States for four years, commencing with the 4th day of March, 1837.

The Senate proceeded, by unanimous consent, to consider the said resolution, and concurred therein.

It was agreed that the President appoint the committee ; and

Mr. Grundy was appointed accordingly.

Mr. GRUNDY submitted the following resolution ; which was considered and agreed to :

Whereas, upon counting the electoral votes in the presence of both houses of Congress, given at the late election for President and Vice-President of the United States, it appears that no person has received for the office of Vice-President of the United States a majority of the votes of the whole number of electors appointed ; and it also appearing that Richard M. Johnson, of Kentucky, and Francis Granger, of New York, have the two highest numbers on the list of those voted for to fill the office of Vice-President : Therefore,

Resolved, That the Senate do now proceed to choose a Vice-President from the said Richard M. Johnson and Francis Granger, they having the two highest numbers on the list ; and the manner of voting shall be as follows : The Secretary of the Senate shall call the names of the Senators in alphabetical order, and each Senator will, when his name is called, name the person for whom he votes ; and if a majority of the whole number of Senators shall vote for either the said Richard M. Johnson or Francis Granger, he shall be declared by the Presiding Officer of the Senate constitutionally elected Vice-President of the United States for four years, commencing the 4th day of March, 1837.

The Secretary having called the names of the Senators, respectively, in alphabetical order, the result was as follows :

For Richard M. Johnson, of Kentucky, thirty-three votes, viz :

Messrs. Benton, Black, Brown, Buchanan, Cutlbert, Dana, Ewing of Illinois, Fulton, Grundy, Hendricks, Hubbard, King of Alabama, King of Georgia, Linn, Lyon, McKean, Moore, Morris, Moulton, Nichols, Niles, Norvell, Page, Parker, Rives, Robinson, Rugles, Sevier, Strange, Tallmadge, Tipton, Walker, and Wright.

For Francis Granger, of New York, sixteen votes, viz :

Messrs. Bayard, Clay, Clayton, Crittenden, Davis, Ewing of Ohio, Kent, Knight, Prentiss, Robbins, Southard, Spence, Swift, Tomlinson, Wall, and Webster.

It appeared, therefore, that the whole number of votes was 49, and that, of these, thirty-three votes were given in favor of RICHARD M. JOHNSON, of Kentucky, and sixteen votes in favor of Francis Granger, of New York.

The PRESIDENT OF THE SENATE thereupon declared Richard M. Johnson, of Kentucky, constitutionally elected Vice-President of the United States for four years, commencing on the fourth day of March, 1837.

The following motion was submitted by Mr. GRUNDY, considered by unanimous consent, and agreed to :

Resolved, That a committee of three members be appointed to wait on Richard M.

Johnson, of Kentucky, and to notify him that he has been this day duly chosen by the Senate, in pursuance of the Constitution of the United States, Vice-President of the United States for four years, commencing with the 4th day of March, 1837.

Mr. Grundy, Mr. Robinson, and Mr. Niles were appointed the committee.

IN THE HOUSE OF REPRESENTATIVES, *February 8, 1837.*

Mr. THOMAS, from the joint committee on the part of the House of Representatives to ascertain and report a mode of examining the votes of President and Vice-President of the United States, and of notifying the persons elected of their election, reported the following resolution; which was agreed to:

Resolved, That a committee of one member of the Senate, to be appointed by that body, to join two members of the House of Representatives, to be appointed by that House, to wait on Martin Van Buren, of New York, and notify him that he has been elected President of the United States for four years, commencing with the 4th day of March, 1837.

February 9, 1837.

Ordered, That the Secretary notify the House of Representatives that the Senate has, in pursuance of the provisions contained in the Constitution, chosen Richard M. Johnson, of Kentucky, Vice-President of the United States for four years, commencing with the 4th day of March, 1837.

February 10, 1837.

Mr. GRUNDY reported from the joint committee that the committee had waited upon Martin Van Buren and notified him of his election as President of the United States, and that Mr. Van Buren expressed in reply his grateful sense of the distinguished honor which his fellow-citizens had conferred upon him, and requested the committee to assure their respective houses that they might rely on his unceasing and best efforts to execute the responsible trust about to devolve upon him in a manner the most conducive to the public interest.

ELECTION FOR THE FOURTEENTH TERM—1841.

WILLIAM HENRY HARRISON, President.

JOHN TYLER, Vice-President.

IN SENATE, *January 28, 1841.*

Resolved, That a committee be appointed, to join such committee as may be appointed by the House of Representatives, to ascertain and report a mode of examining the votes for President and Vice-President of the United States, and of notifying the persons elected of their election.

Mr. Preston, Mr. Hubbard, and Mr. Huntington were appointed the committee.

IN THE HOUSE OF REPRESENTATIVES, *January 30, 1841.*

On motion of Mr. Cushing, the House concurred in the following resolution of the Senate adopted on the 28th instant:

Resolved, That a committee be appointed to join such committee as may be appointed on the part of the House of Representatives, to ascertain and report a mode of examining the votes for President and Vice-President of the United States, and of notifying the persons elected of their election.

The following Representatives were appointed the committee on the part of the House: Messrs. Cushing, J. W. Jones, Grainger, Dawson, and Atherton.

IN SENATE, *February 2, 1841.*

Mr. PRESTON, from the joint committee appointed on the subject of counting the electoral vote, reported the following resolution; which was read:

Resolved, That the two houses will assemble in the chamber of the House of Representatives on Wednesday, the 10th instant, at 12 o'clock, and the President of the Senate shall be the presiding officer; that one person be appointed a teller on the part of the Senate, and two on the part of the House of Representatives, to make a list of the votes as they shall be declared; that the result shall be delivered to the President of the Senate, who shall announce the state of the vote, and the persons elected, to the two houses assembled as aforesaid; which shall be deemed a declaration of the persons elected President and Vice-President of the United States, and, together with a list of votes, be entered on the journals of the two houses.

The resolution was agreed to; and

The Vice-President appointed Mr. Preston the teller on the part of the Senate.

IN THE HOUSE OF REPRESENTATIVES, *February 3, 1841.*

The House of Representatives agrees to the foregoing resolution, and appoints Mr. Cushing and Mr. J. W. Jones tellers on its part.

February 10, 1841.

On motion of Mr. Briggs, it was

Ordered, That the Clerk inform the Senate that the House is now ready to receive the Senate, and to proceed in opening the certificates and in counting the votes of the electors for President and Vice-President of the United States.

IN THE PRESENCE OF THE SENATE AND HOUSE OF REPRESENTATIVES,

February 10, 1841.

The Senate attended in the hall of the House; the President of the Senate was invited to a seat provided for him on the right of the Speaker, which he occupied, and the Senators having taken seats set apart for their accommodation,

The Vice-President of the United States, in the presence of the two houses of Congress, proceeded to open the certificates of the electors of President and Vice-President of the United States, beginning with those of the State of Maine and ending with the State of Michigan; and the tellers, Mr. Preston, on the part of the Senate, and Messrs. Cushing and John W. Jones, on the part of the House, having read, counted, and registered the same, making duplicate lists thereof, and the lists being compared, they were delivered to the Vice-President of the United States, and are as follows:

Number of electors of each State.	States.	President.		Vice-President.			
		William H. Harrison, of Ohio.	Martin Van Buren, of New York.	John Tyler, of Virginia.	R. M. Johnson, of Kentucky.	L. W. Tazewell, of Virginia.	James K. Polk, of Tennessee.
10	Maine.....	10		10			
7	New Hampshire.....		7		7		
14	Massachusetts.....	14		14			
4	Rhode Island.....	4		4			
8	Connecticut.....	8		8			
7	Vermont.....	7		7			
42	New York.....	42		42			
8	New Jersey.....	8		8			
30	Pennsylvania.....	30		30			
3	Delaware.....	3		3			
10	Maryland.....	10		10			
23	Virginia.....		23		23		1
15	North Carolina.....	15		15			
11	South Carolina.....		11			11	
11	Georgia.....	11		11			
15	Kentucky.....	15		15			
15	Tennessee.....	15		15			
21	Ohio.....	21		21			
5	Louisiana.....	5		5			
4	Mississippi.....	4		4			
9	Indiana.....	9		9			
5	Illinois.....		5		5		
7	Alabama.....		7		7		
4	Missouri.....		4		4		
3	Arkansas.....		3		3		
3	Michigan.....	3		3			
294	.....	234	60	234	48	11	1

The VICE-PRESIDENT OF THE UNITED STATES then announced to the two houses the state of the vote for President of the United States, as delivered by the tellers, to be—

For William Henry Harrison, of Ohio..... 234
For Martin Van Buren, of New York..... 60

And the state of the vote for Vice-President of the United States, as delivered by the tellers, to be—

For John Tyler, of Virginia..... 234
For Richard M. Johnson, of Kentucky..... 48
For Littleton W. Tazewell, of Virginia..... 11
For James K. Polk, of Tennessee..... 1

The VICE-PRESIDENT OF THE UNITED STATES then declared that William Henry Harrison, of Ohio, having received a majority of the whole number of the electoral votes, was duly elected President of the United States for four years, commencing on the 4th of March, 1841; and that John Tyler, of Virginia, having received a majority of the whole number of the electoral votes, was duly elected Vice-President of the United States for four years, commencing on the 4th of March, 1841.

IN SENATE, *February 10, 1841.*

Mr. PRESTON, from the joint committee, reported, in further execution of their duties, the following resolution; which was agreed to:

Resolved, That a committee of one member of the Senate be appointed by that body, to join a committee of two members of the House of Representatives, to be appointed by the House, to wait on William Henry Harrison, of Ohio, and to notify him that he has been duly elected President of the United States for four years, commencing with the 4th day of March, 1841.

Mr. Preston was appointed on the part of the Senate.

Mr. Preston submitted the following resolution; which was agreed to:

Resolved, That the President of the Senate do cause John Tyler, of Virginia, to be notified that he has been duly elected Vice-President of the United States for four years, commencing with the 4th day of March, 1841.

IN THE HOUSE OF REPRESENTATIVES, *February 10, 1841.*

Mr. CUSHING, from the joint committee appointed to ascertain and report a mode for ascertaining the votes for President and Vice-President of the United States, and of certifying the persons elected of their election, presented the following in continuation of their report:

Resolved, That a committee of one member of the Senate, to be appointed by that body, to join a committee of two members of the House of Representatives, to be appointed by that House, to wait on William Henry Harrison, of Ohio, and to notify him that he has been duly elected President of the United States for four years, commencing with the 4th day of March, 1841.

Adopted.

UNIFORM TIME OF PRESIDENTIAL ELECTION.

An act to establish a uniform time for holding elections for electors of President and Vice-President in all the States of the Union.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the electors of President and Vice-President shall be appointed in each State on the Tuesday next after the first Monday in the month of November of the year in which they are to be appointed: *Provided*, That each State may by law provide for the filling of any vacancy or vacancies which may occur in its college of electors when such college meets to give its electoral vote: *And provided also*, When any State shall have held an election for the purpose of choosing electors, and shall fail to make a choice on the day aforesaid, then the electors may be appointed on a subsequent day in such manner as the State shall by law provide.

Approved January 23, 1845.

ELECTION FOR THE FIFTEENTH TERM—1845.

JAMES K. POLK, President.

GEORGE M. DALLAS, Vice-President.

IN SENATE, *February 3, 1845.*

Resolved, That a committee be appointed, to join such committee as may be appointed by the House of Representatives, to ascertain and report a mode of examining the votes for President and Vice-President of the United States, and of notifying the persons elected of their election.

The President *pro tempore* appointed Mr. Walker, Mr. Woodbury, and Mr. Dayton the committee on the part of the Senate.

IN THE HOUSE OF REPRESENTATIVES, *February 4, 1845.*

Mr. BURKE moved that the House take up and concur with the following resolution from the Senate:

Resolved, That a committee be appointed, to join such committee as may be ap-

pointed by the House of Representatives, to ascertain and report a mode of examining the votes for President and Vice-President of the United States, and of notifying the persons elected of their election.

The motion was agreed to and the resolution was concurred in; and Mr. Burke, Mr. A. A. Chapman, Mr. J. R. Ingersoll, Mr. D. L. Seymour, and Mr. Vance were appointed the committee on the part of the House.

IN SENATE, *February 7, 1845.*

Mr. WALKER, from the joint committee, reported the following resolution; which was considered and agreed to:

Resolved, That the two houses will assemble in the chamber of the House of Representatives on Wednesday, the 12th day of February, 1845, at 12 o'clock; that one person be appointed teller on the part of the Senate, and two persons be appointed tellers on the part of the House, to make a list of the votes for President and Vice-President of the United States as they shall be declared; that the result shall be delivered to the President of the Senate, who will announce to the two houses assembled as aforesaid the state of the vote and the person or persons elected, if it shall appear that a choice hath been made agreeably to the Constitution of the United States; which announcement shall be deemed sufficient declaration of the persons elected; and that the said proceedings, together with a list of votes, be entered on the journals of the two houses.

Mr. Walker was appointed the teller on the part of the Senate.

IN THE HOUSE OF REPRESENTATIVES, *February 7, 1845.*

Mr. BURKE submitted the report of the joint committee identical with that Mr. Walker submitted to the Senate as above.

The report was concurred in, and Mr. Burke and Mr. J. R. Ingersoll appointed tellers on the part of the House.

February 12, 1845.

Mr. BURKE announced that Mr. Ingersoll, one of the tellers appointed by the House, was unable, through indisposition, to attend, and he moved another teller be appointed in his place. The motion was agreed to, and Mr. J. P. Kennedy was appointed to serve as teller in place of Mr. Ingersoll.

IN THE PRESENCE OF THE SENATE AND HOUSE OF REPRESENTATIVES,

February 12, 1845.

The hour set apart by a joint resolution of the houses for counting the votes of electors for President and Vice-President, Mr. Brodhead moved that the Senate be informed that the House was now ready to receive them and proceed to the opening of the certificates and counting the votes given by the electoral colleges; which was agreed to.

The Senate soon after entered the hall of the House of Representatives, two abreast, preceded by their Sergeant-at-Arms, who was succeeded by their President, the Hon. Willie P. Mangum, and Secretary, Asbury Dickins, esq. The Senators took the seats prepared for them in the central area of the House, and the President of the Senate took the chair of the Speaker, (the Hon. John W. Jones,) the last-named officer being seated on his left. The tellers took their seats at the Clerk's desk, assisted by the Secretary of the Senate and B. B. French, esq., Clerk of the House.

The President of the Senate rose, when the members of the House and Senators were all seated, and stated the object of their thus assembling to be to count the votes cast by the electors of the respective States of this Union for President and Vice-President of the United States; and handing to Mr. Walker (one of the tellers) a sealed packet, he said, "I deliver to the gentlemen tellers the votes of the electors of the State of Maine for President and Vice-President of the United States in order that they may be counted."

Mr. Walker received the packet, and having broken the seals, the tellers examined the votes, which were announced to be nine in number, all of which were given for James K. Polk, of Tennessee, as President of the United States. The same number of votes for the Vice-President were given for George M. Dallas, of Pennsylvania.

The President next delivered to the tellers the votes of the electors of New Hampshire, and of all the other States of the Union in succession in the same manner, and they were examined by the tellers, and the result was announced with the same formalities. The final result stood thus:

Number of electors of each State.	States.	President.		Vice-President.	
		James K. Polk, of Tennessee.	Henry Clay, of Kentucky.	George M. Dallas, of Pennsylvania.	Theodore Frelinghuysen, of New York.
9	Maine.....	9	.....	9	.....
6	New Hampshire.....	6	.....	6	.....
12	Massachusetts.....	.....	12	.....	12
4	Rhode Island and Providence Plantations.....	.....	4	.....	4
6	Connecticut.....	.....	6	.....	6
6	Vermont.....	.....	6	.....	6
36	New York.....	36	.....	36	.....
7	New Jersey.....	.....	7	.....	7
26	Pennsylvania.....	26	.....	26	.....
3	Delaware.....	.....	3	.....	3
8	Maryland.....	.....	8	.....	8
17	Virginia.....	17	.....	17	.....
11	North Carolina.....	.....	11	.....	11
9	South Carolina.....	.....	9	.....	9
10	Georgia.....	10	.....	10	.....
12	Kentucky.....	.....	12	.....	12
13	Tennessee.....	.....	13	.....	13
23	Ohio.....	.....	23	.....	23
6	Louisiana.....	6	.....	6	.....
6	Mississippi.....	6	.....	6	.....
12	Indiana.....	12	.....	12	.....
9	Illinois.....	9	.....	9	.....
9	Alabama.....	9	.....	9	.....
7	Missouri.....	7	.....	7	.....
3	Arkansas.....	3	.....	3	.....
5	Michigan.....	5	.....	5	.....
275	.....	170	105	170	105

The President *pro tempore* then announced to the two houses the state of the vote for President of the United States, as delivered by the tellers, to be :

For JAMES K. POLK, of Tennessee..... 170
 For HENRY CLAY, of Kentucky..... 105

And the state of the vote for Vice-President of the United States, as delivered by the tellers, to be :

For GEORGE M. DALLAS, of Pennsylvania..... 170
 For THEODORE FRELINGHUYSEN, of New York..... 105

The President of the Senate *pro tempore* then declared that JAMES K. POLK, of Tennessee, having received a majority of the whole number of the electoral votes, was duly elected President of the United States for four years, commencing on the 4th day of March, 1845 ; and

That GEORGE M. DALLAS, of Pennsylvania, having received a majority of the whole number of the electoral votes, was duly elected Vice-President of the United States for four years, commencing on the 4th day of March, 1845.

The Senate then returned to its chamber.

IN SENATE, February 12, 1845.

Mr. WALKER, from the joint committee, reported the following resolution ; which was considered and agreed to :

Resolved, That a committee of one member of the Senate be appointed by that body, to join a committee of two members of the House of Representatives, to be appointed by that body, to wait on JAMES K. POLK, of Tennessee, and inform him that he has been duly elected President of the United States for four years, commencing with the 4th day of March, 1845 ; and also to wait on GEORGE M. DALLAS, of Pennsylvania, and inform him that he has been duly elected Vice-President of the United States for four years, commencing with the 4th day of March, 1845.

Ordered, That Mr. Walker be the committee on the part of the Senate.

IN THE HOUSE OF REPRESENTATIVES, February 14, 1845.

The House concurred in the foregoing resolution, and appointed Mr. Burke and Mr. Boyd the committee on its part.

ELECTION FOR THE SIXTEENTH TERM—1849.

ZACHARY TAYLOR, President.
MILLARD FILLMORE, Vice-President.

IN SENATE, *January 31, 1849.*

Mr. CLAYTON submitted the following resolution; which was considered, by unanimous consent, and agreed to:

Resolved, That a committee be appointed, to join such committee as may be appointed by the House of Representatives, to ascertain and report a mode of examining the votes for President and Vice-President of the United States, and of notifying the persons elected of their election.

Mr. Clayton, Mr. Davis of Mississippi, and Mr. Davis of Massachusetts were appointed the committee.

IN THE HOUSE OF REPRESENTATIVES, *February 2, 1849.*

The House of Representatives concurred in the foregoing resolution, and appointed Mr. Hunt, Mr. Barrow, Mr. McClelland, Mr. Truman Smith, and Mr. Harmanson the committee on its part.

IN SENATE, *February 5, 1849.*

Mr. CLAYTON, from the joint committee, reported in part the following resolution; which was considered and agreed to:

Resolved, That the two houses will assemble in the chamber of the House of Representatives on Wednesday, the fourteenth instant, at twelve o'clock, and the President of the Senate shall be the presiding officer; that one person be appointed a teller on the part of the Senate, and two on the part of the House of Representatives, to make a list of the votes as they shall be declared; that the result shall be delivered to the President of the Senate, who shall announce the state of the vote, and the persons elected, to the two houses assembled as aforesaid; which shall be deemed a declaration of the persons elected President and Vice-President of the United States, and, together with a list of the votes, be entered on the journals of the two houses.

The VICE-PRESIDENT appointed Mr. Davis, of Mississippi, the teller on the part of the Senate.

IN THE HOUSE OF REPRESENTATIVES, *February 7, 1849.*

The House concurred in the foregoing resolution, and on February 8 appointed Mr. Hunt and Mr. McClelland tellers on the part of the House of Representatives in pursuance of the concurrent resolution of the two houses.

Mr. Hunt was on February 9 excused from acting on the committee, and Mr. Barrow appointed in his place.

IN THE HOUSE OF REPRESENTATIVES, *February 14, 1849.*

The House of Representatives notified the Senate that the House was ready to receive the Senate, in pursuance of the resolution of the two houses, to the end that the President of the Senate, in the presence of the Senate and House of Representatives, may open the certificates of the votes of the electors of the several States in the choice of a President and Vice-President of the United States, and that the same may be counted.

IN THE PRESENCE OF THE SENATE AND HOUSE OF REPRESENTATIVES,
February 14, 1849.

The Senate, preceded by the Hon. Geo. M. Dallas, Vice-President of the United States, and its officers, entered the hall of the House.

The Senators took the seats provided for them in the circle in front of the Speaker's chair.

The Vice-President took the seat of the presiding officer, the Speaker of the House of Representatives being seated on his left hand.

The Sergeants-at-Arms of the two houses were on the lower platform, at the right and left.

The Hon. Jefferson Davis, the teller on the part of the Senate, took a seat at the clerk's desk, supported by the Hon. Washington Barrow and Robert McClelland, tellers upon the part of the House of Representatives, who were assisted by the Secretary of the Senate and Clerk of the House.

When thus organized, the two branches of Congress in joint assembly, and the aisles and galleries densely crowded with ladies and citizens, the hall presented an imposing appearance.

The VICE-PRESIDENT then rose and said: "In obedience to law the Senate and House of Representatives have assembled, on the present occasion, so that I may fill the duty enjoined upon me by the Constitution, by opening, in their presence, the sealed certificates of the lists of persons voted for by the electors in the respective States, as Presi-

dent and Vice-President, cause the votes to be counted, and have the persons to fill those offices ascertained and declared, agreeably to the Constitution."

The VICE-PRESIDENT then opened the certificate of the electors of the State of Maine, and said: "I now open and present to the tellers chosen by the two houses the certificate transmitted by the electors of the State of Maine, that the votes therein recorded may be counted."

Mr. Jefferson Davis proceeded to read the certificate, and the vote reported was registered by the tellers in duplicate lists.

[After the returns from the State of Maine had been read,

Mr. Stephens arose and suggested that the reading at length of the returns from each State in detail be dispensed with.

The Vice-President stated that no motion was in order, and no other mode of proceeding could be adopted but that pointed out by the Constitution of the United States, but that the tellers might abridge the reports so far as to give merely the results of the electoral ballotings of each State.]

The same form was observed with the certificates from the States of New Hampshire, Massachusetts, Rhode Island, Connecticut, Vermont, New York, New Jersey, Pennsylvania, and Delaware.

The certificates from the States of Maryland, Virginia, North Carolina, South Carolina, Georgia, Kentucky, Tennessee, Ohio, Louisiana, and Mississippi were severally presented in succession in like manner, and read by Mr. Barrow.

Those from Indiana, Illinois, Alabama, Missouri, Arkansas, Michigan, Florida, Texas, Iowa, and Wisconsin were read by Mr. McClelland.

The tellers having read, counted, and registered the votes of the electors of the thirty States, and compared their duplicate lists, delivered the same to the Vice-President.

The Vice-President then arose, and read the report of the tellers. The result was as follows:

Number of electors of each State.	States.	President.		Vice-President.	
		Z. Taylor, of Louisiana.	Lewis Cass, of Michigan.	M. Fillmore, of New York.	W. O. Butler, of Kentucky.
9	Maine.....	.....	9	.....	9
6	New Hampshire.....	.....	6	.....	6
12	Massachusetts.....	12	.....	12	.....
4	Rhode Island.....	4	.....	4	.....
6	Connecticut.....	6	.....	6	.....
6	Vermont.....	6	.....	6	.....
36	New York.....	36	.....	36	.....
7	New Jersey.....	7	.....	7	.....
26	Pennsylvania.....	26	.....	26	.....
3	Delaware.....	3	.....	3	.....
8	Maryland.....	8	.....	8	.....
17	Virginia.....	.....	17	.....	17
11	North Carolina.....	11	.....	11	.....
9	South Carolina.....	.....	9	.....	9
10	Georgia.....	10	.....	10	.....
12	Kentucky.....	12	.....	12	.....
13	Tennessee.....	13	.....	13	.....
23	Ohio.....	.....	23	.....	23
6	Louisiana.....	6	.....	6	.....
6	Mississippi.....	.....	6	.....	6
12	Indiana.....	.....	12	.....	12
9	Illinois.....	.....	9	.....	9
9	Alabama.....	.....	9	.....	9
7	Missouri.....	.....	7	.....	7
3	Arkansas.....	.....	3	.....	3
5	Michigan.....	.....	5	.....	5
3	Florida.....	3	.....	3	.....
4	Texas.....	.....	4	.....	4
4	Iowa.....	.....	4	.....	4
4	Wisconsin.....	.....	4	.....	4
290	.....	163	127	163	127

The Vice-President of the United States then, in pursuance of the resolution adopted by the Senate and House of Representatives on the 7th instant, announced the state of the votes to the houses of Congress in joint meeting, as follows:

The whole number of electors appointed to vote for President and Vice-President of the United States is 290; of which number 146 make a majority.

The state of the vote for President of the United States, as delivered by the tellers, is

For ZACHARY TAYLOR, of Louisiana.....	163
For LEWIS CASS, of Michigan.....	127

And the state of the vote for Vice-President of the United States, as delivered by the tellers, is :

For MILLARD FILLMORE, of New York.....	163
For WILLIAM O. BUTLER, of Kentucky.....	127

That Zachary Taylor, of Louisiana, had received a majority of the whole number of votes of the electors chosen in the several States to vote for President of the United States; and that Millard Fillmore, of New York, had received a majority of the whole number of votes of the electors chosen in the several States to vote for Vice-President of the United States.

And thereupon,

The Vice-President of the United States declared that Zachary Taylor, of the State of Louisiana, is duly elected President of the United States for the term of four years, to commence on the fourth day of March, 1849; and that Millard Fillmore, of the State of New York, is duly elected Vice-President of the United States for the term of four years, to commence on the fourth day of March, 1849.

The joint meeting of the two houses of Congress was then dissolved, and the Senate returned to its chamber.

IN SENATE, *February 14, 1849.*

[After the count.]

Mr. Davis, of Mississippi, from the committee appointed on the part of the Senate, jointly with the committee appointed on the part of the House of Representatives, to ascertain and report a mode of examining the votes for President and Vice-President of the United States, and of notifying the persons elected of their election, reported that the committee had performed that duty, and had instructed him to submit the following resolution :

Resolved, That a committee of one member of the Senate be appointed by that body to join a committee of two members of the House of Representatives, to be appointed by that body, to wait on General Zachary Taylor, of Louisiana, and inform him that he has been duly elected President of the United States for four years, commencing with the fourth day of March, 1849; and also to wait on Millard Fillmore, of New York, and inform him that he has been duly elected Vice-President of the United States for four years, commencing with the fourth day of March, 1849.

The resolution was concurred in, and the President of the Senate appointed Mr. Davis, of Mississippi, the committee on the part of the Senate.

IN THE HOUSE OF REPRESENTATIVES, *February 14, 1849.*

Mr. Barrow, from the joint committee, presented a resolution identical with the foregoing; which was unanimously adopted; and the Speaker appointed Mr. Barrow and Mr. Nathan K. Hall as the committee on its part.

ELECTION FOR THE SEVENTEENTH TERM—1853.

FRANKLIN PIERCE, President.
WILLIAM R. KING, Vice-President.

IN SENATE, *January 31, 1853.*

Mr. Hunter submitted the following resolution; which was considered, by unanimous consent, and agreed to :

Resolved, That a committee be appointed to join such committee as may be appointed by the House of Representatives, to ascertain and report a mode of examining the votes of President and Vice-President of the United States, and of notifying the persons elected of their election.

The President of the Senate appointed Mr. Hunter, Mr. Bright, and Mr. Pearce the committee on the part of the Senate.

IN THE HOUSE OF REPRESENTATIVES, *February 2, 1853.*

The House of Representatives concurred in the foregoing resolution, and appointed Mr. George W. Jones, Mr. Chandler, Mr. John G. Davis, Mr. Alexander H. Stephens, and Mr. Dean the committee on its part.

IN SENATE, *February 4, 1853.*

Mr. Hunter, from the joint committee, reported the following resolution; which was considered and agreed to:

Resolved, That the two houses will assemble in the chamber of the House of Representatives on Wednesday, the 9th instant, at 12 o'clock, and the President of the Senate *pro tempore* shall be the presiding officer; and one person shall be appointed teller on the part of the Senate and two on the part of the House of Representatives, to make a list of the votes as they shall be declared; that the result shall be delivered to the President of the Senate *pro tempore*, who shall announce the state of the vote and the persons elected to the two houses assembled as aforesaid; which shall be deemed a declaration of the persons elected President and Vice-President of the United States, and, together with a list of votes, be entered on the journals of the two houses.

Mr. Hunter was appointed the teller on the part of the Senate.

IN THE HOUSE OF REPRESENTATIVES, *February 5, 1853.*

The House of Representatives agreed to the foregoing resolution, and appointed Mr. George W. Jones and Mr. Chandler the tellers on its part.

IN SENATE, *February 9, 1853.*

The House of Representatives having notified the Senate that the House was ready to receive the Senate in its chamber for the purpose of proceeding to open and count the votes for President and Vice-President of the United States, the Senate proceeded to the chamber of the House of Representatives.

IN THE PRESENCE OF THE SENATE AND HOUSE OF REPRESENTATIVES,
February 9, 1853.

At half past twelve o'clock the Senate, preceded by the Hon. D. R. Atchison, its President *pro tempore*, and its officers, entered the hall of the House to join the House of Representatives in counting the votes for President and Vice-President of the United States, in conformity to the Constitution and in pursuance of the following joint resolution, heretofore adopted by the two houses:

Resolved, That the two houses will assemble in the chamber of the House of Representatives on Wednesday, the 9th instant, at 12 o'clock, and the President of the Senate *pro tempore* shall be the presiding officer; and one person shall be appointed teller on the part of the Senate and two on the part of the House of Representatives, to make a list of the votes as they shall be declared; that the result shall be delivered to the President of the Senate *pro tempore*, who shall announce the state of the vote and the persons elected to the two houses assembled as aforesaid; which shall be deemed a declaration of the persons elected President and Vice-President of the United States, and, together with a list of votes, be entered on the journals of the two houses.

When the Senate entered the hall of the House they were received by the House standing.

The President *pro tempore* of the Senate having been conducted to the chair, the Speaker of the House (the Hon. Linn Boyd) took a seat on his left, and the Senators occupied the seats assigned to them in the area fronting the Clerk's desk.

The Sergeants-at-Arms of the two houses occupied seats on the platform at the right and left of the Chair.

The Hon. R. M. T. Hunter, the teller on the part of the Senate, and the Hon. George W. Jones and the Hon. Joseph R. Chandler, the tellers on the part of the House of Representatives, took their seats at the Clerk's desk, and were assisted on the right by Asbury Dickins, the Secretary of the Senate, and on the left by John W. Forney, the Clerk of the House. Messrs. Machin and Hickey, clerks of the Senate, and Messrs. Hays and Barelay, clerks of the House, acting as recording clerks, were seated at a table in front of the Clerk's desk.

The two houses being thus organized,

The President *pro tempore* of the Senate rose and said: "The Senate and House of Representatives have assembled for the purpose of counting the votes for President and Vice-President of the United States. I present to the tellers the certificates of the electoral college of the State of Maine."

Hon. R. M. T. Hunter received and read the certificate, and the vote reported was duly recorded by the tellers.

The same proceedings were observed with reference to the certificates from the several States.

The certificates from the States of Rhode Island, New York, Delaware, North Carolina, Kentucky, Louisiana, Illinois, Arkansas, Texas, and California were read by Mr. Hunter.

Those from New Hampshire, Connecticut, New Jersey, Maryland, South Carolina, Tennessee, Mississippi, Alabama, Michigan, and Iowa were read by Mr. Jones.

Those from Massachusetts, Vermont, Pennsylvania, Virginia, Georgia, Ohio, Indiana, Missouri, Florida, and Wisconsin were read by Mr. Chandler.

The tellers, having read, counted, and registered the votes of the electoral colleges of the thirty-one States, and compared their lists, delivered to the President *pro tempore* of the Senate the result, which was read by him, as follows :

Statement of the vote for President and Vice-President of the United States for four years from the fourth day of March, eighteen hundred and fifty-three.

Number of electoral votes.	States.	For President.		For Vice-President.	
		Franklin Pierce, of New Hampshire.	Winfield Scott, of New Jersey.	William R. King, of Alabama.	William A. Graham, of North Carolina.
8	Maine.....	8	.....	8	.....
5	New Hampshire.....	5	.....	5	.....
13	Massachusetts.....	.....	13	.....	13
4	Rhode Island.....	4	.....	4	.....
6	Connecticut.....	6	.....	6	.....
5	Vermont.....	.....	5	.....	5
35	New York.....	35	.....	35	.....
7	New Jersey.....	7	.....	7	.....
27	Pennsylvania.....	27	.....	27	.....
3	Delaware.....	3	.....	3	.....
8	Maryland.....	8	.....	8	.....
15	Virginia.....	15	.....	15	.....
10	North Carolina.....	10	.....	10	.....
8	South Carolina.....	8	.....	8	.....
10	Georgia.....	10	.....	10	.....
12	Kentucky.....	.....	12	.....	12
12	Tennessee.....	.....	12	.....	12
23	Ohio.....	23	.....	23	.....
6	Louisiana.....	6	.....	6	.....
7	Mississippi.....	7	.....	7	.....
13	Indiana.....	13	.....	13	.....
11	Illinois.....	11	.....	11	.....
9	Alabama.....	9	.....	9	.....
9	Missouri.....	9	.....	9	.....
4	Arkansas.....	4	.....	4	.....
6	Michigan.....	6	.....	6	.....
3	Florida.....	3	.....	3	.....
4	Texas.....	4	.....	4	.....
4	Iowa.....	4	.....	4	.....
5	Wisconsin.....	5	.....	5	.....
4	California.....	4	.....	4	.....
296	.....	254	42	254	42

The President *pro tempore* of the Senate said :

GENTLEMEN: The whole number of electoral votes cast for President and Vice-President of the United States is 296, of which 149 are necessary to a choice. The state of the vote for President of the United States, as delivered by the tellers, is, for FRANKLIN PIERCE, of New Hampshire, 254; for WINFIELD SCOTT, of New Jersey, 42; and the state of the vote for Vice-President of the United States, as delivered by the tellers, is, for WILLIAM R. KING, of Alabama, 254; and for WILLIAM A. GRAHAM, of North Carolina, 42.

I therefore declare that FRANKLIN PIERCE, of the State of New Hampshire, having the greatest number of votes for President, and that number being a majority of the whole number of electors, has been duly elected President of the United States for four years to commence on the fourth day of March next.

I also declare that William R. King, of the State of Alabama, having the greatest number of votes for Vice-President, and that number being a majority of the whole number of electors, has been duly elected Vice-President of the United States for four years to commence on the fourth day of March next.

The business for which the joint meeting of the two houses was convened is dispatched and Senators will now return to their chamber.

The joint meeting of the two houses of Congress was then dissolved, and the Senators repaired to the Senate chamber.

IN SENATE, *February 9, 1853.*

Mr. HUNTER. The tellers appointed by the two houses to count the votes for President and Vice-President of the United States, have instructed me to make a further report :

Resolved, That a committee of one member of the Senate be appointed by that body, to join a committee of two members of the House of Representatives, to be appointed by the House, to wait on Franklin Pierce, of New Hampshire, and notify him that he has been duly elected President of the United States for four years, to commence on the 4th day of March, 1853.

The resolution was considered by unanimous consent, and agreed to.

Mr. HUNTER. I move that the President of the Senate by unanimous consent, appoint the committee on the part of the Senate.

The motion was agreed to, and Mr. Hunter was appointed.

Mr. HUNTER. I am also instructed by the same committee to report the following resolution :

Resolved, That the President of the Senate do cause William R. King, of Alabama, to be notified that he has been duly elected Vice-President of the United States for four years, to commence on the 4th day of March, 1853.

The resolution was considered by unanimous consent, and agreed to.

IN THE HOUSE OF REPRESENTATIVES, *February 9, 1853.*

The foregoing resolution in regard to informing Franklin Pierce, of New Hampshire, of his election as President of the United States, was received in the House.

On motion of Mr. Jones the resolution was concurred in.

Mr. JONES. I move that the Speaker appoint the committee.

The motion was agreed to ; and the Speaker appointed Mr. George W. Jones and Mr. Harry Hibbard as such committee on the part of the House.

ELECTION FOR THE EIGHTEENTH TERM—1857.

JAMES BUCHANAN, President.

JOHN C. BRECKINRIDGE, Vice-President.

IN SENATE, *February 2, 1857.*

Mr. BIGLER submitted the following resolution ; which was considered, by unanimous consent, and agreed to :

Resolved, That a committee be appointed, to consist of three members, to join such committee as may be appointed by the House of Representatives, to ascertain and report a mode for examining the votes for President and Vice-President of the United States, and to notify the persons elected of their election.

Mr. Bigler, Mr. Benjamin, and Mr. Foot were appointed the committee on the part of the Senate.

IN THE HOUSE OF REPRESENTATIVES, *February 2, 1857.*

Mr. JONES, of Tennessee. I move that a committee of five be appointed by the Chair in conformity with the resolution of the Senate.

The motion was agreed to ; and on February 3 the Speaker announced that he had appointed Messrs. Jones of Tennessee, Washburne of Maine, Fuller of Pennsylvania, Lilen and Bocock, the committee on the part of the House to co-operate with the Senate committee to ascertain and report a mode of examining the votes for President and Vice-President of the United States, and of notifying the persons elected of their election.

IN SENATE, *February 4, 1857.*

Mr. BIGLER, from the joint committee, reported the following resolution ; which was considered and agreed to :

Resolved, That the two houses will assemble in the chamber of the House of Representatives on Wednesday, the 11th instant, at twelve o'clock, and the President *pro tempore* shall be the presiding officer ; that one person shall be appointed teller on the part of the Senate, and two on the part of the House of Representatives, to make a list of the votes as they shall be declared ; that the result shall be delivered to the President of the Senate *pro tempore*, who shall announce the state of the vote and the persons elected to the two houses assembled ; which shall be deemed a declaration of the persons elected President and Vice-President of the United States, and, together with a list of votes, be entered on the journals of the two houses.

The President *pro tempore* appointed Mr. Bigler the teller on the part of the Senate.

IN THE HOUSE OF REPRESENTATIVES, *February 5, 1857.*

The foregoing resolution was considered, and concurred in, and Mr. Geo. W. Jones, of Tennessee, and Mr. Howard, of Michigan, were appointed tellers upon the part of the House.

February 11, 1857.

Mr. JONES, of Tennessee, said: Mr. Speaker, the hour of twelve o'clock m. has now arrived, and I move the following order:

Ordered, That the Clerk inform the Senate that the House of Representatives is now ready to receive that body for the purpose of proceeding to open and count the votes of the electors of the several States for President and Vice-President of the United States.

The motion was agreed to.

Mr. WHITNEY. If it be not out of order at the time, I should like to ask a question of the Chair on a matter of high importance.

The SPEAKER. No debate is in order. No question is before the House. The House is acting under a special order. An inquiry relating to the special order is in order.

Mr. WHITNEY. I simply desired to propound a question for the information of the House as well as for my own information.

The SPEAKER. It can only be received by unanimous consent.

Mr. RUFFIN. I object.

Mr. WHITNEY. If the committee be still in existence I would like to ask the Chair—

Mr. RUFFIN. I call the gentleman from New York to order.

The SPEAKER. The gentleman is not in order.

IN THE PRESENCE OF THE SENATE AND HOUSE OF REPRESENTATIVES,

February 11, 1857.

At twelve o'clock and twenty minutes, the Doorkeeper announced the Senate of the United States.

The Senate entered the hall, preceded by its Sergeant-at-Arms, and headed by its President and Secretary—the members of the House standing in their seats.

Mr. Mason, the President of the Senate, took his seat on the right of the Speaker of the House of Representatives, and presided over the two houses, and the members of the Senate took seats provided for them in the area of the House.

The PRESIDING OFFICER. Pursuant to law, and in obedience to the concurrent order of the two houses, the President of the Senate will now proceed to open and count the votes which have been given for a President and Vice-President of the United States, for the term prescribed by the Constitution, to commence on the 4th day of March, 1857. The teller appointed on the part of the Senate, and the two tellers appointed on the part of the House, will please take the seats assigned them in discharge of their duties.

Mr. Bigler, the teller appointed on the part of the Senate, and Messrs. Jones, of Tennessee, and Howard, the two tellers appointed on the part of the House, took their seats at the Clerk's desk.

The PRESIDING OFFICER thereupon proceeded to open and hand to the tellers the votes of the several States for President and Vice-President of the United States, commencing with the State of Maine.

Pending the count,

Senator CASS said: I suggest that it is better to read the results of the vote, and not the certificates in full, unless the reading of the certificates be called for.

The PRESIDING OFFICER. The Presiding Officer considers that the duty of counting the vote has devolved on the tellers under the concurrent order of the two houses; and he considers, further, that the tellers should determine for themselves in what way the votes are verified to them, and read as much as they may think proper to the two houses assembled.

The tellers discontinued the reading of the certificates in full, and merely announced the votes of each State. It appeared from the certificate of the electors of the State of Wisconsin that the electoral vote of that State had not been cast on the day prescribed by law.

Mr. LETCHER. If I understand the vote which has just been read, it has not been cast on the day prescribed by law for voting for President and Vice-President of the United States. I do not know what would be proper in a case of this sort; but I desire now to call attention to it, in order that the point may be brought to the attention of the country. A time may come when it would be a matter of importance to have these votes in regular shape. I desire, so far as I am concerned now, as a Representative of the people, to present my objection to the reception of this vote.

The PRESIDING OFFICER. The Presiding Officer considers that debate is not in order while the tellers are counting the votes.

Mr. JONES, of Tennessee. I suppose, Mr. President, the proper way would be for the tellers to report the facts to the convention of the two houses, and let them decide.

The PRESIDING OFFICER. The Presiding Officer so considers.

Mr. SMITH, of Tennessee. Would it be in order now to move that the vote of the State of Wisconsin be received?

The PRESIDING OFFICER. It would not be in order.

The count of the votes having been concluded,

Mr. JONES, of Tennessee, one of the tellers, reported. He said: Mr. President, the tellers appointed on the part of the two houses to count and report the votes given for President and Vice-President of the United States, report that they have examined all the returns, and find that they were all regular, and that the votes were cast on the day required by law, except in the case of the votes cast by the electors of the State of Wisconsin. Their returns show that they cast their electoral vote in that State on the 4th of December, instead of on the first Wednesday of December, (which was the 3d,) as required by law. All the returns show that James Buchanan, of the State of Pennsylvania, received 174 votes for President of the United States; that John C. Frémont, of the State of California, received—including the votes of Wisconsin—114 votes for President of the United States; that Millard Fillmore, of the State of New York, received 8 votes for President of the United States; that John C. Breckinridge, of the State of Kentucky, received 174 electoral votes for Vice-President of the United States; that William L. Dayton, of the State of New Jersey, received—including the five votes of Wisconsin—114 electoral votes for Vice-President of the United States; and that Andrew Jackson Donelson, of the State of Tennessee, received 8 electoral votes for the Vice-Presidency of the United States.

The following is the full statement of the tellers :

Statement of votes for President and Vice-President of the United States, for four years from the 4th of March, 1857.

Number of electoral votes.	States.	President.			Vice-President.		
		James Buchanan, of Pennsylvania.	John C. Frémont, of California.	Millard Fillmore, of New York.	John C. Breckinridge, of Kentucky.	William L. Dayton, of New Jersey.	Andrew J. Donelson, of Tennessee.
3	Maine		2			3	
3	New Hampshire		5			5	
13	Massachusetts		13			13	
4	Rhode Island		4			4	
6	Connecticut		6			6	
5	Vermont		5			5	
35	New York		35			35	
7	New Jersey	7			7		
27	Pennsylvania	27			27		
3	Delaware	3			3		
8	Maryland			8			8
15	Virginia	15			15		
10	North Carolina	10			10		
8	South Carolina	8			8		
10	Georgia	10			10		
12	Kentucky	12			12		
12	Tennessee	12			12		
23	Ohio		23			23	
6	Louisiana	6			6		
7	Mississippi	7			7		
13	Indiana	13			13		
11	Illinois	11			11		
9	Alabama	9			9		
9	Missouri	9			9		
4	Arkansas	4			4		
6	Michigan		6			6	
3	Florida	3			3		
4	Texas	4			4		
4	Iowa		4			4	
5	Wisconsin		5			5	
4	California	4			4		
296	.....	174	114	8	174	114	8

Mr. LETCHER. Is it in order now to move to exclude the vote of Wisconsin from that count?

The PRESIDING OFFICER. No debate is in order, in the opinion of the Presiding Officer.

Senator CRITTENDEN. Do I understand the Chair to decide that Congress, in no form, has power to decide upon the validity or invalidity of a vote?

The PRESIDING OFFICER. The Presiding Officer has made no such decision, he will inform the Senator from Kentucky. The Chair considers that, under the law and the concurrent order of the two houses, nothing can be done here but to count the votes by tellers, and to declare the vote thus counted to the Senate and House of Representatives sitting in this chamber. What further action may be taken, if any further action should be taken, will devolve upon the properly-constituted authorities of the country—the Senate or House of Representatives, as the case may be. The Chair was misunderstood by the Senator from Kentucky. In pursuance of the order of the two houses, the Presiding Officer will now announce the vote which has been delivered to him by the tellers.

The Presiding Officer proceeded to recapitulate the vote as announced to the joint convention by Mr. Jones, of Tennessee, one of the tellers upon the part of the House, and then said: Thus it is reported by the tellers that the whole number of electors appointed to vote for President and Vice-President of the United States is 296, of which 149 make a majority. The state of the vote for President of the United States, as delivered by the tellers, is, for JAMES BUCHANAN, of Pennsylvania, 174 votes; for JOHN C. FRÉMONT, of California, 114 votes; for MILLARD FILLMORE, of New York, 8 votes; and the state of the vote for Vice-President of the United States, as delivered by the tellers, is, for JOHN C. BRECKINRIDGE, of Kentucky, 174 votes; for WILLIAM L. DAYTON, of New Jersey, 114 votes; and for ANDREW J. DONELSON, of Tennessee, 8 votes.

In further execution of the concurrent order of the two houses, the Presiding Officer therefore declares that James Buchanan, of the State of Pennsylvania, having the greatest number of votes for President, that number being a majority of the whole number of electors, has been duly elected President of the United States for the term prescribed by the Constitution, to commence on the 4th of March, 1857. I also declare that John C. Breckinridge, of the State of Kentucky, having the greatest number of votes for Vice-President, and that number being a majority of the whole number of electors, has been duly elected Vice-President of the United States for the term prescribed by the Constitution, to commence on the 4th day of March, 1857.

Mr. H. MARSHALL. Mr. President, I think that it is a matter of public importance, not for this occasion, but for some occasion which may arise hereafter, that the ruling of the Chair upon this occasion should be publicly excepted to. I understand the Chair to have ruled that it is within the competency and function of the President of the Senate, in the presence of the Senate and House of Representatives, to open certificates and to count the votes, thereby giving to the President of the Senate the function of counting. Now, in the case which has arisen—the case of Wisconsin—the President of the Senate, through the tellers, announces the vote of Wisconsin, and the vote of Wisconsin is therefore counted, upon your decision. Whether that is a vote or not must depend upon the determination of this convention, and if you will regard the verbiage of the Constitution, you will find that your function goes no further than to open the certificates. The language of the Constitution is that “the President of the Senate, in the presence of the House of Representatives, shall open all the certificates,” and then the phraseology changes, and proceeds, “and the votes shall be counted,” not by you, but by us; and whenever a vote is challenged, this is the time, and this the only place, where a determination can be formed whether it is a vote. I merely want to raise the point, as we all know it makes no difference in the result in this case, but a case might arise in which it might make a difference.

Mr. SMITH, of Tennessee. I rise to a question of order. Is debate in order?

The PRESIDING OFFICER. The Presiding Officer would state that, the votes having been counted and announced, the functions of the two houses, assembled for the purpose of counting the votes, are discharged.

Senator TOOMBS. I except to that decision of the Chair, and appeal from that judgment. I wish to enter my dissent from that decision, that it may not be hereafter drawn into a precedent. I do not consider it law, and I do not consider that the Presiding Officer has a right to close the mouths of Senators and Representatives here, in whose hands the decision of this question must rest.

The PRESIDING OFFICER. The Presiding Officer was about to state that the Constitution provides that the President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates, and the votes shall then be counted. The person having the greatest number of votes shall be the President, if such number be a majority of the whole number of electors appointed. And so as to the Vice-President. The concurrent order of the two Houses provides—

“That the two houses will assemble in the chamber of the House of Representatives on Wednesday, the 11th instant, at twelve o'clock, and the President of the Senate *pro*

tempore shall be the presiding officer; that one person be appointed a teller on the part of the Senate, and two on the part of the House of Representatives, to make a list of the votes as they shall be declared; that the result shall be delivered to the President of the Senate *pro tempore*, who shall announce the state of the vote and the persons elected to the two houses assembled; which shall be deemed a declaration of the persons elected President and Vice-President of the United States, and, together with a list of votes, entered on the Journals of the two houses."

Mr. LETCHER. Will the Chair indulge me for a moment?

The PRESIDING OFFICER. The Presiding Officer will be allowed to conclude what he was saying. The Presiding Officer considers that the only duty imposed by the Constitution was, that the vote should be counted in the presence of the Senate and House of Representatives. He considers that the vote has been counted by the tellers in the presence of the two houses, and under the charge, he presumes, of the Presiding Officer. The tellers have reported the facts upon the vote. In reference to one State, the State of Wisconsin, the tellers have reported that the vote of that State was cast on a day different from that prescribed by law. The Presiding Officer is not aware that what effect, if any, such a difference would have on the vote of that State, can be decided by him. Nor is it his duty to decide upon whom devolves the duty of determining what the effect may be. The Presiding Officer is further required to declare the whole vote as given. That duty he has discharged. He is further required to declare who has received a majority of the whole vote from the list delivered to him by the tellers, and to declare such person elected President or Vice-President, as the case may be.

Senator BUTLER. Mr. President, this is a question of rather a novel character, and I should regret very much to see it come to be regarded as a precedent. Now, sir, I should regard it myself as the most dangerous deviation from the Constitution and law, that one State should assume, either by act or by inadvertence, or in any other way, to give a vote at a different time from another State; because if, when we were electing a Chief Magistrate of this confederacy, the vote should be so equally divided that one State, by reserving its power, in other words, by not voting at the time the other States did—postponing it one month or one day—with this telegraphic communication running to every part of the Union, would change the result, that State would be umpire in choosing the President of the United States; and I am not going to allow any one State to be a *corps de reserve* in this matter if I can help it by my vote. I am very decidedly of the opinion that the Chair ought not to count the vote of Wisconsin as a vote on this occasion.

Senator BIGLER. I am instructed by the tellers to state to the President and the convention, that they have not yet signed this certificate, and that they have determined to sign it only when it sets forth all the facts. One of those facts is with reference to the vote of Wisconsin—the vote of that State not having been cast on the day prescribed by law. The certificate which they will sign will set forth that fact. As to the determination on that discrepancy, the tellers have no suggestion to make.

Senator CRITENDEN. I shall not presume before Congress to occupy a moment's time with argument. I wish merely to say that the sense of duty, an honorable sense of duty I have no doubt, upon which the Presiding Officer has acted in assuming to declare the number of votes, involves the privilege of determining a presidential election, and saying who shall be President. I protest against any such power.

Senator TOOMBS. I join with the Senator in that protest.

The PRESIDING OFFICER. The Presiding Officer is utterly unaware that he has assumed the exercise of any such power.

Senator TOOMBS. I consider that the Presiding Officer has done so.

The PRESIDING OFFICER. The concurrent order of the two houses makes it the duty of the President of the Senate to announce the state of the vote, and the persons elected, to the two houses assembled. That duty he has discharged, and none other.

Mr. ORR. I move that the vote of the State of Wisconsin be rejected, and that the tellers be instructed not to include it in their count. Mr. President, I have but a few words to say. The necessity of this action will, I think, be apparent, if we will look at the matter, assuming that the vote of Wisconsin would determine the result. Suppose the result of the election would depend on the vote of that State: how would it be possible to declare who was elected until it had been decided whether or not that vote was to be received? Who is to decide that? The Constitution and the laws require that the two houses shall meet in joint convention, and that the votes of the electors of the several States shall be opened and counted before them.

Senator TOOMBS. What votes?

Mr. ORR. The votes for President and Vice-President. This, in my judgment, confers upon them the power to determine whether a vote be valid or invalid. Otherwise it is a mere farce if they are called on only to witness the counting. The counting might just as well be done by the Vice-President or the President of the Senate, without the presence of the two houses. But it is to guard against an illegal vote being counted that the two houses are required to be assembled together. I therefore move that the

vote of the State of Wisconsin, having been cast on a day different from that provided by law, be rejected, and that the tellers be instructed to make up their account accordingly.

Senator CASS. I wish to submit a single remark to the President and to the Senate, for I do not consider that this convention can be addressed. We can take no vote. How are we to vote? *Per capita* or by States? Are we to vote as representatives of the people or representatives of States? If we cannot vote here, we cannot discuss. The only thing which remains for us to do, if there are insuperable difficulties in the way, is to adjourn immediately to our respective halls. Then let the Senate or the House of Representatives bring up the matter for action. By the present proceeding we are overturning the Government—we are making this a national convention.

Senator BUTLER. I concur in that, and insist on that mode of procedure. Let us preserve our separate organized existence.

The PRESIDING OFFICER. The duty which brought the Senate into this Hall having been discharged, the Senate will return to its own chamber.

Senator SEWARD. I was about to propose that.

Senator TOOMBS. I protest against that order. We have the right to determine that question. I enter my protest as a Senator from the State of Georgia.

The PRESIDING OFFICER. The Presiding Officer is informed by the tellers that they have not yet made out their certificate. [Laughter.]

Senator DOUGLAS. I rise to state that, in my opinion, the tellers have no right to authenticate that certificate until the two houses have passed upon it as to its being a true count. I rise to protest against this joint convention being dissolved until the question which has been raised shall have been decided.

Senator TOOMBS. That is right.

Senator DOUGLAS. I am willing that the Senate shall retire to its own chamber to consider and determine the question in dispute; but I do protest solemnly against the deed being done before we have had an opportunity of deciding this question.

Senator TOOMBS. I want to vote on it.

Mr. STANTON. I rise to a question of order. Who shall determine when the business for which the joint convention assembled has been concluded? The Presiding Officer, or the body itself? I understand that a motion is pending to adjourn the joint convention, and that, pending that motion, the President of the joint convention announces that it is dissolved, and that the Senate will retire. Am I correct? If I am, then I insist that the joint convention is not dissolved; and that, if the Senate retire without any vote of the two houses, and pending a motion to adjourn, it does not amount to a dissolution of the joint convention.

The PRESIDING OFFICER. The Presiding Officer would again refer to that clause of the Constitution which, in his judgment, prescribes the only functions to be discharged in this presence:

“The President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates, and the votes shall then be counted.”

Senator TOOMBS. What votes?

The PRESIDING OFFICER. The votes for President and Vice-President of the United States.

Senator TOOMBS. That is the question. What are the votes?

The PRESIDING OFFICER, (reading:)

“The person having the greatest number of votes for President shall be the President, if such number be a majority of the whole number of electors appointed; and if no person have such majority, then from the persons having the highest number, not exceeding three on the list of those voted for as President, the House of Representatives shall choose immediately by ballot a President.”

The Presiding Officer, therefore, again states it as his judgment that the Senate came here under the Constitution only for the purpose of counting the votes in the manner prescribed by the Constitution—that the mode of doing it was provided for, in addition, by the concurrent order of the two houses.

Mr. STANTON. I wish to inquire whether it is not essential to the completion of this question, that the motion of the gentleman from South Carolina [Mr. Orr] to reject the vote of the State of Wisconsin should be first determined? How can the object for which we assembled here be decided until we shall have settled the question as to whether the vote of a State is to be counted or not? For what purpose did we come here, if not to decide such questions as the motion of the gentleman from South Carolina? I differ with that gentleman, and shall vote against the motion. But it is a question the right to determine which I will not surrender.

The PRESIDING OFFICER. It is the opinion of the Presiding Officer that no vote can be taken as a joint vote by the two houses thus assembled, and that no motion calling for a vote is in order. The Presiding Officer, therefore, rules the motion out of order.

Mr. HAVEN. I desire to submit a remark here. The President of this joint meeting or convention has announced—and I think very properly—that the duty of the joint

convention is to count the votes given by the electors in the several States. The proposition which I submit is, that we have not yet counted them. That is the only question here—have we counted the votes from the State of Wisconsin? It is alleged on the part of some gentlemen here that there are votes from the State of Wisconsin to be counted. It is alleged by some others that there are no votes here from Wisconsin to be counted. Does the certificate from the electors of that State certify a vote, a legal vote, of which we ought to take cognizance. No final certificate of our action here has yet been made; and the two houses are at issue, not as separate bodies, but individuals of both bodies seem to differ in opinion as to whether there is or is not a vote from Wisconsin here, which, according to the Constitution and the laws, we are to count. It is but of slight importance in this particular case, but may become of vast importance as a precedent on some future occasion.

Now, in reference to what should be done with the alleged vote of Wisconsin, I differ from many gentlemen. My own opinion is, that we ought to count that vote for John C. Frémont and William L. Dayton. But it is right that gentlemen here who think that we ought not to count it should be heard on this subject, either here or in the separate houses by the members thereof, and that this convention should by some mode come to a conclusion. It is understood, I believe, as a matter of history—I do not know whether there is any proof on the subject—that it was an act of Providence, so to speak, which prevented the electors of the State of Wisconsin from meeting and giving their vote on the precise day appointed by law, the 3d of December. My own individual judgment on this subject is, that when the electors of a State are prevented from meeting on the day fixed by law, either by public enemies or by the act of God—and when nothing appears to impeach the good faith of the electors, and they cast their vote at the earliest practicable moment—such votes are the lawful electoral votes of the State, and should be counted by the two houses on an occasion like this; otherwise the people of such State will be utterly disfranchised, when they have performed every possible duty incumbent upon them under the Constitution. The acts of God and of public enemies have always been held to excuse men from the performance of an incumbent duty. On the other hand, the Senator from South Carolina [Mr. Butler] declares that, in his opinion, such votes ought not to be counted, and in effect the State ought to be disfranchised. Now, I do not propose to settle that question; but I do say that we ought not finally to leave this hall as joint convention, and finally to separate, and abandon our duty under the Constitution in this regard, until we have put the public mind of the country at ease on the question as to whether the votes of Wisconsin are to be counted or not; and I, too, wish to enter my protest against the President of the Senate and the tellers settling the question for us, and in spite of us, as to whether the votes of a State shall be counted or not, and whether she shall be disfranchised or not, under such circumstances.

Senator HUNTER. I rise to a question of order. I wish to know how we can debate questions in joint convention? Each house must debate the question for itself.

The PRESIDING OFFICER. The Presiding Officer would inform the Senate and House of Representatives thus assembled that the tellers have not yet completed their certificate. The motion of the gentleman from South Carolina, [Mr. ORR,] in the opinion of the Chair, is not in order.

Senator HUNTER. Let me suggest this point of order: If a question arise during the process of counting which requires action of the two houses, I believe we can settle it in committee of conference, as we settled the Michigan and Missouri cases. It can be settled very soon if we separate, through our committees. I move that the President of the Senate conduct the Senators back to the Senate Chamber.

The PRESIDING OFFICER. The Presiding Officer would again state that the duty of the tellers has not yet been discharged. The tellers, it would appear, made their report before they had signed the certificate. The vote will be again read to the two houses, and they can determine what shall be done.

Mr. BILLINGHURST. I rise for the purpose of addressing an inquiry to the Chair, which is, whether or not an official certificate of the causes which prevented the electors of Wisconsin from voting on the 3d of December, accompanied their return? If so, I ask that it be read to the convention.

The PRESIDING OFFICER. The paper will be read by the general consent of the two houses.

Mr. COBB, of Georgia. I desire to inquire of the Chair what disposition has been made of the motion submitted by the gentleman from South Carolina, [Mr. ORR?] The reason why I make that inquiry is, that I wish to call the attention of the Chair, as well as of the two houses, to this point. I regard it as not material in this case whether you decide to count the vote of Wisconsin or not; but I do consider it important that it should be decided whether or not this convention is to adjourn by the decision of the Chair or by the judgment of the convention. And I desire to inquire of the Chair whether or not he proposes, when the tellers shall have completed their report, to adjourn the convention of his own accord and on his own motion, or whether he proposes to submit it to the judgment of the convention whether or not they have

discharged their duty? I desire, Mr. President, that this convention shall decide, before it adjourn, whether we have completed the business for which we have been called together by the Constitution, and that that shall not be decided simply by the Presiding Officer of the convention. In order, Mr. President, to bring this question directly before the convention, if the Chair rules out the resolution of the gentleman from South Carolina, I appeal from that decision.

Senator BUTLER. I call the gentleman to order. It is not a debatable question. The Senate should go out without any other order. The States shall not be overruled here, so long as I represent the State of South Carolina.

Mr. ORR. Is my motion pending?

The PRESIDING OFFICER. The Senator from South Carolina rises to a question of order, which he will be good enough to state.

Senator BUTLER. My point of order is that this is not a debatable question in this convention, so far as it requires a decision to be given one way or the other. Each house should deliberate upon it separately.

Mr. COBB, of Georgia. All questions are debatable in all bodies, unless prevented by special rules—even a motion to adjourn.

Mr. ORR. I desire to know what disposition has been made of my motion?

The PRESIDING OFFICER. The Chair decided that it could entertain no motion which would involve a vote of the two houses, or of either of them, and he rules the motion out of order.

Mr. COBB, of Georgia. I take an appeal from that decision.

The PRESIDING OFFICER. The Chair desires to be indulged a moment longer, in regard to an inquiry made by the gentleman from Georgia. It is the judgment of the Chair that the Senate is sitting here pursuant to the Constitution, and that when the Senate may determine that its duties here are ended, the Presiding Officer of both bodies will receive a motion from any Senator to return to its own chamber, where its sitting will be resumed. The Senate is in session now.

Mr. ORR. If the Chair will allow a suggestion, I think perhaps we may be relieved from this difficulty. This question arises now, whether a vote shall be counted? A Senator, I think, properly objects that the vote shall be taken *per capita*. Let a motion be made that the Senate retire to their chamber to determine the question, and allow this House to do the same. It can be done by an interchange of messages between the two houses, when the two houses can again come into joint convention. I wish to have my motion taken down, and then the convention can separate.

Mr. JONES, of Tennessee. I hope that this convention will not separate until they receive the report which the tellers have to make; and it will be for the convention then to determine what they will do with the report.

Mr. WASHBURN, of Illinois. I demand the reading of all the official papers connected with the Wisconsin case. I think the convention have the right to know what those papers are.

The PRESIDING OFFICER. The Chair will direct them to be read.

Senator TRUMBULL. I rise to a question of order. It is simply this: the Senate is here in session, and we cannot vote here. I move that the Senate return to its own chamber. Let us there decide what we will do. A difficulty has arisen, and it cannot be settled in this body.

Mr. JONES, of Tennessee. I hope they will first receive the report of the tellers.

Senator TRUMBULL. No, we do not want the report.

Mr. JONES, of Tennessee. Then you will not know what you are acting on.

Senator TRUMBULL. A difficulty has arisen here. Let us retire and consider it in the only constitutional way in which we can, and that is in separate bodies; and I move that the Senate return to their own chamber to consider this question.

The PRESIDING OFFICER. The Chair would respectfully state, as his judgment, that whatever difficulty may have arisen, it cannot be officially known to either house until it is reported by the tellers, to whom the duty of counting the votes was confided.

Mr. WASHBURN, of Maine. The tellers have declared the vote, and the Presiding Officer has announced who is elected President, and nothing more is in order. It is not in order to go over the ground and report again, they having once reported the result to the Presiding Officer, and that result having been announced by him.

Senator STUART. I wish to present a question of order for the consideration of the Senate. I wish to state for the consideration of the Presiding Officer of this body, that after the tellers made the report, and the Presiding Officer announced the result, the Constitution, and the law of the United States in pursuance of the Constitution, was fulfilled. Now, sir, I wish to suggest to the Presiding Officer of this body, at this time, that he place himself at the head of the Senate, and that we return to our chamber without any further discussion, or any further motion here. I hope the Presiding Officer will pursue that course.

The PRESIDING OFFICER submitted to the Senators the motion that the Senate return to the Senate Chamber; and said motion was agreed to.

The Senate, preceded by its President and other officers, thereupon retired from the hall of the House, and the Speaker resumed the chair.

IN THE HOUSE OF REPRESENTATIVES, *February 11, 1857.*

Mr. CAMPBELL, of Ohio, [while the Senate was retiring.] Mr. Speaker, I call for the regular order of business.

The SPEAKER. The gentleman from Maine [Mr. WASHBURN] reported from the Committee on Elections a resolution in relation to the seat of the Delegate from the Territory of Kansas, and the pending motion is to lay the resolution on the table. Upon that motion the yeas and nays have been partly taken. The Clerk will proceed to read the votes.

Mr. ORR. I object to any such proceeding. The House determined, by resolution, that they would receive the Senate in joint convention. The object for which that joint convention assembled has not been accomplished, and no other business is now in order, unless it be business which has arisen during the progress of that joint convention, and which must be decided by this House before the Senate returns.

The SPEAKER. If the gentleman from South Carolina makes a point of order, the Chair overrules the point of order, and the Chair will state the ground of the decision. The House is in session for the transaction of its business, and under the rules the House can take up no other business except that which is pending. If the gentleman proposes to suspend the proceeding, and introduce a new motion, the Chair will hear what it is.

Mr. HAVEN. I have a word to say upon this subject, and I would not intrude it upon the House but for the peculiar turn which the proceedings have taken. I believe the provision of the Constitution is that the House shall elect a President if there be a failure in the joint convention. I want to know whether that is not now the first thing in order? [Great laughter.]

Mr. ORR. I appeal from the decision of the Chair.

Mr. SMITH, of Tennessee. If the gentleman from South Carolina will yield to me for a moment, I will make a motion which I think will entirely obviate the present difficulty. I wish to move that the vote of the State of Wisconsin be excluded from the count.

The SPEAKER. No question relating to that subject can be received.

Mr. ORR. Is not the House in joint convention?

The SPEAKER. It is not. It is in session as the House of Representatives.

Mr. ORR. I appeal from the decision of the Chair, and on that appeal call for the yeas and nays.

The SPEAKER. The Chair will state the question. The House having resumed its regular session, the Chair directed the Clerk to proceed with the call of the roll, which was the business in which it was engaged when interrupted by the special order.

Mr. ORR. But the joint convention has not adjourned?

The SPEAKER. It has dissolved; the House of Representatives is now in regular session.

Mr. ORR. The Senate has retired to consult and discuss a question which arose during the progress of the proceedings of the joint convention. It is now proper that we should consider the same question, so that we may be prepared to receive the Senate on its return.

The SPEAKER. If the gentleman will submit a proposition in order the Chair will receive it.

Mr. ORR. I propose to make this proposition: That the House reject the vote of the State of Wisconsin in the count which may be consummated upon the return of the Senate, because that vote was not cast on the day prescribed by law.

Mr. CAMPBELL, of Ohio. Is that motion in order?

The SPEAKER. The Clerk will read the proposition.

The Clerk read as follows:

"It appearing, from the face of the certificate of electors from the State of Wisconsin for the election of President and Vice-President, that the vote for President and Vice-President was not cast on the day prescribed by law: Therefore,

Resolved, That the vote of the State of Wisconsin be excluded from the count."

Mr. ORR. I will modify that resolution so that it will read—

Resolved, That the Senate be informed that the House of Representatives have decided that the vote of Wisconsin be excluded from the count when the joint convention shall re-assemble."

Mr. CAMPBELL, of Ohio. I understand that the Chair has decided that we are not in joint convention; that we are now in the transaction of the regular business of the House.

The SPEAKER. The House is in session, and the Speaker is in the chair.

Mr. CAMPBELL, of Ohio. I object, then, to anything but the regular order of business.

The SPEAKER. The resolution is not in regular order, but will be received unless there be objection.

Mr. CARLISLE. I object.

Mr. ORR. I think there can be no question of higher privilege than my resolution,

and I therefore appeal from the decision of the Chair ruling it out of order; and on that question I call for the yeas and nays.

Mr. WASHBURN, of Illinois. I move that the appeal be laid on the table.

Mr. H. MARSHALL. I consider this an important question, and would like to say a word or two on it; but I shall be precluded from doing so, if the gentleman from Illinois insists on his motion to lay on the table.

Mr. WASHBURN, of Illinois. I withdraw the motion to lay on the table.

The SPEAKER. The House adopted an order to meet this day with the Senate for a specific purpose. That order has been complied with. The Senate has met with the House, and it has withdrawn. The Speaker has resumed the chair, and the House is in session for the transaction of the regular order of business.

The gentleman from South Carolina [Mr. Orr] has proposed a resolution which has been read to the House. The Chair is of the opinion that it is not in the regular order of business, and can be received at this time only by unanimous consent. From that decision the gentleman from South Carolina takes an appeal. The question now is: "Shall the decision of the Chair stand as the judgment of the House?"

Mr. H. MARSHALL. This matter is worthy of the most serious consideration of the House, and should be treated of calmly and considerately, for the precedent we are now to establish will be cited as authority through the future of this Government. The House of Representatives—the popular branch of the legislative department—should come full up to the line of its duty; I ask no more.

The special rule under which the Senate came to-day into this House, was made in conformity with the Constitution and the law. The Constitution requires that the President of the Senate shall open all the certificates of the electoral votes in the presence of the Senate and House of Representatives, "and the votes shall then be counted," and the question of election or no election determined. The President of the Senate has to open *all* the certificates, and then *his* function is performed; and after *all* the certificates have been opened, the counting of the votes is *then to commence and be concluded*. A question has arisen here to-day, when the certificate of the vote of Wisconsin was opened by the President of the Senate, whether that vote should be counted; and when that vote was challenged by a member of this House the President of the Senate undertook to say that debate was not admissible upon the proposition, and proceeded to read that vote from a paper furnished to him by tellers who were appointed to keep the count, as if that vote was to be counted, when the very question before the bodies was, *whether it is a vote or not?* I entered my protest, as a Representative of the people, against such a proceeding, which in effect gives a construction to the Constitution so as to draw the whole power into the hands of the President of the Senate; and thereupon a question arose as to the true theory of the Constitution, and of the function of the two houses when in the presence of each other, for the discharge of this interesting duty.

What is the function of the houses when in the presence of each other? Are they mere spectators of a scene in which the President of the Senate and the tellers are the actors, or are the houses to act themselves? And if they are the actors, how do they meet and how can they act? When a vote is to be taken or a point determined, how do they vote—*per capita*, as individuals in an assembly, or as houses in a joint convention? It appears to me there is no real difficulty on the last point. Who are in the presence of each other? The Senate as a Senate, and the House of Representatives as a House. There could be no such thing as a vote *per capita* without destroying the theory on which the Constitution rests; for it must be plain that there might exist a state of case, now or hereafter, in which, in a vote *per capita*, the members of the House would overwhelm the voice of the Senate, and so draw undue power to the House, thereby enabling a dominant party of the House to execute its own purposes, without regard to the wishes or views of the representatives of the States. The bodies meet, sir, and vote as distinct organizations; and when a vote is to be taken the Senate very properly retires to consult separately how the vote of the Senate shall be given upon the question, and its vote will then be announced by its own appointed organ.

According to my understanding, the Senate retired upon the motion of the Senator from Illinois, [Mr. Douglas,] and I presume the Senate will consult as to its vote. We have now, as a House, to determine for ourselves whether the vote of the electors of Wisconsin, as certified by them, shall be counted among the votes cast in the late presidential election.

If you adopt any other construction of the Constitution than that I have indicated, on the one hand you supersede the houses and place all power over the count in the hands of the President of the Senate; on the other hand, you destroy the just weight of the Senate, and may establish a precedent, by virtue of which, at some future day, a large body of Representatives may set aside an election made by the people through the electoral college, and assume the power of bringing the election before the House or Representatives. I am, therefore, clear that the houses meet as houses, and no vote *per capita* can be taken. Still, I am sure that the duty of determining whether a vote shall be counted belongs to the Senate and House, and not to the President of the

te; and it is a duty I insist we should perform before the vote shall be counted. The House and Senate do not play the parts of automata; nor are they mere lookers-on at a spectacle in which the President of the Senate is sole performer. As to the tellers, they are part of the *dramatis personæ* not known to the Constitution—mere facilities, sir, adopted by the houses for convenience—instrumentalities, whose acts are no acts at all until the houses adopt them. Their count of the votes is the count of the Senate and House when the Senate and House agree on the report they make, and then they are, as tellers, obliterated, and are not known at all in the transaction—the count is performed by the Senate and House; and I say, sir, until the Senate and House do count the votes certified, and the certificates of which are opened by the President of the Senate in their presence, there can be no constitutionally-declared election of a President and Vice-President of the United States. The functions of the tellers commence when the houses order them to record a vote *as counted*, and they have no right to register a vote as counted unless the Senate votes to count it and the House agrees it shall be counted. The acquiescence of each house may dispense with the formality of a separate vote on each certificate from the electors of a State; but the theory of the Constitution is as I have stated it, I think, and the responsibility of the count is on the houses, respectively. To take a report of tellers before the houses have counted, or before the houses have agreed, respectively, to the report, and while a vote from a body of electors is under challenge from a representative of the people, is premature and unauthorized, and is not a constitutional ascertainment of the election of the President and Vice-President.

The SPEAKER, (interrupting.) The Chair will relieve the gentleman from Kentucky of the question he is now debating. The question is simply a question of priority of business—whether the resolution of the member from South Carolina is in order, and supersedes the regular order of business of the House. The Chair is of opinion that it does not; but if the gentleman from Kentucky desires to make a proposition for a meeting of the two houses for a specific purpose, the Chair will receive it as a matter of privilege, and such conditions as the House propose can be stated.

Mr. H. MARSHALL. I understand the Chair has already, heretofore, decided that the resolution offered by the gentleman from South Carolina is not in order as a question of privilege, and that an appeal from that decision is pending.

The SPEAKER. It is.

Mr. H. MARSHALL. Well, I am already discussing the matter pertinent on the appeal. The Chair decides the resolution out of order, because, in the opinion of the Chair, the meeting of the Senate and House required by the Constitution has definitely closed; while I am of opinion that it has not, and that the House should now deliberate whether, when the two houses meet again, this House will vote to count the vote of Wisconsin or not. The Senate has, as I understand it, returned to its chamber to deliberate on that proposition.

The SPEAKER. If the gentleman from Kentucky will make a point of order on that proposition, the Chair will rule it so that the House can decide.

Mr. H. MARSHALL. I thought the point of order was made. I thought it was made when the resolution of the gentleman from South Carolina [Mr. Orr] was offered, as a matter of privilege, rejecting the vote of Wisconsin, and the Chair decided it could not supersede the ordinary pending business of the House, which has no relation to the special meeting of the two houses. The appeal of the gentleman from South Carolina from that decision of the Chair rests on the ground that the special meeting has not closed, but that this House should now proceed to determine, by its own separate vote, whether it will or will not count the vote of Wisconsin, when the Senate and House meet again in order to count out the votes which have been opened in their joint presence.

The SPEAKER. The point of order presented by the gentleman from South Carolina is, that the resolution proposed by him is in order, and the Chair thinks it is not, as not being the regular order of business under the rules. But the question whether the House is now in session has not yet been put.

Mr. ORR. Will the gentleman from Kentucky yield to me a moment? There seems to be a difference, more in form than in substance, between the opinion of the Chair and my own. The Chair intimates, that if a proposition be made in the shape of an order, that the House continue the joint convention at a particular hour, with such limitations and instructions as the House may direct, it will be in order, and in that order it may be proper for us to say, "It is ordered that the vote of Wisconsin be not counted."

Mr. H. MARSHALL. Will the gentleman permit me to close what I desire to say? I will do so in the least possible time. I would be compelled to vote against the gentleman's resolution, because he has inserted in it "the Senate concurring," thereby making it a joint resolution of the two houses; whereas, I think this House determines by itself, and for itself, how its own vote on the proposition to receive or reject an electoral vote shall be cast when the houses are acting in presence of each other. We do not want the concurrence of the Senate to enable the House to determine how it

will vote; and the view of my friend is defective, therefore, in making the concurrence of the Senate a condition on which only his resolution will be effective. This view is apart from any considerations which may determine my vote as to whether the vote of Wisconsin should or should not be received. I do not enter on those now, because I want to see these other points settled. The idea, as I understand the Chair, is that the joint meeting of the houses has closed. How did it close? Has this House determined what votes cast at the presidential election, and certified, it is willing to count? Has the Speaker of this House interchanged, by authority of this House, any words on that subject with the President of the Senate, as the organ of that house? Has this House acted at all? Has it been called to say yea or nay on any point connected with the whole subject, and has it not merely gone so far as to see the certificate opened by the President of the Senate? Is this not, in law, all that has been done? It may be said the tellers have reported, and the President of the Senate has declared the majority of the President and Vice-President, and that they are elected. Mr. Speaker, one of the tellers on the stand said they had signed no report—would sign none except to state the whole facts. But I care not what the tellers said or signed, or what the President of the Senate said. He said the Senate was in session here. So was the House in session. He presided over the Senate and over the convention: but you presided then and there, over the House. The houses were in the presence of each other, and each under its own officer. The Constitution requires this House to act, and to count the vote; and my proposition is, that until the House agrees to the vote offered to be counted, it is not constitutionally counted, and the President of the Senate cannot, of his own mere will, give that vote any force or validity in that election, or declare a result to which the House has not agreed by a count of the votes.

You say the joint meeting has closed. The Constitution provides that when the votes are "*then counted*," if it shall appear that a candidate has the majority, he shall be President. The law of 1792 says: On the second Wednesday in February the certificates shall be opened, the votes counted, and the persons who are to fill the offices of President and Vice-President *shall be ascertained and declared agreeably to the Constitution*. Ascertained by whom, sir? Declared by whom, sir? Is the President of the Senate to ascertain it? Is he to declare it, agreeably to the Constitution? Or are the houses, in the presence of each other, to ascertain the fact, and are *they* to declare, through their respective organs, and in the presence of each other, who are the persons to fill these offices? Until the fact has been ascertained and declared by the sanction of the House, I say it has not been done "*agreeably to the Constitution*." Suppose, sir, that the House should not agree to the result as declared by the President of the Senate—not in this case, for here there is no doubt who is elected, and we are only trying to determine what is proper, and to do that properly. Suppose that the result depended on this vote of Wisconsin, and that vote had been challenged, as it has been to-day, would you, or any other member of this House, say that vote could be counted and the result declared *without the concurrence of this House*? Or, would not the House of Representatives undertake, in such an event, to judge for itself whether the majority had been cast, whether the vote had been counted agreeably to the Constitution, and whether it would or would not in pursuance of a duty devolved on it by the Constitution, proceed to elect a President of the United States, agreeably to the constitutional requisition, in the event of any one to have a majority? *The House holds in its own hands the means of protecting its own dignity, and of preserving the substantial requisitions of the Constitution by seeing that the votes are properly counted.*

Mr. CRAIG. I understood the Chair to announce that it would receive a proposition touching the joint convention. I suggest, therefore, the propriety of a motion, to the effect that this House will appoint a committee of three or five to confer with a committee on the part of the Senate as to the mode of bringing this matter to a close.

Mr. H. MARSHALL. There may be much in that proposition that is wise, but I cannot give way now for its introduction, as I want to conclude without turning away from the grave question on which the House is now deliberating. Has the constitutional requirement been fulfilled of counting the votes for President and Vice-President, and has the subject been disposed of by the decision of the President of the Senate, though a vote proposed to be counted was objected to by the member from Virginia, [Mr. Letcher,] and before the House has acted upon that objection, or we have consulted as to whether it shall be counted? Has the joint meeting closed, and is the House now in session to proceed with the ordinary business? If the purpose of the Constitution has been accomplished *and properly met*, and we are to proceed to the usual routine of business, the Speaker's decision of the pending point is correct. If we are here to deliberate as to *our consent* to register and count the vote of Wisconsin, then the decision of the Chair must be erroneous. But, sir, if the houses have not, in the presence of each other, counted the votes, and the Speaker is right in saying the joint meeting has closed, a question might arise whether we have ascertained the election of the President and Vice-President *agreeably to the Constitution*.

For my own part, I am unwilling to believe that this House means to surrender its own powers, and to agree to the exclusion of the House from a fair participation in

the duty of ascertaining and disclosing the result. That is the real point at issue here to be decided on this appeal. Will the House say that the President of the Senate has a right to proclaim who is elected President or Vice-President of the United States when no certificate of the fact was signed even by the tellers or certified to him, when no count has been verified by the House as a House, but on the contrary a vote is disputed by a member of the House? Will the retirement of the President of the Senate "with his Senate at his heels," if intended to be final, overcome the House and make us yield our constitutional privilege? If the Speaker of the House announces that there is no longer any joint convention, and if the whole thing be broken up in confusion, the question may very well arise as to what then becomes the duty of the House of Representatives.

I know very well that the President of the Senate finally said that the tellers had made their report; but, as I understood him, the tellers had not *completed* it. I heard one of the tellers say that they did not intend to certify until some event occurred *which had not then transpired*, and in that state of facts the Senate retired from the House. The question is, for what purpose? To consult as to their vote, or upon the assumption that their office here had been performed fully? If the latter, what will this House say?

Mr. SMITH, of Tennessee. Will the gentleman allow me a moment?

Mr. H. MARSHALL. Will the gentleman say what he has to say when I have done? I want to guard the House, if possible, against wrong action, and to induce it to do what is proper for its own dignity and due to the propriety of the occasion.

Mr. SMITH, of Tennessee. I want to correct the impression which the gentleman is making.

Mr. H. MARSHALL. It seems almost impossible for a Representative to speak here except under continued interruption. Upon a subject like this, I did hope that what I had to say could have been said to attentive ears without this; but as it is otherwise, I prefer to yield the floor rather than to conclude under a continued stream of interrogations, and I yield the floor entirely.

Mr. QUITMAN. I think, sir, that if the House will reflect upon the consequences of any misstep in its proceedings now, it will deliberate calmly and maturely as to the proper mode which ought to be pursued. It was my fortune upon one occasion to sit as the presiding officer over two legislative bodies assembled in convention—not, I confess, as turbulent bodies as those I have seen here to-day. Questions of a similar character to these arose, and I have been obliged to give them some attention. But what I wish to impress upon this House now is, that unless some conciliation and some prudent measure takes place, this is but the commencement of a revolution. ["Hear, hear!"] Do you suppose, gentlemen, that a majority of the people of the United States who, through their electoral colleges, have selected a President of the United States, will quietly submit, on account of some technical proceeding, to see that election made by this body? And, Mr. Speaker, unless we get out of this dilemma, I know not how we are to cure it.

The question, then, is this—and it was properly put by the gentleman from South Carolina who introduced this resolution: was the joint convention of the two Houses terminated by the withdrawal of the Senate? No, sir; it was terminated by no act of either branch of this convention. The convention still exists in contemplation of law. It was said by the honorable gentleman from Kentucky, Mr. H. Marshall, that we assembled here in convention as two distinct bodies, and that we must even vote upon every question, even questions of order, when appealed to, as separate bodies. In the case to which I referred, the president of the senate took a vote of the senate in the presence of the house, and the speaker of the house took a vote of the house on the same subject, to save time, in the presence of the senate. But here the Senate, over whose proceedings as a distinct body we have no control, have seen fit to return—not to break up the joint convention, not to dissolve it, but to return to their own chamber, as we are to believe, though not officially informed of it, to deliberate upon and decide questions which arose while the joint convention was in existence. But, sir, are we to suppose that the Senate have abandoned the business which was before that body? It is still before this body, and that is the business before us; and until it is disposed of, in my judgment nothing else is in order. Therefore, it is perfectly right and proper that this House should take up the subject, decide it, and respectfully communicate the result of our action to the Senate, and invite the Senate to return, and continue and conclude the business for which we assembled together.

Mr. STANTON. I have no idea of permitting this question of the power of the Presiding Officer of the joint convention to be overslaughed. I think my friend from Kentucky [Mr. H. Marshall] makes a mistake when he assumes that because each House has a right to a separate vote, that therefore the two houses can separate without dissolving the joint convention. I think the decision of the Chair is correct upon this point of order; and I very much regret that this question as to the right to decide upon the validity and legality of the vote for President should be complicated with a question of order.

Now, sir, the question as to whether or not these two houses are in convention, is a physical fact, determinable by observation. The question as to whether the two houses must vote *per capita* upon all questions while in joint convention, is a question to be decided at the proper time, and in the proper place. But assuming that gentlemen are correct in saying that each house is entitled to a separate vote, it by no means follows that the joint convention should be suspended or dissolved, or that the two houses should separate. I apprehend that it is an every-day occurrence in the legislatures of the several States, when assembled in joint convention, that the clerk of each branch of the body calls his own branch and records its vote, and the presiding officer of each branch announces the vote of each branch to the joint convention.

But, sir, I take it that whenever the Senate or the House, which goes into the chamber where the joint convention is to meet, and there proceeds to the consideration of the business that devolves upon it, and withdraws, that withdrawal, not professedly for any temporary purpose, not professedly for the purpose of consultation, not with the avowed purpose of returning to resume the joint convention, does dissolve the joint convention. I do not see how there is any escape from that conclusion.

I regret that this question as to the right of a joint convention to decide upon the electoral vote of a State should be complicated with a question as to the priority of business. I hope the vote will be taken. Why will not gentlemen permit the result to be announced upon the motion of the gentleman from Missouri to lay the report of the Committee of Elections upon the table?

Mr. CRAIGE. However it may be in theory, I apprehend there is no difficulty in point of fact as to whether we are in joint convention or not. Whether it has adjourned, or is merely suspended, is a matter of no moment. It is clear that we are not now in joint convention. I apprehend that it was the intention of the Senate to consult about this very matter; and therefore I propose, if it is in order, to move that a committee of three be appointed upon the part of the House, to confer with a like committee upon the part of the Senate upon the subject of the re-assembling of the joint convention.

Mr. ORR. I desire to modify my proposition. I propose the following, in lieu of the resolution offered originally:

Ordered, That when the Senate shall return to this House to complete, in joint convention, in pursuance of the order of the two houses, already adopted, the counting of the votes for President and Vice-President of the United States, the vote of any State cast on a day other than that provided by law, to wit, the 3d of December last, shall be rejected by the tellers of this House.

Ordered, That the Clerk acquaint the Senate with the foregoing order of this House.

The SPEAKER. The proposition, in the opinion of the Chair, is in order as a matter of privilege.

Mr. ORR. I have very little to say. It seems to me that that is perhaps the best way of relieving ourselves of the present difficulty. If there be gentlemen here, as I have no doubt there are from the intimations which have fallen from some of them, who think that the vote of the State of Wisconsin ought to be counted, let them move an amendment to the order. My own opinion is that the vote ought not to be counted. It was not cast on the day prescribed by law. If the States be allowed to cast their electoral votes on different days, you will put it in the power of the electors of the State to make combinations so as to secure the election of a President and Vice-President against the voice and will of the people.

Mr. MILLSON. I rise to a question of order.

Mr. WASHBURNE, of Wisconsin. I move that the order be amended so that the vote of Wisconsin be counted; and on that motion I desire to make a single statement.

The SPEAKER. The gentleman from Virginia rises to a question of order.

Mr. MILLSON. I will state in advance that what I raise as a question of order may be considered rather as reasons why this resolution should be rejected. If, however, it be a question of order in the opinion of the Chair, I will only say that I will indicate the points of order, and seek an opportunity at some other time to enforce my objection to the resolution. My point of order is this: The resolution assumes that the Senate is to return in joint convention, when, I hold that they may never, and need never return, the work having been accomplished.

The second point is, that the Constitution is a body of rules for the government of this House, as well as those enacted by ourselves; and under the Constitution the Senate and the House of Representatives have never been, and can never be, in joint convention.

The third point is, that the resolution assumes the right of the House to reject the vote of a State given for President and Vice-President, when no such authority has been given by the Constitution, either to the Senate or the House of Representatives, and when I think the power has been wisely withheld from both to determine any such question.

The SPEAKER. The Chair overrules the question of order raised by the gentleman from Virginia.

Mr. WASHBURN, of Maine. I wish to say a word on this point of order.

The SPEAKER. Debate is not in order until the Chair has given its decision.

Mr. ORR. I will relieve the resolution from one of the difficulties suggested by the gentleman from Virginia. I propose to modify it by striking out "in joint convention."

The SPEAKER. The Chair is of the opinion that the resolution is properly before the House as a matter of privilege.

Mr. ALLISON. I rise to a question of order. My point of order is this: That this House cannot know, as a House, what has been done in joint convention until the tellers appointed by the House shall have made their report. The tellers have not made their report.

The SPEAKER. The Chair overrules the question of order raised by the gentleman from Pennsylvania. The laws of the United States require the two houses to meet in joint session on this day for a specific purpose, and the Chair holds that a proposition relating to that purpose is in order. Such a proposition is presented by the gentleman from South Carolina. It is not necessary that a report shall be made to the House by the tellers, nor indeed are they appointed for that purpose.

Mr. WASHBURN, of Maine. I do not know that I am disposed to appeal from the decision of the Chair, but, if necessary, I will take an appeal *pro forma*, at least in order that I may make a few remarks on this question. We have met the Senate here to-day in pursuance of the provisions of the Constitution, of a law of Congress, and a joint resolution adopted a few days since by the two houses. At such meeting nothing could be done except what had been authorized by the Constitution and the laws of Congress.

Mr. RUFFIN. If debate is not in order, then I call the gentleman to order.

Mr. WASHBURN, of Maine. I will then take an appeal from the decision of the Chair.

The SPEAKER. The gentleman has a right to state his point of order.

Mr. RUFFIN. He is discussing and not stating it, and he says that it is not a point of order.

Mr. WASHBURN, of Maine. I am stating my point of order, which is, that the motion of the gentleman from South Carolina [Mr. Orr] is not in order. Now, sir, if that motion is entertained and prevails, we shall be here not in pursuance of the Constitution—

The SPEAKER. The gentleman from Maine does not present a question of order. He will please state his question of order.

Mr. WASHBURN, of Maine. I understand the Speaker to have decided that the resolution offered by the gentleman from South Carolina was in order. I make the point that the resolution cannot be received, because this House at this time, and in this manner, has no jurisdiction over that question under the Constitution, the laws, or the joint order of the houses.

The SPEAKER. The Chair overrules the point of order of the gentleman from Maine on the ground that it is a question for the House to decide.

Mr. WASHBURN, of Maine. Then I take an appeal, and I desire to state my reasons. The Constitution provides that the President of the Senate, in the presence of the two houses, shall open all the certificates, and that the votes shall be then counted, and the person having the greatest number of votes for President shall be President of the United States, if such number be a majority of the whole number of electors appointed; and so in regard to the Vice-President. The votes shall be opened in the presence of the Senate and House of Representatives, and then counted. By whom? There is no provision of the Constitution, or of law, that they shall be counted by the Senate, or the House, or by a joint convention. There has been no joint convention, nor could there have been any. The assemblage here could do nothing for which it had not the authority of law, and there is no law authorizing the count of these votes by a joint convention, or prescribing the rules and regulations to be observed therein. It was the duty of the President of the Senate here, in the presence of the two Houses, to open the certificates, and to cause the votes to be counted. The Houses had directed how they were to be counted, by a teller appointed on the part of the Senate, and two tellers appointed on the part of the House. These tellers made the count, and here, in the presence of us all, made their report to the President of the Senate; and the President of the Senate, in the presence of the two houses, and in exact conformity with the provisions of the Constitution, did declare the whole number of votes, and did declare who had the majority. Nothing but that could have been done. There was no power on the part of the Senate, or on the part of the House, to interfere with the execution of this duty precisely as specified in the Constitution and in the resolution of the two houses.

I hold, therefore, that no motion whatever can be made; and that the meeting under the Constitution, the law of 1792, and the joint resolution, is *functus officio*. I have no doubt, sir, that there is here a *casus omissus*—that there is no law and no provision of the Constitution by which anything can possibly be done, except what has been done by the President of the Senate in presence of the two houses. I hold that he ruled aright when he refused to entertain the motions made to him, and when he announced

from the chair, in presence of the Senate, and to the House, what had been declared to him by the tellers. That is all that he did, and all that he had authority to do. I am, at the same time, very clear that it is of the highest importance that there should be some legislation on this subject. All that we can now do is to acquiesce in the decision that has been made, and to set ourselves to work immediately for the passage of a law which will prevent any trouble or difficulty of this kind in future. I received a letter but a few days ago from a gentleman, eminent for his wisdom and ability, who stated therein that the late Chancellor Kent, of New York, had told him that here was clearly a *casus omisus*; that there was no power either in the House or Senate, or in a joint convention, to interfere and participate authoritatively in counting and declaring the votes and deciding upon their validity; and he said that the chancellor added, that he feared the time might come when the country would be shaken to its center on this point.

It is very certain, Mr. Speaker, that this vast power should not be vested in the Presiding Officer of the Senate, or in any man; nor should it remain uncertain and unfixed by whom, and how, it is to be exercised. The Presiding Officer may decide all questions justly and fairly; or, influenced by passion and warped by party heat, he may abuse the great power. He may contrive to exclude votes legally given, and thereby to defeat the will of the people. The depositaries of this power, and the manner of its exercise, should be fixed by law of Congress, so that hereafter, when any question shall arise, as arise it will, in reference to the legality or regularity of votes for President and Vice-President, the tribunal will be established by law for its decision, and the mode, manner, and forms prescribed, so that the trial may be had and the result ascertained under the provisions of established and known law. We cannot overestimate the necessity of such a law. Let the election of President depend upon the vote of a single State, and let that vote be contested in earnest, what weight or power would the decision of one man have with the country, or would that of Congress possess, acting arbitrarily, without law, without rules and orders of proceeding, and with a view to making the President, rather than ascertaining who has been duly elected by the people. Suppose the will of the people defeated by a partisan President of the Senate, or a partisan majority of Congress, acting without limitations or restrictions, with no established rules and forms, but making such for the case as the exigencies of party require, and what shall save us from revolution?

Instead of passing such a law as is demanded by the necessities of the case, do not let us go to making precedents which will be useless for good, and will fail utterly when the weight of precedents are required to resist the purposes of unscrupulous power; do not let us entertain motions here, when the principle upon which they are offered would imply authority on the part of the House to do what would be inconvenient, absurd, and unconstitutional. If the late meeting in this hall were a joint convention, how should it vote *per capita*? Whence did the House derive power to insist upon voting in this manner? By the houses separately? Then one house might lock the other by passing such orders or resolutions as that offered by the gentleman from South Carolina, [Mr. Orr,] with conditions annexed? Then, if you may agree to a result upon condition that the vote of one State shall be rejected, you may require that the votes of two or ten be rejected; and the Senate may impose similar conditions. Does any one suppose that the counting and declaring of the votes *in the presence of the two houses*, as required by the Constitution, can ever be had in this way? But, sir, I took an appeal from your decision to enable me to make these few remarks, and now withdraw it.

Mr. WASHBURN, of Wisconsin. I offer the following as a substitute for the resolution of the gentleman from South Carolina.

"Whereas the electoral vote of the State of Wisconsin, cast at the late presidential election, was not cast until the 4th of December last, the day after the day fixed by law; and whereas the presidential electors of the said State were prevented from attending at the seat of government on that day to cast the vote of said State by physical impossibility caused by the act of God: Therefore,

"Be it resolved, That the tellers be directed to cast the vote of the said State the same as if the said vote had been cast on the day provided by law."

Mr. DAVIS, of Maryland. I rise to a question of order. I object to the reception of the resolution, as it relates to no matter which the House can now legally or constitutionally have before it.

The SPEAKER. The Chair is of opinion that the resolution is in order, as it is based upon a statute specifying that the House shall sit on this day, and shall participate in the transaction of certain business. The resolution of the gentleman from South Carolina relates to that, and is necessary to its completion.

Mr. DAVIS, of Maryland. I take an appeal from that decision. It is with great reluctance, Mr. Speaker, that I detain the House for a few moments upon this question; but I entirely concur with the gentleman from Kentucky, [Mr. H. Marshall,] as to the very great importance of the precedent that we are about to set, and therefore I beg the indulgence of the House for a few legal considerations which I think ought to

decide this question. In my judgment, the phrase "joint convention" has led everybody here astray. In my judgment, the duty which was assigned to the Senate and House of Representatives has already been discharged. In my opinion there is no judgment to be passed, either by the Senate or by the House of Representatives, or by the tellers, or by the Speaker of the House. I think that the Constitution of the United States has defined with perfect precision what we are here to do; and beyond that there is nothing to be done, except on a motion which has not yet been made.

The Constitution says that the President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates that are laid upon your table as containing the votes of the various States, and the votes shall then be counted. They are to be counted in the presence—not of any joint convention—but of the Senate sitting separately and of the House sitting separately—as separate houses. It does not say that any result shall be announced. It does not require any judgment to be declared. I does not confer on either the Senate or the House the power to authorize the President of the Senate to declare who is the President of the United States.

Mr. QUIMAN. Will the gentleman permit me to ask a question? Who is to count the votes, and to decide whether a vote is to be counted or not?

Mr. DAVIS, of Maryland. That is the precise point I rose to explain my views upon. The votes are to be "counted," and there the Constitution stops. What do gentlemen mean by the word "counted?" Do gentlemen mean that counting a vote here has the effect of a judgment upon the vote that is counted and admitted, or upon a vote which is not counted and is rejected? Do they mean to say that if a vote were rejected here upon the count by the tellers, or were admitted, it would bind any authority known to the laws of the United States? It is that fertile source of all difficulty, this ambiguity in the phrase we are using. I apprehend that the only purpose of assembling here is to identify the things which are sent here as votes. The act is a ministerial, and not a judicial one. Counting or refusing to count has no effect. Whether a vote shall or shall not have the effect of electing a President is, after the mere ministerial act of counting out the things sent here by the various States, referred by the Constitution of the United States to the body that is to elect in the event of a failure of election, and there is no motion that can be made here which can raise this question, unless some gentleman shall rise and move, in pursuance of the Constitution of the United States, that the House now proceed to the election of a President; and when that shall have been done, and the question shall have arisen whether the papers laid upon the Speaker's table, identified by their official certificates, counted by the gentlemen who are appointed to count, are legal or illegal, that question the House, and the House alone, have the power to decide; and until we are called upon to decide upon the question whether we shall or shall not elect a President, there is no practical question which can be raised in this House upon which our decision would be final. Although this House should go on and pass separate votes upon every vote before them, I apprehend they would be extra-judicial opinions upon facts which they have no right to pass upon separately, and they can only pass upon them upon the motion, or upon the presumption, that there is no election; and the only decision this House can come to is, whether they will proceed or not now to elect a President. I presume that, with reference to the Vice-President, exactly the same question devolves upon the Senate, untrammelled by any count or refusal to count, accepting nothing as the basis of their decision except the papers identified here—identified before the Senate and the House as witnesses to the fact.

Now, sir, no strict constructionist, or wide and loose constructionist, can find any function confided to both houses together, or to one separately, which enables them to pass preliminarily upon the point whether one vote shall be counted, or another rejected. No judgment is called for at all. On the contrary, the Constitution carefully avoids asking for any judgment by anybody upon a mere count. It does not say that anybody shall be declared President of the United States; it does not say that anybody shall decide that question in joint convention; but it simply says "the votes shall be counted;" that is, that the things here as votes shall be ascertained, and that he who has a majority of votes shall be the President—not that he shall be here declared President, for the law declares him; and the only way we can get on record any judgment of ours properly under the Constitution is for some gentleman to move the practical question that this House do now proceed to elect a President. The moment that one practical question is put, it appears how entirely futile all this difficulty is. There are cases where it might be important to determine whether this is, or is not, a legal vote; but that case does not now arise; and no tribunal, no court, no judicial body, moots a mere abstract question of law. We are called upon here to enter nothing on the record, to pass no judgment, until called upon to elect a President; and then we settle the great result that there is an election of President by refusing to go on and perform that duty.

I submit, therefore, that the formal counting out of the certificates by the persons appointed has discharged all the functions which the Constitution requires to be performed in the presence of the two houses, and they having been witnesses of that one

fact, there is no reason why they should assemble again. Our tellers are called upon to give no certificate by any law. We are not called upon to identify the fact in any other manner than simply by counting out the votes; and when the certificates have been opened, the Constitution itself declares to the legal mind of the body the fact that a President has been elected.

Mr. COBB, of Georgia, obtained the floor.

Mr. WASHBURN, of Maine. Will the gentleman from Georgia yield me the floor for a single moment, to read a few words from Kent's Commentaries?

Mr. COBB. I will yield the floor for that purpose.

Mr. WASHBURN, (reading:)

"The act of Congress of 1st of March, 1792, section 2, directs that the certificate of the votes shall be delivered to the President of the Senate before the first Wednesday of January next ensuing the election. The President of the Senate, on the second Wednesday in February succeeding every meeting of the electors, in the presence of both houses of Congress, opens all the certificates, and the votes are then to be counted. The Constitution does not express by whom the votes are to be counted and the result declared. *In the case of questionable votes and a closely-contested election this power may be important; and I presume, in the absence of all legislative provision on the subject, that the President of the Senate counts the votes, and determines the result, and that the houses are present only as spectators to witness the fairness and accuracy of the transaction, and to act only if no choice be made by the electors.* The House of Representatives, in such case, are to choose immediately, which, I presume, may be while the two houses are together, though they may vote after they have retired, for the Constitution holds their choice to be valid, if made before the 4th day of March following."

Mr. COBB, of Georgia. I think there are very important questions connected with the subject now before the House, and it strikes me that the two houses are in the best possible condition to decide those questions properly, as I see no practical result to flow from any decision pronounced upon any point. The whole difficulty which arose while the two bodies were together was upon the simple point whether the Presiding Officer over the two bodies should decide when we had completed the duties for which we had assembled, or whether the question should be decided by the two bodies themselves. That is the point, and the only point; and when we are relieved from that difficulty all others cease to exist.

Now, during that session I submitted that point to the Presiding Officer, and I then insisted, and I now insist, that it was not within the province of the Presiding Officer to determine for the two houses when the work had been completed, or to dissolve the joint convention, or whatever else you may see proper to call it. And the question is, whether or not that question is to be decided when the two houses are together, by the members of the two houses *per capita*, or as houses respectively? I confess, sir, that that is not free from difficulty. On the first suggestion of this question, I was inclined to the opinion that it should be decided by the members of both houses voting *per capita*. I listened with interest and instruction to the able argument of the gentleman from Kentucky [Mr. H. Marshall] on this point; and I am inclined now very strongly to the opinion that whilst the Presiding Officer shall not decide, but the two houses shall decide, yet they must decide it as houses, one as the Senate, and the other as the House of Representatives. If they differ, there is, I confess, no provision for that condition of things; and a *casus omnisus* exists.

Now, in reference to the view suggested by the gentleman from Maryland, [Mr. Davis,] I am not prepared to condemn it, but I will suggest to him the difficulty as it occurs to my mind. The student of the Constitution of this country finds no unmeaning provisions in it. Would the framers of that instrument have provided that the duty of examining and counting the votes cast for President and Vice-President should be discharged in the presence of both houses, and then leave the decision to be made by one house alone, and that, too, the house which was to elect a President, provided there was a failure to elect by the electoral colleges? If the argument of my friend from Maryland be well taken and sustained, then, sir, the President and members of the Senate are here for no practical purpose. Every duty could be as well performed by the Speaker and the House of Representatives alone. They could as well go through with the simple function of opening and recording the papers which have been returned to the two bodies. If a question arises whether or not one of these papers is a forgery, who is to decide it? If a question arises whether or not one of these papers should be counted, who is to decide it? Who is to decide either of these questions? Upon the theory of my friend from Maryland, nothing can be done except to make a record of the papers which have been placed in the charge of the President of the Senate. But when the Senate have retired, then the duty, the important duty, the great responsibility, according to the gentleman, is placed on this House to decide whether or not an election has transpired; and that if a majority of this House sees proper to declare that, on account of informalities—on account of one cause or another, the vote of this State, and of that and the other State, shall be rejected, so that the record shows no election has been had in conformity with the Constitution, then we are to proceed to elect a

President of the United States. I say that the theory of our Constitution could not have contemplated such a state of things as that, and could not have required the President of the Senate and the Senate to come to this hall to be witnesses of this transaction, with all the power residing in the House of Representatives to determine the question.

It strikes me, therefore, as the better course to be pursued in this state of things, that when a question arises, and the two bodies are together, it should be settled with the two bodies sitting here; for, as the Presiding Officer of the joint convention very properly declared, the Senate was then in session, and he entertained a motion from a Senator, and put it to the Senate to be voted on. Why could not the Senate then have acted on any question? Why could not the House have acted on any question? Why could they not have cast their votes respectively? This presents a fair opportunity of deciding this question, free from difficulty. What occurred during the time the two houses were together? The votes were counted, the tellers reported, and the Presiding Officer announced the result. The question arose as to the vote of the State of Wisconsin. That State did not vote for the persons elected; but, whether counted or not, it would not change the result. But a case may arise hereafter when such a vote may change the result; and I think we ought now to prepare for such an emergency.

It strikes me that the suggestion made by my friend from North Carolina [Mr. Craige] was entitled to more consideration than the House has been disposed to give it; and that was, that committees of the two houses should meet and confer on this subject. If in the view presented by my friend from Virginia [Mr. Millson] we have completed our work—done all that is necessary to be done, then I am inclined to the opinion that we have gone far enough for all practical purposes; but if a majority of this House think we have not—if any member of this House is of the opinion that the duty devolving on the House under the Constitution and the law of the land has not been discharged, that member and that majority of this House cannot, without perjury resting on their consciences, adjourn this body until that work is completed. The House must see that the work has been done, that the declaration has been made and the duty discharged, or, sir, you walk over the provisions of this Constitution, and disregard a duty you have sworn to discharge.

I think, under this state of things, that it is well for the House to stop and consider maturely, and free from all feeling and prejudice—there is nothing to cause it here fortunately; for the decision of such an important issue there is nothing to inflame the passions of members, nothing to swerve their judgments from a proper decision in this case—the resolution now before it. I object to the resolution of my friend from South Carolina, because I am not prepared to say that we have not gone as far already as is necessary in the discharge of our duty.

That is my only objection to the resolution of the gentleman from South Carolina. I would prefer, if I could get the concurrence of the Senate and the House of Representatives, the adoption of the resolution of the gentleman from North Carolina. Let this House by its committee meet a committee of the Senate. Let us consider the questions which have arisen in joint convention, and pronounce such a judgment as will afford a precedent for the future—one that the country can safely act upon and will acquiesce in.

MR. BINGHAM. MR. Speaker, I desire to submit some remarks for the consideration of the House on the resolution submitted by the gentleman from South Carolina. The question of the rejection of the vote of Wisconsin can in no manner affect the result of the election, but its decision is made important only from the fact, that it has been assumed by the President of the Senate, when objection was made by a member of this House to the reception of that vote, that neither the two houses, nor any member thereof, could be heard upon the question; that it depended for its determination exclusively upon himself and the tellers. I cannot assent to that, nor to the opinion expressed by gentlemen here that the two houses are, in convention assembled, only in the capacity of spectators. It seems to me that the Constitution imposes upon Congress—the Senate and House—the duty of counting and *announcing* the whole of the votes duly certified as having been cast for President and Vice-President on the day prescribed by law, and the further duty of ascertaining and declaring for whom such votes were given.

It is not for the President of the Senate nor the tellers to determine what votes shall be counted or rejected. The Constitution provides that "the President of the Senate shall, in the presence of the Senate and House, open *all* the certificates;" but it does not provide that *he* shall count the votes, the language being that "the votes shall *then* be counted." What votes shall then be counted? All that appear upon the face of the certificates thus opened? Not at all; but only the votes to which each State is entitled, and which by the certificates appear, or may be presumed to have been given at the time required by the Constitution and prescribed by the statute. The Constitution provides (article two, section one) that "the Congress may determine the time of choosing the electors, and the day on which they shall give their votes, which day shall be the same throughout the United States." The act of March 1, 1792, section

two, provides that "the electors shall meet and give their votes on the first Wednesday in December;" and section four of the same act provides that "Congress shall be in session on the second Wednesday in February succeeding every meeting of the electors, and the said certificates shall then be opened, and the votes counted, and the persons who shall fill the offices of President and Vice-President *ascertained and declared* agreeably to the Constitution.

Congress, composed of the Senate and House, shall be in session on this day—for what? To look silently on, while the President of the Senate and the tellers jointly and severally *ascertain and declare* who is elected President and Vice-President of the United States? The two houses are here to *count* the votes, and to *ascertain and declare* the result. The President of the Senate and the tellers are but the mere agents or organs of the two houses. The DUTY to ascertain and declare these results is, in my opinion, devolved upon the two houses, not upon the President of the Senate or the tellers.

The two houses are thus convened, not to elect a President and Vice-President, but to ascertain and declare the election which has been made (if any) by the electors appointed by the people in the several States. In the discharge of this duty, the Congress may not go behind the certificates, and inquire into the qualifications of the electors, or into any other fact not appearing upon the certificates. But, sir, the two houses, in my judgment, may and should reject all votes which are *certified* to have been given on a day other than that prescribed by law. Such a certificate upon its face shows that such votes were given contrary to the Constitution and the act in aid of the Constitution. The constitutional provision, that "the votes shall then be counted," can only be construed to mean the votes given on *the day* prescribed by law, which the same instrument declares "shall be the *same day* throughout the United States," and that Congress may determine the day on which such votes shall be given. That day Congress has fixed, and the certificate of Wisconsin shows that the votes of her electors were not given on *that day*, but upon another day.

I am convinced that it is the office and duty of the House and Senate to see that no votes are counted which, by the certificate opened and read in their hearing, were given contrary to the express requisitions of the Constitution and the statutes; and that they have no right to count votes certified to have been given for President or Vice-President on a day different from that prescribed. The electors of the several States cannot meet on different days, and vote for President and Vice-President; and if they do, and so *certify* the fact, it is neither the province nor duty of the two houses of Congress to *ascertain and declare* an election upon votes so certified. I am, therefore, for some declaration on the part of the House to that effect.

MR. SCOTT. Allow me to make an inquiry of the Chair. I understand that our journal will show the action of the convention.

THE SPEAKER. The House has no journal of the convention.

MR. BOYCE. Difficulties of a somewhat similar kind, Mr. Speaker, to those which now exist, have occurred before. In 1821, objection was made to counting the votes of the State of Missouri. I shall read what Mr. Clay said on that occasion, and how the difficulty was obviated. It seems to me that by pursuing the same course all the difficulties in this case will be obviated.

The following extract was read by the Clerk:

"MR. CLAY said he really saw no difficulty in this business; and, before he sat down, should make a motion, with a view to put an end to this discussion. The House and Senate have, by a joint act, this day agreed that, in the event of an objection being made to the vote of Missouri, her vote should be counted hypothetically; that the whole number should be announced, including the vote of Missouri, and that the number should also be stated as it would be, the vote of Missouri being excluded; and the result not varying, that it should be declared that, in either case, the person having the largest number of votes was duly elected. The motive which operated on the joint committee in recommending this course, and on the two houses in adopting it, was to avoid the very difficulty into which the House was about to precipitate itself. It was an effort to provide, by previous arrangement, for the very contingency which has arisen. The moment the objection was made, in that instant the rule adopted this morning took effect. MR. C. said it therefore appeared to him, with very great deference to the course of the Presiding Officer of the Senate, that he ought to have gone on, and, after the votes had been summed up, to have made the annunciation as proposed in the joint resolution adopted this morning.

"The two houses ought not, in the opinion of MR. C., to have separated until they had consummated what had been stipulated for. He was now not willing to take up any proposition on this subject or any other, however unwilling he might have been to meet it at any other time. He was opposed to do so, because to do so is a violation of good faith between the two houses, as pledged by the arrangement of this morning. He had not a doubt, he said, that Missouri might be admitted into the Union in a variety of ways, and very possibly, on proper examination, the mode now proposed might be one of them, by the two houses, jointly or separately, giving her the exercise of a right which, as a State, would belong to her. The House, however, as well as the

Senate, had virtually determined to get round that question to-day, and to put an end to any controversy which might arise in respect to it, in the manner contemplated by the second resolution passed this morning. Mr. C. therefore moved that the subject now under consideration be laid on the table, in order to resume the business which had been interrupted by the retirement of the Senate."

Mr. BOYCE. The question was then taken on Mr. Clay's motion to lay the resolution on the table, and it was decided in the affirmative; and then, on motion of Mr. Clay, it was ordered that a message be sent to the Senate to inform that body that the House was ready to receive the Senate in the chamber of the House of Representatives, for the purpose of continuing the enumeration of the votes. I move, then, Mr. Speaker, first, that we adopt a resolution that the vote of Wisconsin be counted hypothetically; and, secondly, that a message be sent to the Senate inviting that body to come in and continue in convention until the announcement is made.

The SPEAKER. There is an appeal from the decision of the Chair pending, and the motion cannot now be received.

Mr. SHERMAN. I move to lay the resolution on the table.

Mr. FLORENCE. I submit a question of privilege.

The SPEAKER. The gentleman from Pennsylvania rises to a question of privilege.

Mr. FLORENCE. Mr. Speaker, my question of privilege is this: That in compliance with the requirements of the Constitution and the act of Congress in relation to the subject, the Senate and House of Representatives having assembled in joint convention, and having counted the votes, and the result having been duly pronounced and declared, there is nothing left but to adopt the resolution I submit, providing that a committee be appointed to inform James Buchanan, of Pennsylvania, that he has been elected President of the United States for the constitutional term, beginning on the 4th day of March proximo; and also to inform John C. Breckinridge, of Kentucky, that he has been elected Vice-President of the United States for the same period. The following is the resolution:

"The Senate and House of Representatives having, in obedience to the requirements of the Constitution, assembled in the House of Representatives to count the votes cast for President and Vice-President of the United States, and it appearing that James Buchanan, of Pennsylvania, having received a majority of the votes cast for President of the United States, which said result having been pronounced and declared; and it also appearing that John C. Breckinridge, of Kentucky, having received a majority of the votes cast for Vice-President of the United States, which said result having been pronounced and declared; and it appearing that James Buchanan and John C. Breckinridge having received more than the constitutional number of the votes cast, without any question or contest, objection or doubt:

"Resolved, That the Speaker of the House be requested to appoint a committee, to act in conjunction with a similar committee of the Senate, to wait upon James Buchanan, of Pennsylvania, and inform him he has been elected to be President of the United States, for the constitutional term of four years, commencing on the 4th day of March, 1857; and also to wait upon John C. Breckinridge, of Kentucky, and to inform him that he has been elected Vice-President of the United States, for the constitutional term of four years, commencing on the 4th day of March, 1857."

The SPEAKER. The resolution, in the opinion of the Chair, is not a question of privilege, and is not in order at this time.

Mr. FLORENCE. Very well, sir. It, however, occurred to my mind we had nothing else to do upon the subject but to pursue the course I have indicated.

Mr. CAMPBELL, of Ohio. I ask my colleague to withdraw the motion until I can have read for information a resolution which I propose to offer as a substitute.

Mr. SEWARD. I object.

The SPEAKER. The motion to lay upon the table is not received pending the question of order as to whether the resolution itself can be received.

Mr. SHERMAN. I move to lay the appeal from the decision of the Chair upon the table.

Mr. FLAGLER, (at twenty-five minutes to 4 o'clock p. m.) I move that the House do now adjourn.

The motion was not agreed to.

Mr. AKERS. I move that the House take a recess until 7 o'clock.

The SPEAKER. The motion is not in order.

Mr. CAMPBELL, of Ohio. I ask to have my proposition read.

Mr. SEWARD. I object.

Mr. DAVIS, of Maryland. I withdraw the appeal from the decision of the Chair.

Mr. CAMPBELL, of Ohio. I now propose as a substitute for the resolution of the gentleman from South Carolina the resolution which I send to the Chair.

Mr. SEWARD. I rise to a question of order. The resolution of the gentleman from South Carolina was offered as an original proposition. A substitute was proposed for that by the gentleman from Wisconsin. My point of order is that no other substitute can be in order.

The SPEAKER. The gentleman from Wisconsin moved to amend the original resolution: and the gentleman from Ohio moves an amendment to the amendment, which is in order.

The substitute offered by Mr. Campbell was then read, as follows:

"Whereas the members of this House are satisfied that, in pursuance of the Constitution and laws of the United States, James Buchanan, of Pennsylvania, has been elected President, and that John C. Breckinridge, of Kentucky, has been elected Vice-President, for the constitutional term of four years from the 4th of March, 1857; and whereas they are further satisfied that a majority of the people of Wisconsin cast their votes for John C. Frémont as President, and William L. Dayton for Vice-President, and that the electors, by act of Providence, failed to cast their votes upon the day fixed by law; and whereas the vote of the said State of Wisconsin cannot affect the result of the election: Therefore,

"Resolved, That when the Senate again return to the hall of the House of Representatives, under the provisions of the joint resolution, it is the opinion of this House that the vote of said State of Wisconsin ought to be counted."

Mr. LETCHER. I would suggest to the gentleman from Ohio that he add to his resolution, that a committee be appointed to notify the Senate.

Mr. CAMPBELL, of Ohio. The Senate left this hall of their own accord, and when they see fit to return, this resolution, if passed, carries with it the expression of the sense of this House. I am not in favor of sending any committee after that body. They left us, a co-ordinate and co-equal branch of the national legislature, of their own will, abruptly; and when they return here, I trust we will receive them and treat them with becoming courtesy.

No difficulty can grow out of the adoption of this resolution in future. It simply puts the facts of the case on record, and establishes no dangerous precedent.

Mr. GARNETT. I desire to know of the gentleman from Ohio, whether a single human being in the State of Wisconsin voted for John C. Frémont for President, or for William L. Dayton for Vice-President; and I wish to know, further, whether in the purview of the Constitution, and according to the facts, the people of that State did not cast their votes for electors of President, and not for President directly; and whether he means to have this House stultify itself by declaring, by this resolution, that to be a fact which is not a fact?

Mr. CAMPBELL, of Ohio. I will modify my resolution so as to meet the gentleman's peculiar views or abstractions. I will insert before "John C. Frémont" the words "electors favorable to the election of." And now, Mr. Speaker, having accepted the suggestion of the gentleman, and having modified my amendment, without going into any elaborate argument upon the abstruse principles of the law bearing upon this case, I will content myself by bringing the House, if I can, to a vote upon the proposition. I therefore move the previous question.

Mr. JONES, of Tennessee. I wish to appeal to the gentleman from Ohio to withdraw the call for the previous question, that I may make a few remarks, as I was one of the tellers on the part of the House, and have not had an opportunity to say a word upon this question.

Mr. CAMPBELL, of Ohio. The position of the gentleman from Tennessee is somewhat peculiar, he having been one of the tellers on the part of the House; and with the understanding that he will renew the call for the previous question, I will withdraw it for his benefit.

Mr. BOYCE. What has become of the resolution I sent to the Clerk's desk?

The SPEAKER. It was not received.

Mr. JONES, of Tennessee. Mr. Speaker, I think there is no necessity for any of this excitement or feeling on the present occasion.

Mr. DUNN. I ask my friend from Tennessee to permit a resolution I have prepared, and which, when in order, I will submit to be read for information.

Mr. JONES, of Tennessee. No further amendment is now in order.

Mr. SEWARD. And I object to the reading of the resolution.

Mr. JONES, of Tennessee. I have a very few remarks to make. I would say that I have no feeling on this occasion; nor, Mr. Speaker, do I see the reason for any feeling or excitement on the part of this House. The Senate and House of Representatives met here this morning, in pursuance of the Constitution and the law of the country, to open and count the votes cast for President and Vice-President of the United States. The President of the Senate, to whom the reports of the votes of the electoral colleges were made, opened them and handed them to the tellers appointed by the two houses. The tellers reported these votes to the two houses. When the vote of Wisconsin was handed to the tellers, I read it to the two houses. I read every word of the certificates attached to the vote of that State. It was dated December 4, 1856, the day after the day prescribed by law for the casting of that vote. The other certificates seemed to be in regular form.

When I made the report from the tellers to the two houses, I stated that of all the votes cast, James Buchanan, of Pennsylvania, had received for President of the United

States 174 votes; John C. Frémont, of California, including the vote of Wisconsin, 114 votes; and Millard Fillmore, 8 votes; and that John C. Breckinridge had received for Vice-President of the United States 174 votes; William L. Dayton, including the vote for Wisconsin, 114 votes; and Andrew J. Donelson, 8 votes.

Now, what is the plain provision of the Constitution? After directing that the returns of the electors shall be sealed, and sent to the President of the Senate, it then provides that the President of the Senate shall, in the presence of the Senate and the House of Representatives, open all the certificates, and the vote shall then be counted. Was not that done; and was not the Constitution complied with? It goes on then to say that the person having the greatest number of votes for President shall be President, if such number be a majority of the whole number of electors appointed. Is there a gentleman on this floor, or who was in the joint meeting of the two houses, who doubts or questions the fact that Mr. Buchanan has received a majority of all the electoral votes, and is, therefore, elected President of the United States for the next four years? Here is the law of 1792, which provides:

"That Congress shall be in session on the second Wednesday in February, 1793, and on the second Wednesday in February succeeding every meeting of the electors; and the said certificates, or so many of them as shall have been received, shall then be opened, the votes counted, and the persons who shall fill the offices of President and Vice-President of the United States ascertained and declared, agreeably to the Constitution."

All this has been complied with; the certificates were opened, the votes counted, and the tellers made their report. The Presiding Officer of the two houses reported the result, and declared that James Buchanan, of Pennsylvania, was duly elected President of the United States for the constitutional term of four years from the 4th of March next, and that John C. Breckinridge was duly elected Vice-President of the United States for the same period.

Mr. WELLS. I ask whether the gentleman from Tennessee knows why the electors of Wisconsin did not cast their votes on the proper day?

Mr. JONES, of Tennessee. That was stated in a certificate on the other side of the paper which contained a statement of the votes.

Mr. WELLS. I ask the gentleman whether the tellers read that to the convention?

Mr. JONES, of Tennessee. We did not read it to the convention.

Mr. WELLS. I call for the reading of that certificate.

Mr. JONES, of Tennessee. That certificate is, I presume, in the hands of the Senate, as all the certificates of votes were taken by that body. It is known (and I suppose there is no controversy about that) that the reason why they did not assemble on the prescribed day was in consequence of the terrific storm by which their progress was impeded, and which prevented them from reaching the seat of government in time to cast their votes on the day prescribed by law. That is the reason. It makes no sort of difference, it seems to me, whether or not we put down the votes of Wisconsin, and say they shall be counted. If they had cast their vote on the proper day, Mr. Frémont would have received it. It makes no sort of difference now whether any one of the votes cast for Mr. Frémont was legal or not, or whether they were all illegal. It does not change the result. Mr. Buchanan and Mr. Breckinridge received one hundred and seventy-four electoral votes. It is conceded by all that they were legal and constitutional; that they were cast on the day prescribed by law. Therefore, no exception can be taken to them.

Now, it is argued here that it is all-important to settle this question, for fear of the tremendous precedent we are about to set. Why, sir, is there a gentleman who believes (let us say what we will on this question) that at some future election a case can arise where (when the electors do not meet for one, two, three, or four days after the day prescribed by law, and when the votes of those States would affect or change the result) this would be held to be a precedent—a controlling and influencing precedent, to be interpreted in favor of the election of the gentleman who would have succeeded to the Presidency if the votes of the electors had been cast on the proper day? I presume not. I have nothing more to say on the subject; and, as I received the floor from the gentleman from Ohio on condition that I should renew the previous question, I do so.

Mr. SMITH, of Tennessee. I move to lay the whole subject on the table.

Mr. H. MARSHALL. On that motion I call for the yeas and nays.

Mr. KUNKEL (at 4 o'clock p. m.) moved that the House adjourn.

Mr. COBB, of Georgia, called for the yeas and nays.

The yeas and nays were ordered.

The question was taken; and it was decided in the negative—yeas 80, nays 94, as follows:

YEAS—Messrs. Akers, Albright, Allison, Ball, Barbour, Billingshurst, Bingham, Bishop, Bliss, Branch, Brenton, Broom, Buffinton, Burlingame, Clawson, Clingman, Colfax, Comins, Cox, Cumbback, Henry Winter Davis, Timothy Davis, Dick, Dickson, Dodd, Durfee, Etheridge, Flagler, Henry M. Fuller, Galloway, Robert B. Hall, Harlan, Harri-

son, Herbert, Holloway, Thomas R. Horton, Valentine B. Horton, Howard, George W. Jones, King, Knapp, Knox, Knukel, Leiter, McCarty, Morgan, Morrill, Murray, Norton, Andrew Oliver, Parker, Pelton, Perry, Pettit, Powell, Pringle, Purviance, Ready, Ricand, Sabin, Sage, Sapp, Savage, Sherman, Samuel A. Smith, Spinner, Tappan, Todd, Tyson, Wade, Wakeman, Waldron, Cadwalader C. Washburne, Elihu B. Washburne, Watkins, Watson, Wood, Woodworth, and Daniel B. Wright—80.

NAYS—Messrs. Aiken, Allen, Barksdale, Hendley S. Bennett, Benson, Bocoock, Boyce, Burnett, John P. Campbell, Lewis D. Campbell, Canthers, Chaffee, Ezra Clark, Howell Cobb, Williamson R. W. Cobb, Cragin, Craige, Crawford, Danrell, Davidson, Day, Dean, Dowdell, Dunn, Emrie, Enstis, Faulkner, Florence, Foster, Thomas J. D. Fuller, Garnett, Goode, Greenwood, Augustus Hall, J. Morrison Harris, Haven, Hickman, Hodges, Hoffman, Houston, Jewett, J. Glancy Jones, Kelly, Kidwell, Knight, Knowlton, Lake, Letcher, Lumpkin, Humphrey Marshall, Samuel S. Marshall, Maxwell, McMullen, McQueen, Smith Miller, Millson, Millward, Moore, Mott, Nichols, Mordecai Oliver, Orr, Packer, Paine, Peck, Pike, Puryear, Quitman, Reade, Roberts, Ruffin, Scott, Seward, Shorter, William Smith, Sneed, Stanton, Stewart, Stranahan, Talbott, Taylor, Thorington, Trafton, Trippe, Valk, Walker, Warner, Israel Washburn, Wells, Wheeler, Williams, Winslow, Woodruff, and John V. Wright—94.

So the House refused to adjourn.

Pending the call,

Mr. CAMPBELL, of Kentucky, stated that his colleague, Mr. Underwood, was detained from the House by indisposition.

Mr. COLFAX moved a call of the House.

Mr. WRIGHT, of Mississippi, called for the yeas and nays.

And then, on motion of Mr. Washburne, of Illinois, (at four o'clock and twenty minutes,) the House adjourned.

IN SENATE, February 11, 1857.

At ten minutes past 2 o'clock the Senate returned to their chamber, and the President *pro tempore* resumed the chair, and called the Senate to order.

Mr. BIGLER. Mr. President, the tellers on the part of the Senate and House of Representatives to count the presidential votes have instructed me to make a report. Before delivering the report to the Secretary to be read, I wish to allude to the difficulty which occurred in convention in reference to the vote of the State of Wisconsin.

Mr. SEWARD. Will the honorable Senator allow me to interrupt him? I think he used the word "convention." I think it is not found in the Constitution or any law of the United States, and as this is an important proceeding, I should like to guard against any misapprehension by way of precedent.

Mr. BIGLER. Then I will say that the two houses assembled in the hall of the House of Representatives, which is the form prescribed. I was about remarking, Mr. President, that this difficulty is not entirely new. There have been similar cases; but they seem to have been anticipated and provided for in advance.

Mr. STUART. I wish to make a suggestion to the Senator, of which I think he will see the propriety. It is that he make such report as he intends to make first, and then make any explanation afterward.

Mr. BIGLER. I was about making an explanation of the peculiar character of the report.

Several SENATORS. Let us hear the report.

The Secretary read it, as follows:

"The tellers on the part of the two houses report that they have counted the votes of all the States cast for President and Vice-President of the United States of America for the constitutional term of four years from the 4th day of March, 1857, and find that on the first Wednesday in December, 1856, the electors of all the States assembled in their respective States, being the day prescribed by law for the assembling of the electors, except the electors for the State of Wisconsin; that of those who assembled and cast their votes on the said first Wednesday of December, 1856, James Buchanan, of the State of Pennsylvania, received 174 votes for President of the United States; John C. Fremont, of California, received 109 votes; and Millard Fillmore received 8 votes for the same office: that for Vice-President of the United States, John C. Breckinridge, of Kentucky, received 174 votes; William L. Dayton, of New Jersey, received 109 votes; and Andrew J. Donelson, of Tennessee, received 8 votes: that from the report of the electors of the State of Wisconsin, it appears that the electors for that State assembled in Madison, the capital of that State, on the 4th of December, 1856, the day after the day prescribed for the meeting of the electors for President and Vice-President of the United States, and so assembled on that day did cast the electoral votes of that State, five for John C. Fremont, of California, for President, and five for William L. Dayton, of New Jersey, for Vice-President of the United States.

"WILLIAM BIGLER,

"Teller on the part of the Senate.

"GEORGE W. JONES, of Tennessee,

"WILLIAM A. HOWARD, of Michigan,

"Tellers on the part of the House of Representatives."

Mr. HUNTER. The Senator from Pennsylvania will allow me to make a suggestion: This whole matter is new; no difficulty of this sort ever occurred before when the two houses were sitting together. Heretofore similar difficulties have been provided for, and provided for by the committee proposing a resolution simply declaring that, no matter how the vote of the disputed State was counted, it should not affect the general result. It seems to me, and I suggest it for the consideration of the teller in regard to the action which he may propose, that the best way would be for the Senate to propose to the House of Representatives that the committee which has been appointed on this subject should confer in regard to the report they have made. I have no doubt they will agree to make some such report as was made in the case of Michigan and Missouri; and when the two committees have agreed that that shall be made, let us go back in joint convention, and settle it as it was settled in the case of Michigan and Missouri. I move, then, that the committee which has been heretofore appointed by the Chair on this subject—I forget its title—be instructed to confer with the same committee on the part of the House of Representatives in regard to the report they shall make.

Mr. SEWARD. And report to the Senate?

Mr. HUNTER. Yes, sir.

Mr. SEWARD. I second that motion.

The PRESIDENT *pro tempore*. The Chair will state that, four years ago, upon a like occasion, it appears, from the Journal of the Senate, that the chairman of the committee appointed jointly with that of the House of Representatives to prescribe the mode of counting the votes, &c., made a report to the Senate after the votes had been counted, so that the functions of the committee are presumed to be still continued.

The Chair will further state to the Senate, as the result of the action in the hall of the House of Representatives in counting the votes, that the duty was devolved upon the Presiding Officer there, by the concurrent order of the two houses, to declare the result of the vote as delivered to him by the tellers. That declaration did not involve, in the opinion of the Chair, the validity or the invalidity of the vote of the State of Wisconsin. The declaration made by the Chair in the presence of the two houses as to the gentleman who had been elected President was written down, and is in these words: "That James Buchanan, of the State of Pennsylvania, having the greatest number of votes for President, and that number being a majority of the whole number of electors, has been duly elected." Whether the vote of the State of Wisconsin be included or not, the declaration made by the Presiding Officer that Mr. Buchanan had a majority of the votes, and that that majority was a majority of the whole number of the electoral votes, was strictly conformable to the fact.

Mr. NOURSE. I wish to suggest to the gentleman from Virginia a difficulty in my mind, to see if he can obviate it. This is a point which becomes important when the vote in question is going to decide the result, but until that occasion comes it is unimportant. It is important now as a precedent, because such a case as that may occur, and then it would be vastly important. Now, if the convention, so to call it, of the two houses is not to decide whether the vote of a certain State is to be counted or not, who is to decide it? It must be decided by some body; and if the two houses separate and do not agree, what is to be the result, and what is to come of it? If the convention assembled have a right to settle the question they can settle it undoubtedly; but if it depends on the concurrent action of the two houses, why may not a result be defeated altogether?

Mr. BUTLER. I feel a little concerned about this question, I confess, as one of those who think the States ought to maintain their relative influence under the Constitution as States, and the representatives as representatives. Now, sir, I dispute the right, out and out, of ascertaining who is elected President, and who is not elected President, except by the rule of addition. Whether the return from Wisconsin forms a part of the vote or not, I want to know; because if this circumstance had happened to fall on New York or Pennsylvania, there might have been a different result. Mind—I wish to be as emphatic as I can on this subject—if this convention, as it is called, in which the Senate is a part only, can assume the jurisdiction of saying how votes shall be counted, (and that is what they have assumed to do in some measure,) I presume they can make a President of the United States without an election, by simply saying what votes shall be counted and what not counted; and the Presidency of the United States would be virtually committed to the numerical strength of the House of Representatives, without what I consider the controlling power of the representatives of the States. That is my opinion. I do not say it in any other spirit than an abstract one. I have no feeling on this subject, for it makes no difference in the result, and it is fortunate that it is so. But I shall insist upon it, in adding up the votes, that you shall say—and I differ from the Chair in that respect—that Mr. Fremont received such a number and no more, and you shall say that Mr. Buchanan received such a number and no more and no less. That is the mode of ascertaining who has the greatest number, and what are the relative numbers of the two. I never will consent, Mr. President, that this Wisconsin vote shall be counted.

MR. SEWARD. Will the honorable Senator from South Carolina allow me to interrupt him for one moment?

MR. BUTLER. Certainly.

MR. SEWARD. I barely wish to inquire of him, and of Senators generally, whether it will not be thought advisable that the motion of the honorable Senator from Virginia, which is intended to bring this matter to a close, shall be passed—which I believe does not involve the point now in debate—and then we may have time to discuss the question.

MR. BUTLER. I do not wish to debate it; but I am not going to let any question of this kind pass by because it is considered necessary to economize time.

MR. SEWARD. Certainly not; but I suggest that we adopt this motion so as to bring the matter to a close.

MR. BUTLER. I have not concluded, but I yield to the suggestion of the Senator from New York. I believe it is made in sincerity, and perhaps it is rather a wise suggestion than otherwise, to let the vote be taken on the motion of the Senator from Virginia. I do not, however, mean to give up, on any notion of economizing time, or anything of that kind, my right to express my voice on a great cardinal question, affecting the organization of this Government.

MR. STUART. It is to the question of the motion to raise this committee that I ask the attention of the Senate for a few minutes. I think, and I shall submit the reason why I think so, the question should not be thus considered. The Constitution of the United States has been read several times to-day, and is undoubtedly familiar to every gentleman present. I call the attention of the Senate to a single clause of the law made in pursuance of it, and desire to submit my views against this proposition. The fifth section of the law of 1792 provides:

“That Congress shall be in session on the second Wednesday in February, 1793, and on the second Wednesday in February succeeding every meeting of the electors; and the said certificates, or so many of them as shall have been received, shall then be opened, the votes counted, and the persons who shall fill the offices of President and Vice President ascertained and declared agreeably to the Constitution.”

Now, sir, I submit that, in obedience to the Constitution and law of the United States, the two houses met together—not as a convention, for no such body is known to the Constitution or the law of the United States—for the purpose of having in their presence the votes which had been cast by the electors for President and Vice President counted, and the result, in the language of the law, ascertained and declared. Those votes were counted; the Presiding Officer of the Senate ascertained the count, and declared the result. That is the end of the subject.

The reason why I am against this proposition is this: precedents are dangerous things—very dangerous things. I object to going on now with somewhat of a suppositions case, and taking a procedure, on the part of Congress, that shall stand as a precedent hereafter. It is quite easy, and I submit to the consideration of Senators that it is somewhat indispensable, that the Congress of the United States should further declare, by law, that electoral votes not cast on the day required by law shall not be counted. It is competent for Congress to do that. It is perfectly competent for Congress, who have declared that the electors shall meet in their respective States on the first Monday in December to cast their votes, to follow it up with the declaration that, unless they be then cast, those votes shall not be counted.

But, Mr. President, when you leave the clear functions of Congress under the Constitution of the United States, and depart from their discharge in the manner prescribed in the Constitution, the Senate, as a separate body, representing States and voting by States, and undertake to say that a question raised in the two houses when they are convened for the purpose of hearing the result, may be decided by a vote of the two together, or that the body thus assembled can decide anything, you raise the question, if they can, how can they decide it? The Constitution is silent as to how those men, thus assembled, shall vote. The law of the United States is silent as to how they shall vote. The weight of the Senate representing States, is swallowed up by the weight of the House of Representatives representing population.

It seems to me that what was said in the hall of the House of Representatives in respect to the tellers signing the statement, is entirely superfluous. As a matter of form, it may be very well, but it is a matter of form without substance. It is not necessary that they should make any formal statement at all. There is nothing in the law, nothing in the Constitution, that requires it. When the tellers, by their organ, reported to the Presiding Officer: of that body, being the President of the Senate, that they had counted the votes, and that this was the result, their duties were ended; they had no further power, and the Presiding Officer was right in announcing the result.

Then the question returns—which will become an interesting one at some time or other, perhaps—whether the vote of the State of Wisconsin shall be counted. Upon the present law, made in obedience to the Constitution, one of two constructions it seems to me is inevitable. The Constitution provides how the electoral votes shall be received, to whom they shall be delivered, and how they shall be kept. The same

officer to whom they are delivered, the President of the Senate, retains possession of them, and opens them in the presence of the two houses. The Constitution declares that he shall open them in the presence of the two houses. The law follows up the language of the Constitution, declaring that they shall be counted and the result declared.

I submit that whenever this matter is examined—and I submit it now only as a question having some relation to this subject—one of two things will be ascertained: either the Presiding Officer is bound to count all the votes that are certified to him by the State authorities, or else the Presiding Officer, under the present law, and he alone, has a right to decide whether he will count or reject them. In my humble judgment that is the construction of the Constitution and law as they now stand. In either event, it will be conceded, I think, by every Senator, that it is a dangerous power. It is dangerous to leave it to the certifying officers or the electors themselves, who make the certificate on the part of the States; it is dangerous to leave it in the hands of the Presiding Officer of the Senate; but in one or the other it rests; and I submit that to undertake to say that it rests in the two houses assembled together in mass to decide such a question, would but fall but little short of a revolution.

Therefore, believing that the matter has been ended, so far as the duties devolved on Congress by the Constitution and laws of the United States are concerned, I express the hope that no further action will be taken which may stand in the way hereafter as a precedent, unless it be action in the shape of additional legislation to define precisely what shall be done in a case of this kind.

Mr. TOOMBS. Mr. President, I protested against the action of the Presiding Officer of this body in the other house; because, as I understood it, the Presiding Officer counted the vote of Wisconsin, announced it in his place, and assumed and exercised the right of declaring that A had received so many votes, and B so many, and of announcing who were elected President and Vice-President of the United States. These are the facts. I understood distinctly this Presiding Officer to say that James Buchanan had 174 votes, John C. Frémont 114, and Millard Fillmore 8 votes; and then he made the announcement read a few minutes ago by the Chair. The Chair supposed, under the clause of the Constitution which he read, that he and the tellers had the right to determine what were legal votes. That I denied; that I protested against.

The question is not whether a joint convention of the two bodies, as it is termed, can determine it. They cannot, in my judgment; but that the Presiding Officer and the tellers cannot, I am well assured. When we are called upon to see these votes counted, it becomes our first duty to know what are the votes to be counted. Suppose there had been presented ten votes from Nicaragua, and the Chair and the three tellers had said, "These shall be counted"—suppose, as might often happen, there was a double return from some State, as in the New Jersey case, shall the President of the United States be made by the Presiding Officer and the tellers? Is not that the result? No one can be heard there, it appears, but the Presiding Officer and the tellers. I deny that. I say it is not law. When you count the votes, it belongs to the Senate and House of Representatives of the United States to determine what are the votes. I denied then, and I deny now, the authority of the Presiding Officer of this body, with two tellers of the other house and one of this, to settle that question. I entered my protest there, and I renew it here. It is a question to be determined by Congress. The Constitution has made these two bodies judges; and the idea of the Senator from Michigan, that you are to declare the result which, according to law, makes the President, and try the question afterward, is like trying a man after he is executed.

Mr. STUART. I beg the Senator's pardon—that was not my proposition.

Mr. TOOMBS. Very well. I state mine, which opposes all other ideas; and it is, that it is our duty to count the votes, and to decide what are votes. This is a necessary duty devolved on the Senate and the House of Representatives. They must do it in their separate capacities, I think; but they alone can determine it, and not the President of the Senate and the tellers of the two houses. That is the point I made there, and I renew it here. It is a high privilege, a dangerous one to the liberties and Constitution of this country—one not conferred on these persons by the Constitution or the law. The circumstances of the case necessarily involve the right and the duty of the two branches of the legislature, the Senate and the House of Representatives, to determine what are the votes to be counted; and the President of the Senate can only announce those to be votes which are thus decided by competent authority; and any attempt on the part of the Presiding Officer to declare what votes he may deem to be legal, or to decide what are the votes, no matter whether it affects the result or not, or even to say the question shall not be decided, however highly I respect the Chair, I submit is not a power given to the Presiding Officer by the Constitution and the laws.

The PRESIDENT *pro tempore*. The Presiding Officer desires to say—as he thought he had distinctly stated whilst presiding over the two houses in the chamber of the House of Representatives—that the conception of the Senator from Georgia is entirely erroneous, in the judgment of the Presiding Officer. The Presiding Officer did not undertake to decide whether the vote of the State of Wisconsin was a good vote or a bad

vote. The Presiding Officer, upon that matter, did no more than recite the fact which was reported to him by the tellers, pursuant to the concurrent order of the two houses. The Presiding Officer did no more than announce that the vote of Wisconsin had been given to John C. Frémont. Whether it was a good vote or a bad vote, he did not undertake to decide. The Presiding Officer announced further that James Buchanan had a majority of all the votes given, and that such a majority was a majority of the whole electoral vote; and he declared, as his duty required him to do, that James Buchanan was thereby elected President of the United States. If the result could have been affected by the collateral fact reported by the tellers, that the vote of the State of Wisconsin had been given on a day different from that prescribed by law, the Presiding Officer would have considered it his duty to have reported, as the state of the vote, that whether a majority of the whole electoral votes had been given to James Buchanan would depend on canvassing the votes—a duty that he did not assume. But inasmuch as it appeared clearly, from the state of the vote, that whether the vote of the State of Wisconsin was counted or not, the result of the election remained unaffected, he announced, as he considered his duty required him to announce, that James Buchanan had a majority of all the votes cast, and that such majority was a majority of the whole number of the electoral votes. He disclaims having assumed on himself any authority to determine whether that vote or any other vote was a good or a bad vote.

Mr. BIGLER. Mr. President—

Mr. TOOMBS. Did not the Chair count it? That involves the question.

Mr. BUTLER. I hope my friend from Georgia will allow me to say a word by way of explanation.

The PRESIDENT *pro tempore*. The Senator from Pennsylvania is entitled to the floor.

Mr. BIGLER. I will give way.

Mr. BUTLER. I think the conclusion of the Chair is right, that the mode in which the vote is to be announced to the country is the ordinary mode—that A B received forty-eight votes or fifty-five votes, and C D sixty votes; and these being a majority of so many, C D has been elected. That is the common way of doing it. The Chair is entirely right in its statement, and I do not undertake to question the decision, as far as regards the result. I should, however, question very much the propriety of any course that would not show to the country, and to these two bodies—both responsible bodies—the Senate and the House of Representatives, the exact result. I think the tellers should have reported exactly as the Secretary here reports, upon counting out the votes, that A B received so many, C D so many, and the result thereof is that C D is elected. That is the common course of procedure in every parliamentary body. But I hope we shall proceed with the motion of the Senator from Virginia, which, however, is objected to by the Senator from Michigan, who takes the ground that the Chair can announce, of its own mere will and motion, without any one else knowing it, who is elected. I do not agree to that.

Mr. STUART. That is not what I said.

Mr. BUTLER. What did you say?

Mr. STUART. What I undertook to say—and I thought I rendered myself tolerably clear—was, that as the Constitution and law of the United States now stand, the duty to be performed to-day is a mere counting of the votes certified, and that one of two things is the construction: either that the Presiding Officer must count all the votes certified to him, or if they have not been given according to law, in his opinion, he objects to them. As the law now stands, the two houses thus assembled have nothing to do with the question at all. The Constitution has devolved that duty on the Presiding Officer of the Senate, to count the votes in the presence of the two houses.

Mr. BUTLER. I have great respect for the President of the Senate, and I would trust him, upon any question of controversy where we had to make a Chief Magistrate, to hoist the flag under which we were to march: but I will trust no man to determine for me who shall be President of the United States on his arbitrary decision.

Mr. STUART. That is precisely what I said.

Mr. BUTLER. Let him add up the votes and announce the result to me. I am one of the judges, or why do you call me there? I would trust you, sir; but I tell the Senator from Michigan, and I tell all others who choose to delegate to any one man such power in a matter of this kind, where there is dispute I would trust it to no man. Suppose there were two certificates from one State, is he to be the judge? I assure you, sir, it is a power which, in time of temptation—and God knows when the time of temptation may not arrive for some one to desire to be a President to rule this country—I would not like to trust to many people.

Mr. STUART. That is precisely what I said, that it was a dangerous power to be intrusted to the Presiding Officer in either event. I beg the Senator's pardon; he must not undertake to assume from what I said to the Senate that I was submitting my views of what ought to be the case. Very far from it. I was submitting my views of what the law is: and I said that I deemed it imperative on Congress, in the mode pointed out by the Constitution, by legislation, to determine definitely what should be done in this case. But, sir, the Constitution has devolved upon the Presiding Officer

the duty of receiving these votes, of keeping them, of opening them in the presence of the two houses, of counting them, and declaring the result. What votes he shall count it is entirely competent for Congress by law to declare.

Mr. BUTLER. I go much further than that, sir. I do not say that it requires previous legislation. I say we have jurisdiction at the time, without a previous law to regulate a matter of this kind. Can a President be made against the whole tenor of the Constitution, and against what may be the wishes of the different States, by the Presiding Officer of the Senate counting what votes he may choose? What is the use of Mr. Dickens, our worthy Secretary, reading the thirteen votes of Massachusetts, the thirty-five of New York, and so on; and what is the use of putting them down, unless I can verify the facts as one of the judges? As I understand this subject, I assure you it is one of those things upon which I would stand here a long time before yielding the ninth part of a hair. The Senate of the United States is called into the other house as a corporate body, an imposing corporate body, to be a witness to the election of the Chief Magistrate of this country, and to see that the votes are counted fairly; and, sir, if the votes are not counted fairly, I protest against it.

Mr. BIGLER obtained the floor.

Mr. ADAMS. Allow me to make an explanation as to a matter of fact.

Mr. BIGLER. I have only a few words to say, but I yield the floor.

Mr. ADAMS. It is only in relation to a matter of fact, which seems to have been overlooked, that I desire to call attention. I do not understand that the President of the Senate determined or counted the vote from Wisconsin. I wish to call the attention of Senators to the report of the joint committee. The committee reported that on the day of election all the States gave their votes according to the facts as stated, with the exception of Wisconsin, and that on a subsequent day Wisconsin voted for Mr. Frémont. That fact was reported by the committee; they could not have done otherwise. The Presiding Officer announced the final result, but did not either directly or indirectly intimate that he had counted that vote. That fact I wished to have brought to the notice of the Senate.

Mr. BIGLER. The remarks of the Senator from Mississippi have, to some extent, supplied what I intended to say. I have felt unwilling to allow the remarks of the Senator from Georgia to go to the country without some explanation on the part of the tellers. His remarks are very well calculated to make the impression that the tellers in this case had attempted some usurpation—that they had attempted to go out of the ordinary performance of their duty. Those tellers regarded their duty as sheerly ministerial—not discretionary at all. What duty had the tellers to perform? To examine the returns and report the facts—nothing more nor less. To have done less than that would have been to disregard duty. They could not know in advance what the facts would be on the face of the papers. We reported the facts as they appeared on the face of the returns; and they are that, on the day prescribed by law, all the votes were cast, except as to the State of Wisconsin, and that vote was cast on the 4th instead of on the 3d of December. The tellers have simply reported the facts. They have stated those facts in the report which they make here. The Senator from Michigan will remember, (for I believe he took the position, that after the result was announced the certificate of the tellers could not set forth the facts,) when the returns were read particular attention was called to this difficulty and discrepancy —

Mr. STUART. The Senator is mistaken. I took the ground that there was no law making a certificate of the tellers necessary at all, and that in point of substance it was of no consequence whether they ever made any. That was my position.

Mr. BIGLER. It is a report—call it a certificate or not. In cases similar, Mr. President, to which I was about to refer when we first came into the chamber, one occurring in Michigan and another in Missouri, the difficulty had been anticipated, and the report of the tellers was accordingly. The joint resolution of the two houses adopted prior to counting the vote in those cases provided for the difficulty. Here it was not anticipated; no provision was made for it; and the tellers decided in their report simply to state the facts as they are. Now I ask my friend from Georgia if there is any usurpation in that? What else could we do? Wherein have the tellers attempted to usurp power, or to state anything else than simply the facts as they appear on the face of the papers?

Mr. WILSON. Will the Senator from Pennsylvania allow me to ask him a question?

Mr. BIGLER. Certainly.

Mr. WILSON. I should like to ask the Senator how it happens that after the tellers had counted the votes, and had made the announcement to the convention that Mr. Frémont received one hundred and fourteen votes, including the vote of Wisconsin, and the President of the convention read their precise report, using their exact language, these tellers, after having thus discharged their duty, and what seems to me their whole duty, make up and bring in another report here?

Mr. BIGLER. I made the whole explanation a moment ago, and it was this: that when the returns of the State of Wisconsin were read, special attention was called to them; the additions of the votes were announced of course, just as they stood after we

had added them all up; but is that a reason why the fact should not be stated on the report, that as to the State of Wisconsin the vote was not cast on the day prescribed by law? I have explained why this was done. If it had been anticipated, the joint resolution of the two houses would have provided for it, and the tellers would have had no occasion to refer to it in the manner they have done.

Mr. HUNTER. Mr. President, I submitted this motion, and I should like to say a word in regard to it. My object was to enable the two houses to do, after the difficulty had occurred, what had been done on two former occasions to avoid a difficulty of precisely the same nature. When heretofore there was a difficulty in regard to counting the vote of the State of Michigan, and another in regard to the vote of the State of Missouri, the joint committees which had been appointed by the two houses to regulate the matter proposed a report, by which it should be declared that an election had been accomplished, whether they counted the votes of those States or not. Now the same state of facts exists here. We have no means of settling this dispute between the two houses as to whether the vote of Wisconsin ought to be counted or not, and happily for the country it is not material for us to settle it. I think difficulties of this kind are matters which should be remedied by legislation to be applied to future cases. Fortunately, we are enabled to settle this election without attempting to arrive at any conclusion on this point in a joint meeting of the two houses, or by an interchange of resolutions between them. I propose, therefore, that we shall settle this matter as similar matters have been settled before, and that we shall instruct the joint committee of the Senate, heretofore appointed on this subject, to confer with the joint committee of the House in regard to the report which they are to make on this question.

But the Senator from Michigan thinks this is unnecessary, because, in his opinion, the action of the President of the Senate in the joint meeting of the two houses has settled and concluded the whole question. That may be his opinion, but I apprehend it will not be the opinion of the House of Representatives, nor do I think it will be the opinion of a majority of the Senate. It is important so to act as to satisfy the House of Representatives of the propriety of the mode of action, and to secure their concurrence in it. I believe they will agree to settle this matter as it has heretofore been settled on two occasions, and then some other occasion in the next four years, if they should think proper to do so, to resort to legislation for the purpose of remedying the difficulty.

Nor do I understand that the Chair claimed to have the right to preclude the two houses by any declaration of the facts. It cannot be so, because the President of the Senate and of every parliamentary body is only the organ of that body, subject to its control, subject to its direction; and he could not therefore assume to act, and did not, as I understand the Chair to have said, independently of the House which he represented. But all these are questions which it is not now necessary to raise. What we desire to do is to settle this difficulty—to settle it to the satisfaction of the two houses, to the quiet of the country, and to dispose of it to-day. What will enable us to do this so readily as a resort to the very plan which has accomplished that object on two occasions heretofore? I move, therefore, that the joint committee of the Senate be instructed to confer with the joint committee of the House on this subject.

Mr. DOUGLAS. On looking into the law and the Constitution since we have returned to our chamber, I have arrived at the conclusion that all has been done that the law requires to be done to make the action complete. We assembled in the hall of the House of Representatives in pursuance of the law. The law has been complied with in all things. The fact that the tellers have not made a report is of no consequence; first, for the law does not provide for tellers. The tellers appeared in this transaction only in pursuance of the joint resolution of the two houses, and those tellers have done all that the joint resolution required. It was in these words:

"That one person be appointed teller on the part of the Senate, and two on the part of the House of Representatives, to make a list of the votes as they shall be declared; that the result shall be delivered to the President of the Senate *pro tempore*, who shall announce the state of the vote and the persons elected to the two houses as aforesaid, which shall be deemed a declaration of the persons elected President and Vice-President of the United States, and, together with the list of the votes, be entered on the journals of the two houses."

The tellers did deliver to the Presiding Officer the result of the count, as provided in this resolution. They read it first to the two houses, and then formally delivered it to the Presiding Officer. The Presiding Officer read over that list distinctly, and thereupon announced that James Buchanan was duly elected President of the United States, and John C. Breckinridge duly elected Vice-President. Hence, so far as the legality of the election is concerned, so far as any compliance or any non-compliance with the law of 1792 is concerned, it has been complied with; and there is an end of the controversy so far as any duties are imposed upon us to be performed this day under the Constitution and law.

Then, sir, there is one point of irregularity, in my opinion, to which it is well for us

to turn our attention on this occasion—not because anything more is necessary to be done at this time with regard to the late election, but with reference to preventing confusion in the future. In my opinion, Wisconsin ought not to have been entered on the tellers' list for this simple reason, that the two houses assembled to hear announced the votes of all the States of this Union which assembled, by their electors, on the 3d day of December last, and cast their votes for President and Vice-President of the United States. You had no right to receive any vote, or any return, except of an election on the 3d day of December last, for that was the day appointed by law. I submit that, when twelve o'clock at night of the 3d day of December last arrived, there were no presidential electors in Wisconsin. The fact appeared on the face of the certificate that they assembled on the 4th day of December, at three o'clock in the afternoon. Those electors had been chosen by a law which continued them in office to the night of the 3d of December, when their office as electors expired. These individuals were not electors of the State of Wisconsin on the 4th day of December. They had no more authority to cast the vote of Wisconsin on that day than any other five individuals in that State had, or than had the five individuals who were electors four years before. They were out of office; and they had no power to cast the vote of the State. I think it was an irregularity to place the State of Wisconsin on the list; but, inasmuch as it has been put there with a statement of the fact that it was cast on the day afterward, inasmuch as it has been duly announced in the report by the tellers and the Presiding Officer that James Buchanan received a majority of all the votes, and as that majority was a majority of all the electors chosen, I think the Constitution and law have been complied with. The only irregularity is that the name of Wisconsin is unnecessarily on the list.

In this state of the case, I am inclined to arrive at the conclusion which my friend from Virginia suggests, that we had better let this committee make a report in accordance with the precedents that have been alluded to in the Michigan and Missouri cases. It is immaterial whether Wisconsin was counted or not; the result is the same, and consequently the duty has been complied with. I think we have had sufficient to warn us of the necessity of legislation with reference to the future; but our duty for this day has been complied with without any further steps being taken; but, as a matter of form, I will close it up in the manner indicated by the Senator from Virginia.

MR. REID. Mr. President, I suppose every member of the Senate must be perfectly satisfied that the course pursued by the President of the Senate was from the purest and highest consideration. I understood the whole difficulty to occur while the Senate was in the Representatives' Hall, upon this single, isolated point: it was apprehended that at some future time the question involved in the vote of Wisconsin to-day might determine who should be President of the United States; and the protest made there by Senators and Representatives was merely for the purpose of declaring, as their opinion, that the settling of the question as to the validity of the votes cast for President and Vice-President did not rest alone with the President of the Senate of the United States. I did not understand the President of the Senate to settle that the vote of Wisconsin was a valid vote—that question was left out entirely—but that the election was made whether that vote were legal or void.

The difficulty arose upon the ground which I have stated, that if our action to-day was to be regarded as a precedent hereafter, the count of the President of the Senate must be considered as conclusive. The Constitution requires that "the President of the Senate shall, in presence of the Senate and House of Representatives, open all the certificates, and the votes shall then be counted." The President of the Senate does not open the votes in the presence of the two houses in their individual characters; but the two houses are assembled in their character as a Senate and House of Representatives under the Constitution; and I infer that the counting of those votes is to be directed and controlled by the two houses. It has often happened that the Vice-President is a candidate for re-election; and we can scarcely suppose that the Constitution intended to confer on him the power of declaring himself elected by the votes he may count, without an appeal from his decision. The framers of the Constitution seemed to contemplate, if there was any power given to revise at all a contested election of President, that it should be jointly in the Senate and House of Representatives. It is true, the Constitution of the United States confers on the House of Representatives alone the power to make the election in the event of none having been made by the electors; but it does not confer on the House of Representatives alone the power of settling a contested election for President. Nor, in my opinion, does it confer on the President of the Senate alone the right of declaring that vote when either of the two houses may dissent.

Then I think the course that should be pursued in the practice of the two houses is this: When they are assembled together, it is the duty of the President of the Senate to open the votes; but whenever it shall be suggested by any member of either branch of Congress that the returns are informal, or that they require to be investigated, the two houses should retire in their separate capacity to determine such questions for themselves, as we have done to-day.

That the vote of Wisconsin is illegal, and ought not to be counted, is most clear: "The Congress may determine the time of choosing the electors, and the day on which they shall give their votes; which day shall be the same throughout the United States." This is a constitutional requirement—that the votes shall be given on the same day throughout all the United States. But this question is not material here. The only apprehension is, that our action now may be regarded hereafter as a precedent in settling this point. I think it is perfectly right for the Senate, if it chooses, to waive the decision of the question in regard to the legality of the vote, because it is not material here; but the point being suggested by a member of either branch of Congress, I think it is the duty of the two houses to investigate the question. I should be perfectly willing—and perhaps it may be the better practice always to pursue—to let the determination of such questions alone until a time shall arrive making it necessary to decide them. I think it would be better to postpone this question until the time shall arise when it is indispensably necessary that it should be settled.

MR. SEWARD. I do not object to this debate, because I am desirous to have this resolution passed and the question settled; but inasmuch as I find the opinion is quite generally expressed here, and I have heard it expressed by members of the House of Representatives also, that the vote of Wisconsin could not be properly counted under the circumstances, I rise to express my dissent from that proposition—not to declare the opinion that it ought to be counted, because I have not made up my mind to that; but certainly I have not made up my mind to the other conclusion. I wish to congratulate Congress, and the Senate, and the country, that it is unnecessary to pass on that question now. Sir, it would seem to be a very different case if the vote which was proposed to be rejected, or was questioned, was a vote which determined the election of a President and a Vice-President of the United States, and it would then be found to be a very dangerous thing for either the Presiding Officer, or the Senate, or the House of Representatives, or both houses concurring, to undertake to decide that a presidential election was determined in one way, when it involved the exclusion of the votes of one of the States, which exclusion was the result of an accidental delay produced by the interposition of Providence preventing the vote being cast at the prescribed time. But, sir, I pass it by, rejoicing that it is not necessary to decide it; and now I come to the present state of the case.

I agree with the honorable Senator from Michigan, [Mr. Stuart,] and I agree with the honorable Senator from Illinois, [Mr. Douglas,] that all has been done which the Constitution and laws require to be done to determine who has been elected President and Vice-President of the United States; and I have a strong belief that James Buchanan will be the President for the next four years; and he will be, whether we do anything more than we have already done, or whether we stop where we are, or undertake to undo what we have done. But while that is my opinion, and while that is their opinion, it is known to us all that a doubt arises—a misunderstanding exists in both houses of Congress, whether the President of the Senate, acting, as I hold, as the organ of the Senate, has not passed upon the question, and counted the votes from the State of Wisconsin, and whether that may not be drawn into a precedent hereafter. I am one of that number who think the President has not counted them, and who are entirely satisfied with the manner in which he has performed and discharged this duty. I think it was left entirely open; but it is due to those who dissent—who think that the record of our action may be misunderstood unless it shall be made more accurate, that the record shall be made to correspond to the fact, and shall show that in the proceedings when the two houses were assembled together, the declaration made by the President in the name and as the organ of the two houses of Congress, that James Buchanan was elected President of the United States, was made upon the ground that, without counting or rejecting, or even if you were to count the votes of the State of Wisconsin, the result would be unchanged, and, therefore, the question of counting those votes was avoided. That is due to the House of Representatives, which House we left under a high state of excitement, arising out of the fact that the President of the Senate, an officer foreign to them, seemed to them to have undertaken to decide that question against the views, if not a majority, at least of a portion of the House.

I have no doubt that all the House of Representatives desire, and all any portion of the members of the Senate desire, is that the record shall be made to correspond to the fact, and to show that this declaration was made, this result was thus attained, without passing upon the votes of Wisconsin one way or the other, and without settling the question, or attempting to settle the question, for present or future effect, whether a vote given under such circumstances ought ever to be counted. Inasmuch as the danger in our country of revolution must be seen to arise from the possibility that injustice may occur in cases where the law has not provided, with sufficient care, for ascertaining the will of the people, I hope this resolution will not pass without the Judiciary Committee, or some other competent committee of this house, taking up the subject and providing for just such a contingency.

MR. COLLAMER. Mr President, I should be willing to vote for the appointment of a committee of conference, if I could perceive that there was any question for them to

settle or confer about, or any question now pending which ought to be settled between the two houses. I have not been able, however, to perceive that there is any such question. It is true, I do not altogether concur in the construction which the gentlemen on the other side of the chamber have given to the Constitution and law, nor in the course taken by the tellers. In my estimation, the moment the tellers came to a certificate irregular on its face, stating that the votes were cast on a day different from that prescribed by law, they should have stopped there, and announced the fact to the Chair, and the Chair should immediately have stated that condition of things, and the two houses should have separated to make provision in relation to the manner of settling it. In my opinion, further, the Chair, immediately on being informed of that fact at any stage of the proceedings, should have stated it to the body, and then the two houses should have separated and taken proceedings in relation to the matter.

In these remarks, I am proceeding entirely on the ground that there was no previous preparation as to the manner of settling these questions, which, I think, should have been provided for by law long ago; or if not provided for by law, everything reasonably to be anticipated should have been provided for in the resolutions making arrangements for the meeting of the two houses. Neither by law, nor by the previous resolutions of the two houses, had any such arrangements been made. Now, what is the condition of things?

Mr. BIGLER. The Senator from Vermont will allow me to explain for the purpose of being accurate. I have by my side the teller who made the report, [Mr. George W. Jones, of Tennessee.] When the returns from the State of Wisconsin were opened and read, the teller reading those returns stated distinctly that the vote of that State was cast on the 4th of December instead of the 3d, the day prescribed by law. Now, will the Senator from Vermont say that the tellers had any discretion on this subject? Could they have refused to read the certificate? When the tellers announced the result of the addition, they gave the vote of Mr. Frémont as one hundred and fourteen, including Wisconsin, in order that the point might be distinctly presented to the body.

Mr. COLLAMER. The gentleman's version of the transaction does not alter the case in my mind. My idea is, that when they came across a certificate which was irregular apparently on its face, they should have announced that fact to the Chair.

Mr. BIGLER. I have just asserted that they did announce that fact.

Mr. COLLAMER. That is not material to my point. I say the Chair should have immediately announced it to the body, and the body should have separated, each house going to its respective chamber, to provide for such a contingency, and prescribe a mode of arranging it. That is my view of what was the proper course, instead of going through the count and seeing whether it would not turn out right without the vote of this State. They did, however, go on and finish the count. Very well. Then, when the whole count was announced, it was stated at the same time what was the fact in regard to the Wisconsin certificate. That was a proper announcement. The result having been reduced to writing, and read in that form, was delivered to the Chair, and the Presiding Officer read it in the same way; not reading in it, however, what the teller making the announcement had stated, that the certificate from Wisconsin was irregular. That fact did not constitute any part of the written paper which the Chair had, and therefore he did not announce it; but the body understood it from the announcement of the teller. If the Chair, on that occasion, decided any question which is material to the result, it is well enough to have this committee for the purpose of arranging it. But did the Chair decide anything about the Wisconsin vote? I insist that it did not. The Chair only decided the ultimate result—that James Buchanan was elected President by the votes of a majority of the electors. If it was material to that decision that the Wisconsin vote should be passed upon, then the Chair did pass upon it; but if that announcement was the statement of a result which would have been the same independently of that vote, then he did not pass upon it. He certainly did not pass upon it in terms.

Mr. PUGH. I think the Senator is mistaken. I think the Presiding Officer said there were one hundred and fourteen votes for Mr. Frémont, and took no notice of the fact reported by the tellers, that the vote of Wisconsin was contested. My impression is that the President of the Senate did not advert to that fact at all.

Mr. COLLAMER. The announcement of the tellers was, that Mr. Frémont received one hundred and fourteen votes, including the vote of Wisconsin, they having stated how the fact was in regard to Wisconsin. The Chair read it in the same way. Now, I say, if the Chair in terms decided the question in relation to Wisconsin, the Chair perhaps did that at least which ought to be inquired into by a committee; but I say the Chair decided nothing as to the Wisconsin vote being lawful or unlawful. He read over the figures and then announced the result for President. If, in announcing that result, the Chair necessarily passed upon the legality or illegality of the Wisconsin vote, then the Chair decided that question; but if, in making that announcement, it was not material whether the Wisconsin vote was counted or not, then the Chair did not pass on it. Now we all understand that the result—the election of James Buchanan as President of the United States—is a matter entirely independent of that law. De-

ciding that the result was the election of Mr. Buchanan, does not either directly or indirectly involve a decision of the legality of the Wisconsin vote. As it does not, I do not see what more we have to do. It appears to me that is the end of the subject.

Mr. HALE. Mr. President, I was not in the House of Representatives when these proceedings took place. I had made up my mind very early that Mr. Buchanan was elected—and indeed, after the October elections in Pennsylvania last year, I came to the conclusion that he would be elected soon after that. I did not wait to hear the votes read with much interest. I wish now, however, to express my dissent from what seems to be the received opinion of almost every one whom I have heard speak on the subject here, that the vote of Wisconsin should not be counted. I protest against that, here and now, forever and always. I say those votes should have been counted. Form should always yield to substance, except where the form itself is substance. Prior to the passage of the act of 1845, you left every State to fix the day upon which the people should vote for electors; but in that year Congress, in its wisdom, for certain purposes, prescribed the same day throughout the Union.

Mr. BELL, of Tennessee. The Constitution of the United States provides that the electors shall vote on the same day in all the States.

Mr. HALE. I speak of the day on which the electors are chosen. That formerly was different in all the States; but in 1845, I think, you passed a law compelling all the States to vote for electors on the same day.

Mr. CRITTENDEN. Allow me to read the Constitution:

"The Congress may determine the time of choosing the electors, and the day on which they shall give their votes, which day shall be the same throughout the United States."

Mr. HALE. Exactly; but the Constitution does not fix the day. The provision of law fixing the day is one of those provisions which are not essential to the merits of the case—one of those provisions which are directory, and ought to yield to the substance. The substance is, that the people of Wisconsin did, on the day prescribed by law, cast their votes, and did, by a large majority, choose an electoral board. By an interposition of Providence, it may be said, or from some unavoidable accident, those electors failed to cast their votes on the precise day fixed by law; but just as soon as they could, they proceeded to cast them on the day following. I am not clear in my own mind that, as a legal question, those votes were not given on the day indicated in the law, in legal intendment; for this reason: they began, they entered upon the work, they were impeded and not able to complete it so as to throw their votes on the particular day prescribed. Whether that construction be so or not, this is a matter of direction. The main and the great point is, did the people of Wisconsin, by a major vote, do all they could do to express their voice in the presidential election? If they did, they ought to be heard; and if by accident the men whom they merely delegated as their agents failed to get together at the immediate hour prescribed, the penalty of being disfranchised should not be visited on the whole State of Wisconsin.

Suppose that, instead of the failure to cast this vote at the proper time having resulted from accident, it had resulted from fraud; suppose it had resulted from collusion or connivance; would you visit this high penalty on the people of a State, because their electors failed to meet together at the prescribed hour? If they failed to arrive at the State capital on the 3d of December, and arrived on the 4th, are the whole people, who have done everything that the Constitution and laws required them to do, to be visited with this tremendous penalty of disfranchisement, simply because the form of casting these votes on the 3d day of December has not been complied with? I say not, sir; and just exactly as you stick to forms and depart from substance, you depart from the spirit of the Constitution, and you will come to that result to which the British Parliament came when they gave a man a seat in the House of Commons as a representative, from the Middlesex district, I think, who had received only two hundred votes, and turned out a man who received fourteen hundred. Why was that? Because of exactly the same stickling at form, and setting aside of substance, which would decide that the vote of Wisconsin now should not be counted.

Mr. HALE. It is fortunate for us that this election is decided irrespective of this vote; but there is a principle here which I am not willing to see trampled down; and I am not willing to submit to have it conceded away, as it has been by almost every one who has spoken, except my honorable friend from New York, [Mr. Seward:] and even he seems to approach it so timidly as not to have formed an opinion on it. Sir, I was born with an opinion on that question, and I have always entertained it. My opinion always has been that form shall yield to substance. When the people have spoken, and have done everything to give force and effect to their sentiments, they should not be deprived of the constitutional result to which they have come, by an accident happening to the agents whom they have selected and made the depositary of their trust. But, sir, this occasion will not be entirely useless if it suggests to the distinguished men of the Senate, the leading men of the Senate—I mean those who shape legislation here—the necessity of a law—

Mr. WADE. The higher law?

Mr. HALE. No, sir. The law that is going to set aside the will of the people is a higher law. I say, this occasion will not be useless if it suggests the form of a law which shall prescribe the manner in which this subject shall be regulated. I think there is, and has been for a long time, a necessity for such a law. If this incident, or accident, or whatever you choose to call it, shall suggest the necessity for such a law, I think it will not be without profit.

Mr. BUTLER. I have a resolution to offer, which I hope will be voted upon, and I think it will settle the question. I am willing to acquiesce in the decision of the Chair, provided the record will hereafter show what I regard to be the true state of the case.

The PRESIDENT *pro tempore*. The Chair will say to the Senator from South Carolina that a motion has been offered by the Senator from Virginia, which is the question now before the Senate.

Mr. HUNTER. I have been requested by several friends to withdraw that proposition. I withdraw it.

The PRESIDENT *pro tempore*. The resolution of the Senator from South Carolina will be read.

The Secretary read it, as follows:

"Whereas the Senate having met the House of Representatives, in accordance with the fifth section of the act of the 1st of March, 1792, relative to the election of President and Vice-President of the United States, and the electoral votes having been opened by the President of the Senate in the presence of the two houses of Congress, and counted by the tellers appointed on the part of the two houses, and it appearing that James Buchanan, of Pennsylvania, had received 174 votes, John C. Frémont, of California, 109 votes, and Millard Fillmore, of New York, 8 votes for President of the United States; and that John C. Breckinridge, of Kentucky, had received 174 votes, William L. Dayton, of New Jersey, 109 votes, and Andrew J. Donelson, of Tennessee, 8 votes for Vice-President; and the same having been duly declared by the President of the Senate in the presence of the two houses: Therefore,

Resolved, That the Senate are of opinion that the Constitution and laws have been duly executed, and that no further declaration of these facts is necessary than the announcement that James Buchanan is elected President of the United States, and John C. Breckinridge elected Vice-President of the United States."

Mr. COLLAMER. If that resolution be passed, it in effect disposes of the question respecting the Wisconsin votes, and rejects them. It is totally unnecessary to pass on that question, and I think it is not desirable to do so. I propose to amend the resolution so as to make it a simple statement that James Buchanan, having received 174 votes, and that number being a majority of the whole number of electors, is elected President of the United States; and that John C. Breckinridge, having received the same number of electoral votes, which is a majority of the whole number, is elected Vice-President of the United States, and that, the same having been properly announced, no further proceedings are required. I would prefer to have a resolution in this simple language, leaving out all detail, simply stating the result, and then make it a joint resolution requiring the action of both houses.

Mr. BUTLER. If the proposition takes that form I shall not object materially, but I cannot consent to receive any other than actual votes. I ask and insist upon a decision of this question, because I desire it to be understood that I do not intend to put into the volume of history a fact that is not so. I am not like the Senator from New Hampshire, who was born with an opinion.

Mr. COLLAMER. I wish to add to my proposed amendment that the President and Vice-President elect be informed of the result.

Mr. TOOMBS. I hope the amendment of the Senator from Vermont will be adopted for another reason. The resolution of the Senator from South Carolina, in my judgment, does not recite the facts. As I before stated, I do not think I am mistaken in the fact that it was announced that John C. Frémont had received 114 votes and not 109 votes.

Mr. WILSON. The annunciation was "114, including the vote of Wisconsin."

Mr. TOOMBS. That, however, was the announcement of the Chair—that he had received 114 votes. This resolution says it was announced that he got 109 votes.

Mr. BUTLER. It does not say "was announced," but "be announced."

Mr. TOOMBS. My only solicitude on the subject was as I stated before—

Mr. BUTLER. If my friend from Georgia will allow me, I will accept the amendment at once.

Mr. TOOMBS. I am glad that it has been accepted. My solicitude on the subject was this: The Chair having announced that it did not decide whether the vote of Wisconsin was counted or not as a good vote, then my objection was that the Chair so ruled as not to permit it to be decided. Certainly the Presiding Officer was of opinion that there was no authority to decide it; for, whether he determined that the vote was a good vote or not, the Chair having said that it did not decide that point determined that it should not be decided at all. I want no such fact spread on the record. I again affirm, as I did before, that it is competent for the two houses, in their separate

capacities, to decide which are the votes under the Constitution. It is expressly declared by the Constitution that "the votes" shall be counted, but not by the officers of this body, or of the other house, or by tellers, but it is by law provided that they shall be opened and counted before the two houses. The point is, what are the votes to be counted? I insist that nothing shall, by legal intendment or implication, assert the doctrine that anybody can determine what are votes except the Senate and House of Representatives, or that any one can prevent them from deciding that question. That is all I wish to be provided against.

The *PRESIDENT pro tempore*. The order that was made by the Senate of the United States prescribing the mode of counting the votes for President and Vice-President is not a joint resolution. It is a resolution of the Senate, in which the House of Representatives concurred. The entry in the House of Representatives is:

"IN THE HOUSE OF REPRESENTATIVES, February 5, 1857.

"*Resolved*, That the House of Representatives concur in the foregoing resolution of the Senate."

That resolution prescribed to the Presiding Officer simply this duty. The resolution provided for the appointment of a teller on the part of the Senate, and two tellers on the part of the House of Representatives. It required of those tellers to make a list of the votes as they should be declared; then "that the result shall be delivered to the President of the Senate *pro tempore*, who shall announce the state of the vote, and the persons elected, to the two houses assembled as aforesaid." The President of the Senate, having received the list from the tellers, announced as the state of the vote, the state of the vote as it appeared on that list. In the list the vote of Wisconsin was assigned to John C. Frémont, and the Chair so read it. The Presiding Officer did no more than give the result as stated by the tellers, and then, in the further discharge of the duty devolved upon the Presiding Officer by the concurrent resolution, he announced the person who was elected, the Constitution providing that "the person having the greatest number of votes for President shall be the President, if such number be a majority of the whole number of electors appointed." The Presiding Officer in his own judgment believed then, as he believes now, that he declared correctly, as the state of the vote, that James Buchanan had received the greatest number, and that that number was a majority of the whole number of electors, not undertaking to decide, and not having decided, whether the vote of the State of Wisconsin had been given to John C. Frémont or not—a power that the Chair utterly disclaims and never asserted.

Mr. COLLAMER. Let the resolution be read as I have amended it, which the Senator from South Carolina accepts.

The Secretary read as follows:

"Whereas, having met the House of Representatives in accordance with the fifth section of the act of March 1, 1792, relative to the election of President and Vice-President of the United States, and the electoral votes having been opened by the President of the Senate in the presence of the two houses of Congress, and counted by the tellers appointed on the part of the two houses, and it appearing that James Buchanan, of Pennsylvania, had received one hundred and seventy-four votes, such number being a majority of all the electoral votes of the several States, and that John C. Breckinridge, of Kentucky, had received one hundred and seventy-four votes, such number being a majority of all the electoral votes of the several States, as Vice-President of the United States, and the same having been duly declared by the President of the Senate in the presence of the two houses: Therefore,

"*Resolved by the Senate and House of Representatives of the United States of America in Congress assembled*, That the two houses are of opinion that the Constitution and laws have been duly executed, and that no further declaration of these facts is necessary than the announcement that James Buchanan, of Pennsylvania, is elected President of the United States, and John C. Breckinridge, of Kentucky, is elected Vice-President of the United States."

Mr. TOUCEY. I do not rise for the purpose of entering into a debate on any question which has been raised. I think it due to the Presiding Officer of the Senate to say that he did not undertake to admit, or to exclude, the vote of Wisconsin, or to express any opinion on that question, because it was entirely immaterial to the result to be announced. I understand the Chair to decide that, in joint convention, there is no propriety in deliberating or debating, and I do not understand that there is any diversity of opinion in the Senate on that point. There is no question, I think, anywhere, that when the Senate and House of Representatives are together for the purpose of witnessing the counting of the votes given for President of the United States, there can be no action. If there is to be any action, or deliberation with a view to action, the two houses must separate, deliberate, and act separately. That was the course which I understood the Chair to indicate—nothing more than that.

If the tellers had made a written report, such as has been presented here in the Senate, there would have been no question—there would have been no difficulty—be-

cause that presents distinctly the number of votes given, and leaves out of the count the votes of Wisconsin as being doubtful whether they would be counted or not, and expresses no opinion on that point; but the result being the same, the declaration was made by the Chair. I have no objection to the resolution proposed, as amended by the Senator from Vermont, or leaving the whole subject in the condition in which it is understood on all sides to be. I hope, therefore, we shall act on it promptly, if at all.

MR. HOUSTON. Mr. President, I am very reluctant to occupy any portion of the Senate's time. It seems to me that there is really no ground for discussion. In the first place, I believe that the Presiding Officer discharged correctly the constitutional and lawful duty assigned to him while this body was in the hall of the House of Representatives. He was bound to open, in the presence of the two houses, the electoral votes which he had received. The law vested him with no discretionary power to decide as to the validity and legality of those votes.

In the next place, it was proper that he should make the announcement which he did make, in pursuance of the Constitution and law. He has carried out, in my opinion, in these two acts—opening the votes received by him, and announcing the result—all the functions delegated to him by the Constitution and law. I look upon every subsequent act by either body, or both bodies, as done without legal or constitutional authority. There was no means by which a decision could be had in the House of Representatives upon the validity or insufficiency of the votes, and therefore the President of this body was estopped from taking action thereon.

Mr. President, I call for the reading of the 2d rule of the Senate, which prohibits conversation while a Senator is speaking.

THE PRESIDENT *pro tempore*. Senators will please not converse in the hall. Does the Senator from Texas insist on the reading of the 2d rule?

MR. HOUSTON. I seldom speak in this body, and I do not ask for the reading of this rule with relation to myself; but I desire to hear what is going on. I suggest that hereafter the Sergeant-at-Arms put out of this chamber every person who whispers sufficiently loud to be heard above the voice of the speaker. Sir, I well remember the august and solemn appearance of this body some twenty years ago when the Fathers sat here. Then it was a majestic body indeed. There was something awful in its appearance. The solemn stillness, the gravity of Senators, the propriety of conduct, the silent auditory—all impressed the spectator with a solemn awe when he entered this chamber or came into its galleries or lobbies. The House of Representatives, too, was silent. If there a voice was heard in the galleries, instantly the eye of the Speaker rested upon the Sergeant-at-Arms, and a messenger or the Sergeant in person immediately repaired to the individual in the gallery and touched him, and there was silence. If a member sat in an indecorous position, or laid his foot upon his desk, the Speaker sent his page with this message: "The compliments of the Speaker to Mr. —, and he will please take down his foot;" and he never put it up a second time.

There was grandeur about legislation then; there was impressive awe. Then, when you came into the Senate chamber, there was no hum, no noise, no whispering, no talking; and legislation then was as beneficial to the country as it is at this hour. The time is coming when this body will be hurried and pressed with business, and the tumult of business will be sufficient without the noise and hum of conversation. I shall protest against it, and suggest that the President have his eye on the Sergeant-at-Arms, and that he maintain silence in this chamber and in the galleries.

Now, sir, after this digression, most important, and I am sorry to say necessary, I will proceed with my remarks. When the votes were counted, and when the Presiding Officer announced the individual constitutionally elected President of the United States, all his functions ceased. It was not material whether the tellers certified the result or not. It was before the nation when the announcement was made to the constitutional bodies to bear attestation of the facts. There was no necessity of further action; and every attempt at it on a supposed contingency was unnecessary and improper. There is no law determining in what manner a vote shall be rejected; and if Congress has failed to pass laws for regulating a contingency of this kind, or to say how it shall be determined, it cannot be determined, no matter what the consequence may be.

Every act done beyond the constitutional functions imposed on the President of this body in this instance, is a revolutionary act. This very resolution is not known to the Constitution, nor is it known to the laws of Congress, and it is therefore of itself revolutionary. If in this matter anything be done which is not known to the Constitution and laws, it is done in violation of them; and is not only a nullity, but is revolutionary in its character. You may say it is only a form; but, sir, it is a form not known to the Constitution, and I invoke this body not to adopt such forms, lest they become substance. There is no evil arising from the insufficiency or illegality of the vote of Wisconsin in this case, and there is no necessity for adopting a resolution which merely goes to a matter of form and has no validity, because it is not known to the law or the Constitution. I maintain that the election is good, constitutional, and lawful. That is the announcement made in conformity with the Constitution and the law,

and the election is valid without any plastering up by resolutions of this kind. I have no doubt of the opinion of every individual here as to the validity of the election. It is not necessary to decide the question of the Wisconsin vote. There is a constitutional majority without it, and no action of this body or of the House of Representatives is required. The President of the Senate has told the nation what is the result. He is the organ for communicating the votes of the electoral college to this nation, and his announcement gives it all the validity that a thousand resolutions could do, without law, without precedent, and, so far as I can see, without reason. I am against such resolutions.

Mr. WELLER. I desire to terminate this debate. I regard it as a very unprofitable one—the discussion of a mere abstraction. Nobody doubts the validity of this election. The very moment the announcement was made by the President of the Senate of the result of the vote, Mr. Buchanan became President elect of the United States. He has but to await for the arrival of the 4th of March to be inaugurated. All that remains for the Senate to do, is simply to appoint a committee to inform the President elect of his election. This resolution, however, is based on the assumption that our action has been illegal or irregular; that there is some informality which may affect the result of the election. Now, suppose, in the present organization of the House of Representatives, they do not choose to agree to that resolution; what is the consequence? Does it not stand on the assumption that there is something irregular which we endeavor to cure, and that it requires the action of the Senate and House of Representatives to cure that irregularity? They seem to have taken up the idea that the President of this body had usurped a power which properly did not belong to him. In that they do him injustice. But in the present organization of that house the discussion may last for days. *Cui bono?* Who is to be benefited by that?

I wish to move that this resolution lie on the table; giving notice that, if it be laid on the table, I shall move for the appointment of a committee to inform the President elect of this day's work; which is all, in my judgment, we are called upon to do. I move to lay the resolution on the table.

Mr. RUSK. Will the Senator withdraw that motion for a moment?

Mr. WELLER. My object was to prevent discussion.

Mr. RUSK. I do not desire to discuss the question, but simply to read the Constitution.

Mr. WELLER. If the Senator will renew my motion, I shall withdraw it for him.

Mr. RUSK. I shall renew it. The Constitution declares:

“Every order, resolution, or vote, to which the concurrence of the Senate and House of Representatives may be necessary, (except on a question of adjournment,) shall be presented to the President of the United States; and before the same shall take effect, shall be approved by him, or, being disapproved by him, shall be repassed by two-thirds of the Senate and House of Representatives, according to the rules and limitations prescribed in the case of a bill.”

I think we acted hastily in appointing tellers, because that was done by a resolution concurred in by the House of Representatives. I agree that we should not pass this resolution; and I renew the motion that it be laid on the table.

Mr. BELL, of Tennessee. I hope, before that question is taken, I shall be allowed to say a word.

Mr. RUSK. I withdraw the motion for the accommodation of the honorable Senator.

Mr. BELL, of Tennessee. If it is supposed that this resolution is necessary at all, I think it should be modified.

Mr. BUTLER. To terminate this debate, as I see there is no disposition—

The PRESIDENT *pro tempore*. Does the Senator from Tennessee yield the floor?

Mr. BELL, of Tennessee. No, sir.

Mr. BUTLER. I intended to withdraw the resolution.

Mr. BELL, of Tennessee. I was going to say that, if the resolution be necessary, it should be modified.

Mr. BUTLER. If I withdraw it, it will not be necessary to discuss it.

Mr. BELL, of Tennessee. The honorable Senator will excuse me, if he pleases, for not yielding him the floor, but going on myself, as I have it.

Mr. BUTLER. Certainly.

Mr. BELL, of Tennessee. I do not rise to make a speech on this subject, but to express my opinion. I think the President of this body acted in conformity strictly with his duty, according to my comprehension of it. It is due to him that I should express my opinion on that point, if I deem it proper to do so. I think, when the vote of Wisconsin was called, and the tellers reported it as having been taken on a wrong day, it was then proper for some member of the House of Representatives or of the Senate to raise the question whether it should be counted; but the Presiding Officer had no right to suggest or dictate such a course. His duty, under the Constitution, was to open the votes in the presence of the two houses. He discharged that duty. The tellers reported that the vote of Wisconsin was cast on a day not provided by law, and of course it was unconstitutional in that respect.

If this resolution is to be sustained, I suggest—and I think it will recognize the announcement of the President of the Senate before the two houses and legalize it, and render it entirely in conformity with the Constitution—it should be amended so as to be in the language of the Constitution. The constitutional provision is:

“The person having the greatest number of votes for President shall be the President, if such number be a majority of the whole number of electors appointed.”

That is not the language of the resolution now before us. It should, in conformity with the Constitution, say that the Presiding Officer having announced that James Buchanan received one hundred and seventy-four votes, being the greatest number of votes, and being a majority of the whole number of electors appointed, has been duly elected. That declaration, of course, would include Wisconsin, if it was proper that its vote should be included. Whether the vote cast in Wisconsin was cast in conformity with the law or not, makes no difference. According to the language of the Constitution, the announcement of the President of the Senate was right.

The Constitution having required that the electoral votes shall be cast on the same day throughout the United States, my impression at present is that the vote of Wisconsin on this occasion ought not to be counted; but that is not a material question now. It makes no difference to the result in the present case. Electors were appointed by the vote of the people of Wisconsin, and James Buchanan was announced by the President of the Senate to have received a majority of the whole number of electors, including those appointed by Wisconsin; and for this purpose it makes no difference whether their votes be counted or not. The form of the announcement in this case excludes the question of the legality of the vote in any particular State. As neither house objected to the announcement, and there was no separation of the two houses to deliberate upon the question whether the votes were all legally counted or not, it seems to me to be unnecessary to pass this resolution; but if passed at all, it should be amended as I have proposed.

MR. WELLER. I make the motion to lay the resolution on the table.

MR. CRITTENDEN. I wish to suggest an amendment which I intend to offer to the resolution.

THE PRESIDENT *pro tempore*. The motion is to lay the resolution on the table.

Several SENATORS. It has been withdrawn.

THE PRESIDENT *pro tempore*. The Chair is not aware of it.

MR. WELLER. The Senator from South Carolina withdrew it. He could not do it at that time, because there was another Senator on the floor.

THE PRESIDENT *pro tempore*. The Chair will put the question on laying the resolution on the table.

The motion was agreed to.

MR. WELLER. I now offer this resolution, which I think will complete the business so far as the Senate is concerned:

“Resolved, That a committee of one member of the Senate be appointed by that body, to join a committee of two members of the House of Representatives, to be appointed by the House, to wait on James Buchanan, of Pennsylvania, and notify him that he has been duly elected President of the United States for the constitutional term, to commence on the 4th day of March, 1857; and also to wait on John C. Breckinridge, of Kentucky, and inform him that he has been duly elected Vice President of the United States for the constitutional term, to commence on the 4th day of March, 1857.”

MR. CRITTENDEN. I may as well offer my amendment to this resolution as any other. I think it is of importance that we should avail ourselves of this occasion for settling a question that may be a most momentous one hereafter. In this election the question that has sprung up is not important, for the result is altogether independent of that question; but we may imagine what would have been the state of things if the result had been dependent on the vote of the State of Wisconsin. It was ruled, when the Senate was in the chamber of the House of Representatives, that no objection could be made to it. It was ruled that the counting must proceed, and the counting did proceed, and the result was announced. I am looking to the future. Suppose some future Presiding Officer there, when the vote of Wisconsin would determine the result, should decide that it should or should not be admitted, how is such a decision as that to be met? Suppose he should declare the vote admitted, and the party to whom it was given elected President of the United States, what could ever countervail that declaration? How could you ever question the election of a President thus announced according to the forms of the Constitution, but in disregard of the substance of it, as I think? We could easily see to-day what would be the result: confusion and revolution springing up instantaneously in their worst form on the floor of that House, and scattered like wildfire through the whole country. Such a question as that ought to be met and settled. I propose, therefore, as an amendment to this or any resolution offered on the subject:

“But it is resolved furthermore, That the vote of Wisconsin, being given on a day different from that prescribed by law, ought not to have been included in the count of the electoral vote, and that any member of either the Senate or House of Representatives had the privilege and right to object to the counting of said vote, and that it was com-

petent for the Senate and House of Representatives alone to decide upon that objection."

I think the Senate is not in a condition to decide this question now. I do not think there is a quorum, or anything like a quorum, present. We shall know that, however, by the vote, for I shall call for the yeas and nays on the adoption of the resolution.

Mr. WELLER. I hope the Senator from Kentucky will offer that as an independent proposition.

Mr. CRITTENDEN. If I do I shall never be able to get it up.

Mr. WELLER. It has no sort of connection with the appointment of a committee to wait on the President elect. I shall be compelled, perhaps, to vote for the resolution of the Senator from Kentucky, but I do not see any connection between his proposed amendment and the resolution which I offered. I certainly feel every disposition to give the resolution of the Senator from Kentucky a hearing, and I should like to have a vote on it, and, entertaining the opinions I do now, I shall be compelled to vote in its favor, although it would, in effect, disfranchise a State. It is one of the cases not provided for in the Constitution. Under the Constitution we have power to fix the day, and it must be uniform. I think it doubtful whether we can say that if they do not meet on that particular day—if they are prevented by the act of Providence, or otherwise, from assembling—they may assemble at some future time. I doubt that power, but I think we ought to withhold this until we pass on the other resolution.

Mr. CRITTENDEN. If my resolution be passed first I shall have no objection; but if it is not, I shall never be able to get it considered hereafter.

Mr. WELLER. I really cannot see any reason why it should not receive the consideration of the Senate at any time. I am sure the Senate will have every disposition to receive the resolution of the Senator from Kentucky, and pass upon it. I have no objection to acting on it first, but I do not wish it attached to the resolution I have offered, with which it has no connection.

Mr. STUART. If the Senator from Kentucky wishes to obtain a vote on his resolution, it ought to be taken when the Senate is full, and therefore I move that the Senate adjourn.

The motion was agreed to; and the Senate adjourned.

IN SENATE, February 12, 1857.

On motion of Mr. WELLER, the Senate resumed the consideration of the following resolution submitted by him yesterday:

Resolved, That a committee of one member of the Senate be appointed by that body, to join a committee of two members of the House of Representatives, to be appointed by the House, to wait on James Buchanan, of Pennsylvania, and notify him that he has been duly elected President of the United States for the constitutional term, to commence on the 4th day of March, 1857; and also to wait on John C. Breckinridge, of Kentucky, and inform him that he has been duly elected Vice-President of the United States for the constitutional term, to commence on the 4th day of March, 1857."

The pending question being on the amendment offered by Mr. CRITTENDEN, to add to the resolution:

"But it is resolved furthermore, That the vote of Wisconsin, being given on a day different from that prescribed by law, ought not to have been included in the count of the electoral votes, and that any member of either the Senate or the House of Representatives have the privilege and right to object to counting the said vote, and that it was competent for the Senate and House of Representatives alone to decide upon that objection."

Mr. THOMPSON, of Kentucky. Mr. President, it is with great reluctance and diffidence that I express a legal opinion in reference to this matter. I, however, feel constrained to do so, because I believe there has been a confusion of ideas, and a misunderstanding in relation to it. So far as the resolution of my colleague declares that the vote of the State of Wisconsin ought not to be counted, I believe it is correct and proper, and I would so vote. I do not, however, believe in the right of any member of the Senate or any member of the House to object when we were in joint session, or to take any part in it; and I will proceed to show very briefly why I do not believe it. I will read from the Constitution of the United States, and I will state very concisely what my view is. The Constitution provides:

"The electors shall meet in their respective States and vote by ballot for President and Vice-President, one of whom at least shall not be an inhabitant of the same State with themselves."

I believe the State of Arkansas was particular enough to certify that fact.

"They shall name in their ballots the person voted for as President, and in distinct ballots the person voted for as Vice-President, and they shall make distinct lists of all persons voted for as President, and of all persons voted for as Vice-President, and of the number of votes for each, which lists they shall sign and certify, and transmit sealed to the seat of the Government of the United States, directed to the President of

the Senate. The President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates, and the votes shall then be counted."

Now, sir, I apprehend the whole of this difficulty began in what was an original error. The votes are sent here to the President of the Senate, who, as the officer presiding over the representatives of the States, is to open and count them. The Constitution says it shall be done in the presence of the Senate and House of Representatives. The House of Representatives might have been invited to this chamber, or we might have gone to theirs. You, sir, according to my opinion, ought to count those votes, as the Presiding Officer of the Senate. I suppose that notions of convenience heretofore dictated to us the propriety of our going to the chamber of the House of Representatives. This being a small chamber, we did not wish to bring the members of the House of Representatives here, and seat them around in the ladies' galleries because they were curious to see, or put them in privileged seats, or niche-hole or pigeon-hole them in one place or another. As the Presiding Officer of the Senate, the direction of the Constitution is that you, sir, shall open and count the votes—that is your duty—before the Senate, and the members of the House of Representatives are to be present as witnesses. In the contemplation of the framers of the Constitution, what could have been meant by this? The idea was that we were not to go into executive session, nor, by some secret cabal or clandestine arrangement, get together here and have a *coup d'état*, and make a President. But the contemplation of the Constitution was that the House of Representatives were to be present as witnesses, to see that the count was fair; that the Senate were to regulate the mode of counting, and that we should not have a secret session and exclude the other house. We might invite them here; and, as a matter of courtesy between the two houses, probably we ought to have invited them here.

You know, sir, how these matters are generally arranged. Some person who is super-officious and wishes to get placed at the head of a committee, and get his name in print—I will not say in this body or in the other house, but anywhere else you please—gets up and moves that such a thing be done. You go there with the officers of your house, dressing up your Secretary of the Senate and the Sergeant-at-Arms in the insignia of office, one man taking the right and the other the left, just as they do at an English dinner.

The Constitution, in my judgment, is that these votes are to be returned to us and counted by us, and the House of Representatives are admitted to be present at the count to prevent a combination, a clandestine operation, a secret session, a *coup d'état*. The idea is that the people's representatives, having a right to look on, by their majesty, by their presence, representing the people in their integrity and in their might, may overawe us and prevent us from acting unfairly. They are present to know the result when it is declared. I suppose that the reason the House of Representatives have never met in this chamber for this purpose, and have not been invited here, was that we had no place in which to put them, and we were compelled to go to their chamber, because we had not tables enough at dinner to accommodate them. That is the whole matter. We had a right to pass, and ought to have passed, on these votes; and I will tell you why we ought to have the right to pass upon them.

The States return their votes to our Presiding Officer. Because I speak of States, do not suppose that I am going off on that second constitution, the resolutions of '98 and '99. I do not suppose what I have said is anything eliminated from the occult virtues of those resolutions; they were passed by my own State, and I do not want to quarrel with my grandfather. I say the votes were to be returned to the Senate, and counted by the Senate. The Senate has to be in session as a body. I do not wish to be committed by anything I did or did not do yesterday; for when members of the other house got up and commenced speaking, while this body was in session in the other hall, I left. I did not desire to call them to order, but I say they had no right to speak. They are like witnesses in the presence of a court. They have a right to look on, but not to participate. All that was done by them yesterday was out of order and improper. The votes must be counted, and counted as the votes of States. Why so counted? There are Ohio, New York, and Pennsylvania, which might, in the first place, send on a fraudulent list; and if you were to have a joint convention, as the members of the other house proposed, what would be the result? Those three States would weigh down two dozen such States as Florida, Arkansas, Delaware, Rhode Island, or New Jersey; and they might send on a fraudulent list; and those very identical States, by their overpowering voice in such a convention, could carry out the fraud.

I do not blame you, sir, under the novelty of the case, arising as it did, for having listened to those men of the other house. I suppose a great many of them there would have thought the proceeding could never be fixed and never be finished, and never be a done-up job, unless they had a say in it. I do not believe they had a right to say anything, or to interpose, or be heard at all. The votes were sent to you, sir; and you were to have them counted under the Constitution. The members of that house were to be witnesses that the proceedings might not be done clandestinely, nor

in a caucus or cabal. They looking on in that way, and you having the votes, and counting them, when you came to the returns from the State of Wisconsin you might have very properly said: "Gentlemen, under the law of 1792, and under the Constitution, a certain day is prescribed for the meeting of the electors; this vote was not cast on that day. Shall we count it?" Then any Senator might have moved that it should be counted; but what right had a witness—a member of the lower house—to put in at all? We were standing there to count the votes for President of the United States—the votes of every State—and your only security for State rights was, that nobody else should interfere; that when you came to this vote you should pass upon it, whether it should be counted or not. That is the right view of the case.

Talk about an amalgamation of the two houses! I do not know what the precedents are, though allusions have been made to them. I do not consider myself committed by anything that transpired; I do not commit any future Congress, much less commit posterity, by what transpired yesterday, because by the Constitution, the Senate, the representatives of the States, are to supervise the counting of the votes. The members of the House of Representatives may be present, under such forms and ceremonies as you choose. Then, whenever the vote is counted out, and you have not a constitutional majority to elect a President, the House of Representatives ought to retire to their own hall, and immediately proceed to elect, the Speaker beginning with the statement that there has been a default of election under the Constitution, and now we will proceed by votes to elect a President if we can.

We all know the fact that Wisconsin, under the act of 1792, did not vote in time. She ought not to stand as a *corps de reserve* to vote after the proper day. The framers of the Constitution may have had no more notion of the telegraph which now puts the country in instantaneous communication throughout all its borders, than Scipio Africanus or Hannibal had of gunpowder or cannon. But when we have such an instrument affording a means of entering into combinations, it is wrong that a State should stand as a reserved corps.

Under the Constitution, if you mean to carry it out and enforce it, whenever a State does not come up to time—time being a material matter in this proceeding—her vote ought to be excluded.

I have, perhaps, as much respect for, and confidence in, my colleague as one man ought to have in another; and, while I am willing to declare the fact that the vote of Wisconsin ought not to be counted, I am not willing that we should pass a resolution conceding the idea of a joint convention, and saying that any member of either house had a right to put in, or to call us to order, or to do anything else. It has been a ceremony sanctioned by time, for the two houses to meet in the Representatives' Hall. Suppose it is sanctioned by time; if it is a bad precedent—*malus usu sabolendus est*—the sooner you get back to the right course the better.

I have stated my view of the Constitution. The votes are to be sent to you, sir, and we are to count them. Resolutions are got up by superofficious men, who like to be figuring in such matters, and get their names in the newspapers, that this, that, or the other course takes place in arranging the proceedings; but when you come down to the real sense and understanding of the matter, it is that we, as representatives of the States, shall count the votes; because at last there is to be some final tribunal where justice, and honor, and reliance, and confidence reside. The presumption is that we will act right: but upon the predication that it was no harm to watch even us, the framers of the Constitution said that we should count these votes in the presence of the House of Representatives. We may place them in our lobby, or in the reporters' seats, or anywhere else, but they are to look over the proceedings. After the votes are counted, and a majority is declared to have been given for a particular person as President, he is declared elected. It is a fixed fact. I do not pretend to say that on the Journals here or in the House of Representatives this, that, or the other thing ought to be entered *in testimonium rei*, as you would enter a formal writ in an action of ejectment or a chancery suit. The votes are to be counted, and when counted, and the person declared to be elected President, it is a fixed fact, notorious to the representatives of the States and the people, and to everybody. It is a thing known, just as the courts judicially know the revolutions of the seasons, the natural divisions of time into night and day, the changes of the moon, the ebb and flow of the ocean. When it is done, it is done in that notorious way, and it is a fixed fact. This proceeding is not material to the decision of the election just now, for everybody knows that Buchanan is elected President and Breckinridge is elected Vice-President. Hereafter—however, I am afraid I shall not live that long—in the new Capitol I think we ought to make a new precedent, and have a large Senate Chamber, and let us invite the other House and seat them around very cleverly and properly. Let us count the votes in their presence; they may be witnesses; they may look over it; let us do it as a Senate in session, and let us regulate our own business, and not allow an interloping member (I mean no disrespect to any member who spoke yesterday in the other House) put in—I will not say his jaw—and say the matter is not finished because he did not get a chance to talk.

We had the right to count the votes. When we found, in discharging that duty, that

the State of Wisconsin, under the requirements of the law passed to carry out the Constitution, came up out of time, like a horse ruled out of time and distanced in a race, she ought not to be counted. I will vote for the naked fact asserted in my colleague's resolution as to the vote of Wisconsin; but as to this idea of an amalgamation of the two houses and a joint convention, I cannot go it. I take my politics from Washington and Marshall and that school of politicians, and I reckon that I never was as near coming up to what are the hidden, occult virtues of the resolutions of '95 and '99 before in my life as I am in this instance. While I have not the vanity to think as did the French woman who said to her sister, "It is very singular I never knew anybody that was always right except myself," [laughter,] I have an almighty confidence, at least in this particular instance, that I am right. The votes are to be returned here to the Senate, counted by the Senate, regulated by the representatives of the States, and if there is a failure of election the House of Representatives is to retire and proceed immediately to an election. In all civility, in all courtesy, in all propriety, we might notify them of the failure of the electors to choose, or the Speaker might march back with his squad or gang that he had brought over here, and proceed to elect a President simply because there had been a failure under the law to elect by the States.

I am willing to declare that the State of Wisconsin should not be counted. My politics—I will not say my Federal teachings, because that is an odious word—all lead me the other way; but my opinion, under the law and under the Constitution, is that which I have stated as to the power of the Senate. I verily believe that is the simple, honest, naked, straightforward view of the question. I say this without any reference to collateral considerations and hypothetical cases that will occur to every gentleman in the Senate without my suggesting them. We ought to stand by the Constitution, and by the law, as far as the law intends to carry it out, and execute it. I do not believe the vote of Wisconsin ought to be counted; nor do I believe that members of the House of Representatives had any right in the world to do anything except to stand by and look on as witnesses while the count was going on, to see that the proceeding was done right. They could fall back on their parliamentary or revolutionary rights, whatever they were, if we did wrong.

That is my opinion, and I have felt it due to myself to state my view. I do not believe in any humbuggery about the majesty of the representatives of the people being there. The question comes before them in due time; for if the States do not elect by proper electoral votes, it is remitted to the House of Representatives in their State capacity. Evidently the intention of the Constitution is that the votes are to be returned here, and counted off and decided on by the representatives of the States. Any other course would allow the State of New York to have as potential a voice as all the States from Kentucky to the Gulf of Mexico and swallow them all up. At her rate of increase, if you had not got in a good many new States she would have swallowed a great many of them, just as a shark swallows up minnows. She might get in a fraudulent vote; and then, if the two houses are to be amalgamated in a joint convention, the question is to be decided by the same political influence. I will not say it would be a fraud, but the same feeling that would control in the one instance would in the other. I think my State can take care of herself in any contingency. I feel confident of that; but still she is concerned as to the fairness and propriety of this count. I must say that this is the first time in my life that I had real State-rights sentiments come strongly over me, so as to induce me to object to anything that is not consistent with them.

I have made these remarks, sir, simply in justice to myself and what I think are the sentiments and feelings of my Commonwealth.

MR. STUART. Mr. President, I do not design to detain the Senate in a lengthy discussion of this question. I occupied considerable time yesterday. Some objections were made by certain Senators to the views I then presented. I stated a strong objection to going any further in our action on counting the votes for President and Vice-President of the United States, and undertaking to declare any further result, or doing anything more than had been done by the Presiding Officer in the presence of the two houses. My view was and is that the duty of counting the votes devolves upon the President of the Senate, and nobody else. The law and the Constitution are very clear as to how the electoral votes shall be cast, and as to when they shall be cast, and very clear as to the mode of their transmission to the President of the Senate. He then becomes the mere custodian to retain the votes. The Constitution declares, and the law of Congress makes it more specific, that he shall open those votes in the presence of both houses of Congress, and they shall be counted. It seems to be supposed by some gentlemen that the counting is to be done by the two houses of Congress, but that is impossible in itself; it is not, therefore, a fair construction of the Constitution of the United States.

I concede there is not that precise accuracy in language in this respect in the Constitution of the United States which usually characterizes that instrument in all its provisions. It would have been more strictly accurate and definite to have said, "The President of the Senate shall open and count the vote in the presence of the two houses

of Congress," but the Constitution does not say in express terms who shall count them. Having made the President of the Senate the custodian of the votes—having prohibited him from opening them until the arrival of a particular day, and then providing for its being in the presence of the two houses of Congress—the law having provided that Congress shall be in session on that day, it secures a certainty of action by the President of the Senate—he being an officer always in existence—because, if a vacancy happens in any way, the law making it the duty of Congress to be in session on that day, the Senate have the power to supply a vacancy, and have a President of the Senate.

It may be said that Congress ought by law to define more particularly what shall be done on this subject. I yield to that opinion; I expressed it yesterday. I think the law may be made more specific; but I cannot admit that the law can provide for any other counting of the votes under the Constitution than that they shall be counted by the President of the Senate. Upon this subject allow me to turn your attention to the Commentary of Chancellor Kent:

"The President of the Senate, on the second Wednesday of February succeeding every meeting of the electors, in the presence of the members of both houses of Congress, opens all the certificates, and the votes are then to be counted. The Constitution does not expressly declare *by whom* the votes are to be counted and the result declared. In the case of questionable votes and a closely-contested election, this power may be all-important; and I presume, in the absence of all legislative provision on the subject, that the President of the Senate counts the votes and determines the result, and that the two houses are present only as spectators to witness the fairness and accuracy of the transaction, and to act only if no choice be made by the electors."

That is precisely the view which I sought to present to the Senate yesterday. I disagree, therefore, with the honorable Senator from Kentucky, (Mr. Thompson,) when he supposes this is a count by the Senate. It is a count by the President of the Senate. To secure fairness and accuracy, it is a public count before two responsible organized bodies under the Constitution. All that was done here in respect to the negotiation between the two houses was simply done in courtesy. It had no binding force as law. If it were a concurrent vote of the two houses, it could only be binding by the approbation of the President of the United States. It was good only as a matter of courtesy for the purposes of convenience. When the President of the Senate counted the vote, no matter who aided him, it was his count. When he counted the vote and declared the result, the authority conferred by the Constitution and law of the United States was ended, the duty was performed, the individuals declared to be elected stand elected, and there is no power under the Constitution or law to review that decision. What may be done ultimately, when cases may arise, when difficulties may intervene, will be better determined when those difficulties arise. I have simply expressed my solicitude not to go beyond the present case, and therefore I hope no further action will be had on the subject.

MR. HUNTER. Mr. President, the Constitution evidently contemplated a provision to be made by law to regulate the details and the mode of counting the votes for President and Vice-President of the United States. "The President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates, and the votes shall then be counted." By whom, and how to be counted, the Constitution does not say. But Congress has power "to make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the Government of the United States, or in any department or officer thereof." Congress, therefore, has the power to regulate by law the details of the mode in which the votes are to be counted. As yet, no such law has been found necessary. The cases, happily, have been rare in which difficulties have occurred in the count of the electoral votes. All difficulties of this sort have been managed heretofore by the consent of the two houses—a consent either implied at the time or declared by joint resolutions adopted by the houses on the recommendation of the joint committee which is usually raised to prescribe the mode in which the count is to be made. In the absence of law, the will of the two houses thus declared has prescribed the rule under which the President of the Senate and the tellers have acted. It was by this authority, as I understand it, that the President of the Senate acted yesterday. The joint resolution of the two houses prescribed the mode in which the tellers were to make the count, and also required him to declare the result, which he did. It was under the authority, therefore, and by the direction of the two houses, that he acted. The resolutions by which the authority was given were according to unbroken usage and established precedent.

Nor were the occurrences of yesterday without a parallel. Just such a difficulty arose in regard to the vote of Missouri when Mr. Monroe was elected; and the scene in the House, to judge from the report, must have been more tumultuous than that of yesterday. The difference between that case and this was, that the joint committee had provided, by a resolution adopted previously to the count, that the result was to be announced as not being affected by the vote of Missouri in one way or the other, so that the resolution itself prescribed the mode in which the result was to be declared.

This precaution was taken upon the motion of Henry Clay, of Kentucky, fortunately enough, as the sequel proved. When the votes were being counted, and the certificate from Missouri was reached, Mr. Livermore, of New Hampshire, objected to the reception of her vote. Upon that debate arose; and the Senate, upon motion of Mr. Williams, of Tennessee, returned to their own chamber. When they were gone, a debate arose, and Mr. Clay said that, with deference to the President of the Senate, he thought he ought to have declared the result, for "the moment the objection was made the rule (*i. e.* the joint resolution) adopted this morning took effect." He thought, therefore, that the President of the Senate ought to have done as I understand our President did yesterday, the resolution of the two houses giving him this authority.

Mr. THOMPSON, of Kentucky. Allow me one moment. From the tenor of the remarks of the gentleman from Virginia, an expression may be drawn which I wish to disclaim, in reference to the President of the Senate. In calling members of the House interloping speakers, do not understand me as in the least way saying that he acted improperly, or wrong. He acted probably as most men would have acted, and possibly as I might have done myself. I will not say that, in regard to that, there was anything improper. I think he acted very discreetly and prudently. But then, what is the right of the matter? When we are counting the votes, (for the President of the Senate only counts them in his official capacity, and in the session of the Senate, because he cannot count them as a private individual,) it is improper for the House members to be anything but listeners. When they commenced speaking I retired as an individual. I did not think that it was in order for them to speak.

Mr. HUNTER. The result in the Missouri case was, that the Senate was invited back by the House of Representatives to its hall, and the President of the Senate did announce the result, as ordered by the joint resolution, in the midst of interruptions and murmuring; and then, upon motion of a Senator, the Senate retired from the hall; which so much provoked Mr. Randolph, of Virginia, that he declared the election vitiated, and offered resolutions affirming the whole proceeding to have been illegal. In the midst of a debate upon these the House adjourned; and this seems to have closed the proceedings in relation to the count of the electoral votes. It would seem, then, that whatever authority is vested in the President of the Senate as to the declaration of the result, has been supposed to have been given him by the joint resolution of the two houses of Congress. It probably would be still better to regulate the whole matter by law. If, then, his authority be denied in either of these modes, the power of the two houses to regulate the count is recognized.

I thought, therefore, yesterday, that inasmuch as the joint committee had failed to take the precaution beforehand which had been taken on two occasions heretofore, it would have been better to remedy the omission by a conference at the time. A joint resolution might thus have been adopted, which would have conformed to precedent, and reserved unmistakably to the two houses the authority over the subject heretofore exercised by them. The opportunity for that has now passed away. I presume that the declaration as to the persons elected is valid. If anything further ought to be done, it would seem to me that it would be to pass a resolution declaring that, as the vote of Wisconsin could not affect the result in either way, it had not been reckoned in the count. Whether even that be necessary now, it will be for the Senate to consider. More than that cannot now be necessary, and perhaps it will be sufficient to order the result of the election to be announced to those persons who have been elected as President and Vice-President of the United States.

Mr. CRITTENDEN. It is the furthest from my wish or purpose to embarrass the proceeding that gentlemen desire to take. Fortunately for us, this vote is of no consequence as it regards the result of the election. Mr. Buchanan is elected President of the United States, and it has been so declared; but it seems, according to the judgment which prevailed yesterday when we were in the other house, that, although objection was made to the counting of the vote of Wisconsin, there was, according to the opinion of the Presiding Officer, no way in which that objection could be decided. I think it is very important that we should decide it in some form or other. We see the danger that may arise out of the uncertainty existing on this subject. We saw enough yesterday to satisfy us that, if this presidential election had depended on the admission or exclusion of the vote of Wisconsin, the result would have been little less than revolutionary. Is it not wise to avail ourselves of this warning for the purpose of determining whether such votes ought or ought not to be admitted? I think it is. I think it is of great consequence, if we exercise any sort of providence or foresight on this subject, that the sense of the Senate and House of Representatives should be expressed on that question.

Other difficulties may be removed by such legislation as the gentleman proposes; but whatever may be your legislation on the subject, there must be electors, and you must appoint the day when the electors shall be chosen, and the day on which those electors shall meet and cast their votes; and then the day of the election of the electors; and the day when they shall meet and cast their votes must, by the express declaration of

the Constitution, be the same throughout the United States. You can by no law modify or nullify the election in this respect. On the same day on which electors are chosen in one State, they must be chosen in all the States. The same day on which they meet and cast their votes must be the day for meeting in every State. That is a constitutional provision.

As for the idea that it is in our power, or that we ought to admit a vote under any special circumstances not given on that day because of the weather, is to make the construction of the Constitution depend on the state of the weather—is to make it depend on any accident, or the pretext of any accident, or the pretext of any unavoidable detention of the electors from the place of voting. That cannot be. The Constitution says it shall be on the same day throughout the United States. You ought, therefore, in your law, to fix that same day for all the Union. Here is a vote tendered us from a State given on another day. We call it a vote in common parlance; but in the constitutional sense is it a vote at all? Is it not merely null? Unquestionably, it seems to me, it is null and void. The constitution of a State, for instance, provides that its legislature shall be elected on a prescribed day. Can any voter be allowed to vote afterward? Does his coming to the polls the day after the election is over, or an hour after, and declaring his voice in any way he pleases, give any effect to his voice? It is not a vote; it is only a declaration of how he would have voted if he had the privilege of voting at all. It is idle to talk about circumstances changing the Constitution in this respect, or giving by accident validity to a vote which the Constitution prohibits. It is no vote at all, and should be rejected as such. That is my idea, and I wish to declare it.

Upon more and more reflection, I am rather disposed to settle it, because the other difficulties which have resulted from the joint meeting as to the mode of procedure may be remedied by legislation, and I hope will be. We have nothing, in my judgment, so important before us this day as the question that this presidential election has opened to our view. Let us avail ourselves of the warning which accident has given us—a warning which comes at a time when the question is comparatively of no consequence, and we can calmly apply our minds to the proper constitutional consideration of the question. But whatever legislation may take place, electors must some day be appointed, and the point I now propose to settle is one that may arise under any state of legislation you can possibly adopt. I am willing to confine our action now to that unavoidable state of the case which may occur in every future presidential election, in spite of all we can do. We cannot give a single day longer than that allowed by the Constitution. The vote must be on a particular day. No time before, no time after, will do. That is the Constitution, and we cannot change it. We cannot say that for the purpose of avoiding difficulties of this sort, and affording more time for the electors to meet, the election may take place any time within three days after a given time. We cannot give more days than one, and that one day must be the same throughout the Union; so that this question may occur in any and every presidential election. Now, is a vote given on a day different from that prescribed, null? I think it is.

I will ask leave, wishing, as far as it is in my power, to avail myself of every means of obtaining a vote on this question, to disembarass the object which gentlemen have in view by the additional resolution; and, therefore, as I understand that the gentleman from California, who offered the original resolution, is willing that a vote may first be taken on my resolution, I withdraw it in the form of an amendment, and offer a distinct resolution embracing that single point.

Mr. WELLER. For the purpose of effecting the Senator's object, I can withdraw the resolution I offered for the time being, and the Senator from Kentucky can offer his proposition.

Mr. CRITTENDEN. Very well. I am willing to have them disconnected.

Mr. COLLAMER. I understand that the resolution of the Senator from Kentucky is now offered. I wish it read.

The PRESIDENT *pro tempore*. The resolution of the Senator from California is understood to be withdrawn.

Mr. CRITTENDEN. I now offer this resolution:

Resolved, That the electoral vote of the State of Wisconsin, in the late presidential election, being given on a day different from that prescribed by law, was therefore null, and ought not to have been admitted or included in the count of electoral votes given in the late presidential election.

Mr. BENJAMIN. Permit me to make a question to the Senator from Kentucky. I am perfectly willing to vote for all the propositions contained in the resolution; I believe them to be founded in the Constitution and laws of the land; but in the shape of a resolution it will not avail so much as it would to pass a law now, directing that hereafter, when the vote of a State presented for count shall appear to have been given on a day different from that provided by law, it shall be the duty of the President of the Senate not to count that vote. If we pass a law declaring that, it will have effect for all future time. If not, this will be merely an expression of opinion that does not

bind any one; and the difficulty to which the Senator refers will again occur. With a law there can be no difficulty.

Mr. WELLER. The Senator from Kentucky, perhaps, can get at the question in this way: Let him offer his proposition in the shape of a resolution instructing the Judiciary Committee to report a bill providing that in such a case, where a State fails to give a vote at the time fixed by law, it shall not be counted. That will be a test vote, and we can get the sense of the Senate on that proposition.

Mr. CRITTENDEN. I prefer this mode. I hear the gentlemen's suggestions with great kindness and all proper respect; but I do not know that a law may be passed. We have been now seventy years and more without any such law, and I do not know but that, when this presidential election and the consequences which might have resulted from it have been lost sight of, we shall go on without legislation. I wish to change this resolution and make it a joint resolution of the Senate and House of Representatives; and in that form I offer it:

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That the electoral vote of the State of Wisconsin in the late presidential election, being given on a day different from that prescribed by law, was therefore null, and ought not to have been admitted or included in the count of electoral votes given in the late presidential election.

Mr. BIGGS. Is it in order to move to refer that resolution to the Judiciary Committee?

The PRESIDENT *pro tempore*. It is perfectly in order.

Mr. BIGGS. I move that reference.

Mr. CRITTENDEN. I hope that will not be done. I hope we are prepared now to act. I think we ought to take a vote on it without reference to the Judiciary Committee.

Mr. COLLAMER. It is obvious, Mr. President, in the first place, that the form of this resolution is not the making of a law, but the expression of an opinion. In the second place, it is the expression of an opinion concerning a matter that is past, and has no operative effect. The matter is over to which it relates—it is all done. There is no practical effect in the resolution when passed, unless it makes a law for the future. It is badly drawn with a view to that purpose, for it only declares that the vote of Wisconsin ought not to have been counted. That is gone by, and it makes no regulation in relation to the future at all. My first objection to it is that it is entirely inoperative.

But, Mr. President, I should not have risen on that account merely. Strange as it may appear to gentlemen who may think proper to listen to me, I cannot but say that I entertain very serious doubts under the Constitution as to whether we possess any power to express any opinion at all about it. I very much doubt whether the framers of the Constitution ever intended to leave the subject of the presidential election to the House of Representatives, or the Senate, or either, or both of them. There was a great deal of debate in the convention that framed the Constitution as to the manner of choosing a President of the United States. Various projects were presented. Among others, it was very gravely debated whether he had not better be elected by Congress. For some considerable time that proposition was under consideration. Various plans were put forward, various suggestions made as to the manner of choosing a President, and much difficulty was found in relation to it before a plan was arrived at, and that so soon resulted in a practical failure as to lead to the change in the Constitution to what it now is in this respect. The Constitution vested in each house the power to decide upon the election of its members; it provided carefully that it would not trust to the two houses to elect a President.

It seems to me that if we consult history at all, and consider the probability of things even as they fall within our own observation and experience, we shall find that there is very little practical difference between leaving the presidential election to Congress and leaving Congress to decide that election. It will amount practically to about the same thing. Disguise it as we may, after all, the truth constrains us to acknowledge, more or less, that, in deciding on the election of members of the two houses of Congress, when the decision of the election of a proposed member or a contested seat determines the state of political parties one way or the other, the vote is a political one. When the question arises in such a contingency, in such a crisis, it requires very little acquaintance with mankind to know what will be the result. It will be simply a political decision; and individuals, instead of being held responsible for their opinions and votes on such occasions, will go with their party, and endeavor to get rid of personal responsibility in that way. In deciding upon an election which has been had by electors, the legality of that election is always a turning-point in politics. There are always candidates of different parties; and deciding one way would be the triumph of one party, and deciding another way the triumph of another. It will always present that state of things.

Now, is it difficult to see that, if the question is to be submitted to Congress as to the propriety or legality of an election of President, it will always be a party decision? It will be so, as a matter of course. There is no difficulty, whenever you choose, in

creating questions of that kind; for it is a common charge of one party against another, that votes are procured by fraud and by corruption. In particular States, where there is a close vote, each party charges the other with producing the result by fraud, by violence, or trickery. Then, whenever the election of electors is close in a State, such as Delaware or Louisiana, or one where the possibility is more likely, and it is decided one way or the other by only a small plurality, the moment that election comes to be canvassed before the two houses, at once testimony will be offered to show that the election in that State was procured by fraud or violence, and therefore that the votes of its electors should be set aside. Such a question, I say, in any tolerably close election, may be raised at any time. Either party may at any time raise such a question; and if they know how the Senate or House of Representatives, or the two houses, who are to pass upon that question, stand, they know what will be the result always.

Under this view of the case it is, to say the least, exceedingly questionable whether, when the Constitution said, not that Congress should decide the election of President, but that it should decide upon the elections of its own members, it at the same time meant to trust to these houses, or either or both of them, the power of deciding the presidential election. I very much doubt whether, if we were now arranging the election of President, we should ever think of resorting to such a means as that; but I am not fully settled in my own mind that that is so. If, however, we adopt this resolution, it is not merely an expression of our private opinion on the subject of the Wisconsin vote—that is not all, by any means. If that were all, it would be of rather slight consideration; but the truth is, that by the expression of our opinion in the form of this resolution in relation to the electoral vote of the State of Wisconsin, we in fact take upon us to say that we are judges of the election. We assume and exercise the right of judging on the legality of the vote of the different electors. We actually assume and take upon us the exercise of this exceedingly questionable power. Before we take this long leap, and undertake to express this opinion in this way, and thus assume this much contested power, it seems to me we ought to have some occasion to demand it; and there is nothing in the present occasion that in the least demands it. The whole matter is settled and ended.

I do not say that, in my opinion, the House of Representatives and the Senate, or the Senate alone, are not judges of the election. I do not say it is not so; I do not say it is so; but I think, by entertaining this resolution, we in fact decide that it is so; and that is my great objection to entertaining it. I am unwilling to have the question passed upon in this summary manner, and in relation to a case that does not demand anything to be done by us at all, for the whole matter is ended and completed. With these views, my motion is to lay the resolution on the table.

Mr. TOUCHEY. Will the Senator from Vermont withdraw that motion?

Mr. COLLAMER. If the Senator will renew it, I have no objection to withdrawing it.

Mr. TOUCHEY. I will renew it. Mr. President, I should be very loth to express an opinion on this question in opposition to that which has been declared by the honorable Senator from Kentucky, that the vote given by the State of Wisconsin, or which appears to have been given on the 4th of December by the gentlemen who were elected by the people of Wisconsin as electors, was a valid vote. It strikes me that it is not in the power of Congress to pass any law by which a vote given after the day prescribed by law, and upon which the Constitution acts when it declares that the day shall be uniform throughout the United States, shall be held to be valid. Any law of Congress undertaking to prescribe for any State, or any class of States, on the ground of accident or any existing state of things, a day different from that prescribed for all the States of the Union, would, I apprehend, be null and void to all intents and purposes; and it would be very difficult to show that Congress, by a joint resolution, could have the power to do what they could not by an express law.

But I do not intend to express any definite opinion on that subject, because there is no question arising in the present election. The only question that arose was, whether the President elect, James Buchanan, had a majority of all the electoral votes. That fact was ascertained without controversy. That he had one hundred and seventy-four votes, a majority of all the electoral colleges, is admitted on all sides, and the moment it appeared that he had one hundred and forty-nine votes, which was a majority, every other inquiry became perfectly irrelevant and immaterial; every inquiry in regard to the electoral vote of Wisconsin was entirely immaterial; and when the Presiding Officer of this body declared the result of the election, he did not declare that those votes were admitted or rejected. He had no authority to declare the one or the other. The fact was announced as the fact existed, but it was immaterial; and when he declared the result he declared that which it was his duty to declare, and the truth of which no one controverts.

However, a question might arise, to which I beg leave to call the attention of the Senate. Suppose the electoral colleges had so stood that the rejection of the vote of Wisconsin would have left no choice, no one then having a majority of the electoral votes; I ask Senators what would then have been the condition of the case? Suppose the rejection of the vote of Wisconsin had left no choice by the presidential electors;

if that vote was not an effective vote, the House of Representatives would have the power, without the assent or consent of this body, to elect a President of the United States by States. Who shall decide that question? If I were a member of the House of Representatives, and believed the state of the vote required me, as a member of that house, to go into the election, I should act without any reference to the opinion of the Senate. It would be a duty devolved by the Constitution on the House of Representatives, and no act and no vote of the Senate could take away the power of the House of Representatives to elect a President in that case.

Again, let me go a step further. Suppose the Senate should be of the contrary opinion, believing that the vote of Wisconsin was a valid vote; and the gentleman elected President by that vote should assume the office of President and undertake to discharge its duties, and should send to this body his nomination for any officers which the Constitution authorizes the President to nominate; and this body, acting upon its opinion, should confirm the nominations of the President thus elected by that vote which they declare to be legal, but which the House of Representatives declare to be illegal and void. We have then a contest between two Presidents, one recognized by the House of Representatives, and the other recognized by the Senate. Now, that this body would be called upon in that case to act and decide, I doubt not; and that the House of Representatives, in the case I have supposed, would be called upon to act and decide, I doubt not; because the Constitution has devolved on them the power of acting, and the right to act upon the hypothesis that there was no choice. Then how is the question to be decided? Can the Senate decide it? Can the House of Representatives decide it? If they differ in opinion, can either branch decide it? The courts of justice are open. There is a mode of legal proceeding by which this question could be brought before the judicial tribunals of the country in any individual case; and any question that may arise may be carried to the Supreme Court and adjudicated in that particular case by that court; and what can be done in one case can be done in another case.

I suppose this state of things for the purpose of presenting the idea which is very strongly impressed on my mind, that it is not in the power of Congress to make a President, or to unmake one. There is no power in Congress to declare a man effectively to be President or not to be President except in a single case, where by the Constitution the power is devolved on the House of Representatives. That question is decided by the people. It is the people who make the President through their electors and by their votes; and there is no power in Congress to change the result. The whole proceeding of counting is based on the idea merely of disclosing to the public in a safe, authentic way, the actual state of the vote; and when that is ascertained truly, the President who is chosen by that vote is President, let Congress do what it may.

I say, then, sir, that any resolution of Congress on this subject is nothing more than an expression of opinion, not obligatory on those who may come after us; and any law of Congress which undertakes by its operation to change the actual result, as found upon an inspection of the facts, would, so far as it changed or varied the result, be inoperative and of no effect: and hence I say to-day, as I said yesterday, that in my judgment the course of the Presiding Officer was entirely correct in the House of Representatives. When the two houses met, they had no power as a deliberative body. No motion could be submitted; no question could be debated; no vote could be taken. An objection might be interposed by a member; and if there was to be any deliberation, the two bodies must separate and act separately. But when they act separately, they have very little power. In the present case they have no power, because it is admitted on all hands, without controversy, that a President and Vice-President have been chosen; and the result having been ascertained and declared, neither house of Congress has any control over it. I hope, therefore, that no resolution will be adopted on this occasion, except only that which is proposed by the Senator from California, appointing a committee to wait on the President and Vice-President elect, and give them the usual notice of their election.

Mr. STUART. I concur mainly in what has been said by the Senator from Connecticut, and I only rise to correct what I think was a misapprehension in a single particular. The Senator states that it was not the duty of the Presiding Officer under the circumstances to make any decision in respect to the vote of Wisconsin. I say it was the duty of the President of the Senate to decide upon the vote of every State. The Senator from Connecticut is correct in saying that, after it was ascertained that Mr. Buchanan had a majority of all the votes cast, it was immaterial as to the vote of Wisconsin; it was equally immaterial as to the vote of every other State except those counted for Mr. Buchanan. It was a question that should have been decided. It was a question, in my judgment, that should have been decided by the President of the Senate, and which could be decided by nobody else. There was no appeal from the decision. As the Constitution and the law stand, it is the duty of the President of the Senate, being the proper officer under them, to decide what he counts, and what he refuses to count, in every instance. This is all I designed to say, and I now renew the motion to lay the resolution on the table.

Mr. PUGH. I rose when the Senator from Michigan did, and I hope he will withdraw the motion for a few minutes. I desire to offer an amendment.

Mr. WELLER. The Senator from Connecticut was under a pledge to renew the motion.

Mr. PUGH. But he did not renew it.

Mr. STUART. I cannot consider this as my motion. I renewed it, because I felt under obligations to do so; but I have a disposition to hear every Senator. As far as I am concerned, I have no objection to withdrawing the motion.

Mr. PUGH. Mr. President, I cannot vote for this as a joint resolution; for if we pass it as a joint resolution, it must go to the President of the United States, and pass under his approval or disapproval. The provision of the Constitution is express, that every order, or resolution, or vote to which the concurrence of both houses is necessary, except on a question of adjournment, shall be submitted to the President. Now, confessedly, the President has nothing to do with counting the votes for his successor. It seems to me, therefore, that it is an error to make this a joint resolution; and the first amendment I wish to submit is to strike out the words, "by the Senate and House of Representatives of the United States of America in Congress assembled," so that it may be a separate resolution of the Senate. Then I shall move to add to it this further resolution:

"That a copy of the foregoing resolution be sent to the House of Representatives, together with a message that the Senate is now prepared to proceed with counting the votes for President and Vice-President of the United States."

It will be observed, by reference to the Missouri case, that after the Senate retired, some debate occurred in both houses; and having settled in their own minds the proper course, a message was sent from the House of Representatives notifying the Senate to return, and the Senate returned and completed the business.

The honorable Senator was interrupted by the delivery of the following message from the House of Representatives, by Mr. Cullom, their Clerk:

Mr. President, I am directed by the House of Representatives to inform the Senate that the House has passed a resolution appointing two of its members to act in concert with a committee of the Senate, to be appointed by the Senate, to notify the Hon. James Buchanan, of Pennsylvania, of his election to the office of President of the United States for four years from the 4th of March next; also to inform the Hon. John C. Breckinridge, of Kentucky, that he has been elected to the office of Vice-President for four years from the 4th of March next; and have appointed, on the part of the House, Mr. Jones, of Tennessee, and Mr. Florence, of Pennsylvania.

Mr. WELLER. I hope my resolution will now be taken up by unanimous consent.

Mr. PUGH. I object to it. I have partly the same objection to this as to the resolution of the Senator from Kentucky.

It is in vain for us to resolve out of a question of this magnitude. It is in vain for us to attempt to escape it. What are the facts as they occurred? The Senate and House of Representatives met yesterday, pursuant to the Constitution and laws, to count the votes for President and Vice-President. I certainly can never agree to any construction of the Constitution which fixes that that is the duty of the President of the Senate, in exclusion of the members of Congress. Two difficulties seem to me to stand in the way of that construction. First, the Presiding Officer of this body may be the Vice-President of the United States, and may claim to be the President-elect, and he is to stand there, in the presence of both houses of Congress, and reject votes, or admit votes, by his single will, and thus make or unmake himself President. It is a power higher than the veto. I am bound to say under my construction of the Constitution of the United States, no such power is lodged in any individual, whatever may be his station. The Constitution says that the President of the Senate shall open the votes. That is the end of his duties. He is to open them and to read them. The joint resolution never devolved on the tellers the right to read those votes. The joint resolution was that the tellers should record them. Who are the tellers? We heard a great deal about their report yesterday. I do not care if they never reported. They are nothing but clerks—clerks of the joint session of the Senate and House of Representatives. This is the very language of the joint resolution, which was copied from former precedents:

"That one person be appointed a teller on the part of the Senate, and two on the part of the House of Representatives, to make a list of the votes as they shall be declared, that the result shall be delivered to the President of the Senate *pro tempore*, who shall announce the state of the vote and the persons elected to the two houses assembled."

It was for the President of the Senate to open the sealed certificates which were sent to him, and to announce to the two houses of Congress their contents, and then our clerks, to wit, the Senate teller and the two House tellers, were to record it; and accordingly the Constitution says, "the votes shall then be counted." Who are to count them? Congress. What are we there for? My friend from Kentucky [Mr. Thompson] supposed that the House of Representatives could be brought to our bar. I ad-

mit they may come here; but why do we want them for witnesses, or why are we to be witnesses if we have no control over it at any stage?

Mr. THOMPSON, of Kentucky. Will the Senator allow me a moment?

Mr. PUGH. Certainly.

Mr. THOMPSON, of Kentucky. I suppose, according to all sort of logic and proper proceeding, the President of the Senate counts the votes officially. He does not count them as Mr. Mason, of Virginia, but he counts them as the President of the Senate, under the direction and control of the Senate, where each State is equally represented. The members of the House of Representatives are present, looking on as witnesses, to prevent any clandestine cabal or secret association, or any sort of—I will not say Catiline conspiracy. The President of the Senate is to count, and do it under the regulation of the Senate. The members of that House of Representatives are to sit by, and whether we put them in the gallery, or the reporters' desks, or in niches—wherever they are placed they are to look on. When the President gets through with the counting, under the direction of the States as represented here, if it is ascertained that no person has obtained a majority of all the votes cast, the House of Representatives then retire to their chamber; or, I suppose, official courtesy would require that we should notify them that no one had been elected; and then the Speaker of the House should rise and call the roll of the States, beginning at the State of Maine, and ask the members of each State for whom they voted as President. That is to protect the States against any—well, I will not say, fraudulent combination—I will not say anything about the big States, like whales swallowing up forty minnows at a bite, or anything of that kind. I am of opinion that the House of Representatives had no right to say anything in regard to it, but I had nothing to say about the Presiding Officer, when the two houses were assembled yesterday, recognizing one of the members of that House as entitled to the floor. I did not want to call any of them to order, but I got up and went out, as I stated some time ago. I thought they had no more right to talk about it than a witness has to interfere with the proceedings of a court of justice. In Kentucky phrase, they had no right to put in their “jaw” at all. [Laughter.] That is just the long and the short of the matter. That is exactly what I think about it.

Mr. PUGH. I wish to put in a *caveat*, once for all, in speaking of the course which was taken yesterday, or the views expressed. I join the Senator from New York, [Mr. Seward.] I consider it fortunate that the vote of Wisconsin is immaterial to the result, and I consider it fortunate, too, that the Presiding Officer of the joint convention was not interested in the result of the vote at all; but I speak to-day as I understand the rights under the Constitution.

I think a grave error was committed yesterday in the joint convention, and that it behooves us to remedy it by whatever means we can. It was the duty of the President of the Senate to open the votes, and declare the contents; it was the duty of the tellers, as clerks, to record the declaration; and whenever a vote was presented to which any objection could be made, the time to make the objection was when the vote was read. That was attempted yesterday. A representative from the State of Virginia objected to the vote of the State of Wisconsin. He was told that that was not the proper time, and, submitting to the suggestion that the proper time would come directly, he took his seat, and we waited then until it was all through. Then a motion was made to reject the vote of Wisconsin, and it was said that was not the proper time. Then we were told to wait until the tellers reported. Well, the tellers reported; and they reported the fact that the vote of the State of Wisconsin was given on a day unauthorized by law. I agree with the Senator from Kentucky, that it was a nullity. We cannot make it a vote. It is not in our power to do so, unless we can make the Constitution over again. Then the objection was raised by the Senator from Georgia [Mr. Toombs] and others, that it was now apparent, on the report of the tellers, that here was an illegal vote which had crept in; but we were told that that was not the time.

What further? Then the Presiding Officer of the two bodies read to us—here is his own statement: “That one hundred and fourteen votes had been cast for John C. Frémont, of California.” If the vote of Wisconsin was a nullity, no such number of votes was given to Mr. Frémont; and in making that announcement, whether he designed to do so or not—and I accept his disclaimer—he did, in fact, decide the whole question. He could not have made this declaration without deciding it. There were not one hundred and fourteen votes for John C. Frémont, unless the vote of Wisconsin was counted. Then an objection was interposed, and we were told that the two houses had discharged all they came for, and were to separate and go to their chambers.

So, at every stage of this proceeding, beginning with the first presentation of the certificate, some one of the members of Congress objected to this vote, and he was told that the proper time had not come, and the whole proceeding was completed and ended, and we were called out of the chamber and back here. At every stage we were told the proper time had not come, and now when we get here we are told the proper time has not come yet, or that it has passed.

Mr. President, when is it to be settled? Suppose, as Senators have said, the vote of Wisconsin would have led to a different result, we should have had anarchy in both halls

of Congress. But now, when the question is here in the most favorable circumstances for its settlement for the future, for a deliberate expression of the views of both houses of Congress, we are told that we must lay it on the table until it shall come again in more terrible circumstances, and resolve ourselves out of it by appointing a committee of three gentlemen to go and tell Mr. Buchanan that he had a majority of the votes. It seems to me—and I say it with due respect to Senators—a trifling with the magnitude of the question. Let us understand what is our power.

I believed at the time, and I believe now, that when the Representative from the State of Virginia objected to that vote, his objection was rightly made; it was made at the right time and at the right place. I believe that the proceeding should have stopped at that point—that all that passed beyond that was illegal. Here was a vote proposed; it was objected to by one of those whom the Constitution said should be present and assist in the counting; and it was then our duty to settle what should be done with this alleged vote from Wisconsin; and having settled it—either admitted or rejected it—then the result should have been ascertained and the declaration made. Instead of that it was passed over. I appeal to Senators, was there any step in the proceeding yesterday when any member of either house was allowed to put in an objection, or debate an objection, or state it in the joint convention?

I say it is fortunate that our Presiding Officer had no interest in the result. I know the Presiding Officer of this body will not suspect for a moment that I have any unkind feelings toward him; I have none. But suppose the case had been otherwise. Aaron Burr once sat in your chair, sir. Suppose he had undertaken, or another Aaron Burr, if he should come here, in the face of both houses of Congress should undertake to exercise this extraordinary and irresponsible power, it would be the end of this Government. It seems to me, then, that a great error was committed, and although the Presiding Officer disclaimed intending to exercise it, and although I believe he did not intend to exercise it, yet practically it came to that; for how could we ascertain what the votes were at all if the vote of Wisconsin was recorded by the tellers, and then, the tellers having reported to us, we could not pass upon the question?

This is not exactly the Missouri case. That was a case which is never likely to happen again. It was a question whether Missouri was a State or not. It could have been avoided on that occasion, and was avoided easily; but here is a question that may occur one hundred times again, if the Government shall stand that many years.

It seems to me, then, that my own impression differs from that of every Senator who has spoken, except the Senator from Maine, [Mr. Nourse.] I believe the two houses together were the proper forum to settle the question. I do not consider that it is a legislative question. I do not believe that it is to be settled by a joint resolution or a bill. I believe the two houses assembled together were a board of canvassers organized by the Constitution for the express purpose of counting these votes. The whole number of Senators and Representatives taken together is equal to the whole number of electors in all the colleges. It is exactly the same body of men in number, equal to all of them. All the States, if they had voted there yesterday through their Senators and Representatives, would have exercised the precise power which they exercised in the election of President. Every State has a number of electors equal to her Senators and Representatives. Every State had in the joint body yesterday two Senators and her number of Representatives according to the apportionment; and I believe, as I said, that that was a board of canvassers organized for the purpose of counting the votes for President and Vice-President.

Mr. SEWARD. Will the honorable Senator allow me to ask him a question for the purpose of testing his position?

Mr. PUGH. Certainly.

Mr. SEWARD. Suppose the two houses yesterday had decided to count the Wisconsin vote under the circumstances, and suppose that should have determined the election, would the decision of the two houses have been conclusive of the election?

Mr. PUGH. I think so. It would be like many a decision made by the courts. I have known courts of last resort to decide what I believed to be utterly unconstitutional; but I believed it to be settled, at least for that case, and it was my duty to acquiesce in it. In a proper case it may be reconsidered. But I believe that very tribunal was adopted; that that was the idea of adopting it; that the States were there represented by their proper representatives, exactly as they were represented in the electoral college; that it was the duty of the President of the Senate to open the votes; that when an objection was raised that was the place and the time to settle it; and the question should have been put, in my judgment, to the joint convention, "Shall the vote purporting to be the vote of Wisconsin be received and recorded?" If it had been recorded, although I should have deemed it unconstitutional, I should have felt bound, as a citizen, to acquiesce in it as a decision made by the competent authority.

Mr. MALLORY. Allow me to ask my friend a question. Do I understand him to take the position that this joint convention, as he terms it, but which term is found nowhere else than in the debates of yesterday, this union of the two houses for the purpose of counting the votes, may determine what votes shall and what votes shall not be

counted? Is that the idea—that the Senate and House of Representatives, assembled as they were yesterday, have the power to rule out or rule in the votes of any State?

MR. PUGH. Why not? Do not gentlemen propose to do it by joint resolution?

MR. MALLORY. Then how are they to cast their votes—*per capita*, or otherwise?

MR. PUGH. *Per capita*. How do they cast their votes in the electoral college? The Constitution says, for instance, that my State shall have twenty-three votes. Why? Because she has twenty-one Representatives and two Senators. How many had she there yesterday? Twenty-three votes—no more, no less. Why adopt this number for the electoral vote of the State, and make it exactly equivalent to the representation of the State in both houses?

My friend says that I call this meeting a joint convention. I adopt that term merely for convenience. I do not care what title you give it. The counting is to be done in the presence of both houses—I care not what you call it. It is a convening of them both. It seems to be considered a very dangerous power to be lodged there. I acknowledge it; but is it more dangerous to lodge it there than in the person of the President of the Senate alone?

MR. MALLORY. Is not my friend, then, providing a third mode of electing President and Vice-President, unknown to the Constitution, which prescribes that, when not chosen by the electors, the House shall immediately proceed to vote by States? His method, as I understand him, provides a third method of electing President and Vice-President in this manner.

MR. PUGH. I provide no method of electing. I provide a method of ascertaining the fact who is elected.

MR. MALLORY. That is electing.

MR. PUGH. I ask Senators again who else is to decide it? Are you prepared to adopt the proposition which I understand was made by the Senator from Michigan, [Mr. Stuart,] that the President of the Senate alone has to decide this question? Are you prepared to declare that by a joint resolution, and have it vetoed by the President at the other end of the avenue? It is no legislative act. If it is, it is subject to a veto.

Suppose this case were to arise: that the vote of Wisconsin decided the whole controversy, and the President of the Senate should decide to count that vote, and a majority of one in the other House should agree with him, and we, the representatives of the States of which we have heard so much, should unanimously disagree with him: the vote would be counted in spite of us, for the President would put it down, and that House would disagree to your joint resolution to strike it out. That is the result of the course you now propose. There are ten thousand difficulties in any other proposition to one in the proposition that I have suggested. The joint body is a general assembly of all the States, represented according to their congressional power; but I only gave that as the expression of my opinion, and I wish to concur in what was said by the gentleman from Maine [Mr. Nourse] yesterday.

The purpose of my amendment to this resolution now is that it shall be a resolution expressing the sentiment of the Senate that the vote of Wisconsin cannot be counted; and that we notify the other House of the fact, and notify them that, having arrived at that conclusion, if they, by a separate resolution, come to the same conclusion, the two houses can reconvene and count the votes upon that basis, and announce the result. At present, I confess, I think it is imperfect; and I think it is imperfect for this reason: Here was a grave objection urged to the vote. The objection was not considered at any stage; it was ruled out at every stage, and the venerable Senator from Michigan [Mr. Cass] told us to come back to the Senate Chamber and consider it; and we retired upon the suggestion that we could consider it. The Senator from Illinois [Mr. Trumbull] said that we are to retire for that purpose. We have retired and got here, and now we are told we should let the whole subject drop. It makes no difference to me. It is not denied in the resolution that Mr. Buchanan is elected President and Mr. Breckinridge Vice-President, and I am sure that is perfectly acceptable to me. But the question may arise in the future; and if we stand here upon an imperfect settlement of this question, it will come back to plague us or our successors with a thousand fold of its difficulties. This is the time for settling it when no person can be accused of acting from interested motives, for it will not alter the result. I am sure no man can be accused of any intentional discourtesy to the State of Wisconsin, when it is a purely naked case of construction under the Constitution. We can give our deliberate judgment; and our successors, if they choose, can avail themselves of that judgment on more difficult occasions.

I hope, therefore, that instead of attempting to get rid of the resolution proposed by the Senator from Kentucky, in any of these collateral modes, it will be kept before the Senate, and in some shape or other the Senate declare its opinion on this question, and then notify the House of Representatives that, having settled this disputed question, it is ready to proceed.

MR. BENJAMIN. I move to lay the resolution, with the amendments, on the table. I give notice that I will not withdraw my motion at the solicitation of any gentleman.

The motion was agreed to.

Mr. WELLER. I hope the resolution I offered this morning will not be taken up. I understand the House of Representatives has laid the whole subject on the table, and appointed a committee on the part of that House to wait on the President elect. My object can be accomplished, perhaps, by concurring in the resolutions sent from the House of Representatives.

The Secretary then read the following resolutions of the House of Representatives :

"IN THE HOUSE OF REPRESENTATIVES, *February 12, 1857.*

"Resolved, That two members of the House be appointed by that body, to join a committee of one member of the Senate, to be appointed by that body, to wait on James Buchanan, of Pennsylvania, and inform him that he has been duly elected President of the United States for four years, commencing on the 4th day of March, 1857 ; and also, to inform John C. Breckinridge, of Kentucky, that he has been duly elected Vice-President of the United States for four years from the 4th of March, 1857.

"Ordered, That Mr. George W. Jones, of Tennessee, and Mr. T. B. Florence, of Pennsylvania, be the committee on the part of the House."

Mr. WELLER. I move that the President of the Senate appoint a committee of one.

The PRESIDENT *pro tempore*. It is moved that the Senate concur in the resolution.

Mr. WELLER. No, sir. My motion is that the President appoint a committee of one.

The PRESIDENT *pro tempore*. The Senate can have no committee until it concurs in the resolution.

The resolution was concurred in ; and there being no objection, the President *pro tempore* was authorized to appoint the committee on the part of the Senate ; and Mr. Weller was appointed.

VOTES FOR PRESIDENT AND VICE-PRESIDENT OF THE UNITED STATES.

IN THE HOUSE OF REPRESENTATIVES, *February 12, 1857.*

The Speaker stated the question to be on the following resolution submitted by the gentleman from South Carolina, [Mr. Orr,] the pending question being the motion of Mr. Smith, of Tennessee, to lay it on the table :

Ordered, That when the Senate shall return to this house to complete, in joint convention, in pursuance of the order of the two houses, already adopted, the counting of the votes for President and Vice-President of the United States, the vote of any State cast on a day other than that provided by law, to wit, the 3d of December last, shall be rejected by the tellers of this House.

Ordered, That the Clerk acquaint the Senate with the foregoing order of this House.

Mr. ORR. Since the adjournment yesterday, I have examined the Constitution and the law of Congress passed to regulate the counting of the votes for President. The count proceeded far enough to ascertain that Mr. Buchanan and Mr. Breckinridge had each received for President and Vice-President one hundred and seventy-four undisputed electoral votes, which, under the Constitution, was "a majority of the whole number of electors appointed," and they are declared by the Constitution "the President and Vice-President," no further action being necessary to complete the result. The Senate, therefore, need not return to the House for any purpose whatever. I think a mistake was made yesterday, which, failing to be corrected at the time, cannot now be remedied. The vote of Wisconsin was counted, according to the declaration of the President of the Senate, announcing the result, and, I think, improperly counted. The Constitution says :

"The Congress may determine the time of choosing the electors and the day on which they shall give their votes, *which day shall be the same throughout the United States.*"

The vote of Wisconsin was given on a day different from that provided by law, and was consequently illegal and void, and should have been rejected. How was this to be done ? The gentleman from Virginia, Mr. Letcher, objected very properly to the vote of Wisconsin when the certificate was opened and was being handed to the tellers. The objection was overruled or not entertained by the presiding officer, the President of the Senate. One other certificate was afterward opened, which completed the count. The objection might perhaps have been renewed then, but it was not. Nor was the point made when the tellers reported the result ; nor was it made when the President of the Senate recapitulated the result, and declared Buchanan and Breckinridge constitutionally elected President and Vice-President. Was it not then too late to make the question whether the vote of Wisconsin should be counted, the result having been announced ? I think it was. I am of opinion that the gentleman from Virginia, [Mr. Letcher,] as well as others of us who objected to the validity of that vote, erred in permitting the count to proceed until the question was decided. We erred in not requiring its decision before the tellers reported, and the error reached a

point where it was irremediable when we permitted the result to be officially declared by the President of the Senate. That officer, in my judgment, committed a mistake in refusing to entertain the objection of the member from Virginia. He should have submitted the question to the joint meeting or convention before proceeding further with the count. Who was to decide on the validity of the challenged vote? The two houses in joint convention by a *per capita* vote. The Constitution, in the twelfth amended article, says:

"The President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates, and the votes shall *then* be counted."

Why were the houses to assemble, and the votes *then* to be counted? Was it to look on and allow any paper offered, though known to be fraudulent or illegal, to be received and registered? If the convention or meeting have no power to object, and, if necessary, reject that which purports to be a vote, why are the two houses required to assemble together? Can it be assumed that the meeting is an idle, unmeaning, powerless form? If the joint meeting has no such power, then it would be a most useless form. But "*the votes shall then be counted.*" If that which is illegal, and only purports to be a vote, is presented, can it be counted when it is not a "vote" under the Constitution and law? If the State of Pennsylvania, being entitled to twenty-seven votes in the electoral college, should elect fifty electors, and they should send fifty votes for Mr. A, would the members of the joint meeting have to remain silent, like so many automatons, and permit fifty votes to be registered for Mr. A, when every member knew that the vote was illegal and void? The Constitution devolves on the two houses of Congress the duty of being present, and the votes shall be counted then. Does not the requisition to be present at the counting necessarily carry the right to determine what votes offered are legal, and what votes may be void, as an inseparable incident to the power of counting?

Is the question to be determined concurrently, or by the joint decision of the two houses? If it is to be done concurrently, there could be no decision on a contested vote when the two houses should disagree—the one voting to count, the other to reject; and if the admission or rejection of the challenged votes should determine the result of the election, by electing or defeating one of the candidates voted for, we should then present the anomalous condition of having two Presidents elected, and presenting themselves for inauguration—Mr. A being President by the decision of the Senate, and Mr. B by the decision of the House. The next step in such a contingency as this would be revolution—a resort to the sword to settle the question in fraternal blood, when it might properly be decided by the *per capita* votes of the joint convention, which would decide definitely for the one or the other.

Nor is the dignity of the Senate or the sovereignty of the States compromised or endangered by any such proceedings. The Senate and House are equals in the joint meeting. Their combined numbers are the same as the electors in the electoral college; it is a proceeding having reference to the President of the United States. Senatorial electors in the several States possess no power or dignity superior to those representing the congressional districts; they all assemble together, and each one casts a *per capita* vote. The Senate in joint meeting, in voting *per capita* on the question "Shall the vote excepted be counted?" wields the same power, relatively and absolutely, as the senatorial electors in the electoral colleges. In pursuing this analogy, is any wrong done the Senate? Are its prerogatives infringed? Is the sovereignty of the States, as represented in the Senate, invaded?

The conclusion, then, to which I come is this: Any member of either house, when the two houses meet to count the votes for President, may object to the counting of any particular vote upon what he may conceive sufficient ground. When the objection is thus taken, it is the duty of the Presiding Officer of the joint meeting to propound the question, "Shall the vote be rejected?" which shall be decided by a *per capita* vote of all the members of each house, and the vote so contested received or rejected, as the majority of the joint meeting shall determine.

This is a legitimate construction of the Constitution; the only one which can enable the two houses to reach a decision, and to relieve them from the ridiculous assumption that they can look on, and, knowing a vote to be fraudulent, have no power to arrest its counting. The Constitution makes us the managers or canvassers to count the electoral votes, and in doing so gives us the power to say whether a vote presented is or is not legal.

The decision of the question is of no practical consequence now. There were one hundred and seventy-four unimpeached votes counted for Mr. Buchanan and Mr. Breckinridge, which was a majority of all the electors appointed, and they are declared by the Constitution elected President and Vice-President. No further action is necessary in the joint meeting, and I withdraw my proposition offered yesterday.

Mr. JONES, of Tennessee. I wish to introduce a resolution which has been agreed upon by the joint committee on the subject of counting the votes of President and Vice-President.

The resolution was read, as follows:

Resolved, That two members of the House be appointed by that body to join a committee of one member of the Senate, to be appointed by that body, to wait on James Buchanan, of Pennsylvania, and inform him that he has been duly elected President of the United States for four years, commencing on the 4th day of March, 1857; and also to inform John C. Breckinridge, of Kentucky, that he has been duly elected Vice-President of the United States for four years, from the 4th of March, 1857.

Mr. H. MARSHALL. I am opposed to the passage of the resolution.

Mr. JONES, of Tennessee, (interrupting.) I ask for the previous question on the resolution.

The SPEAKER. The gentleman from Kentucky [Mr. H. Marshall] has the floor.

Mr. JONES, of Tennessee. Am I not entitled to it?

The SPEAKER. The gentleman was entitled to the floor on the resolution, but he did not claim it; and the gentleman from Kentucky addressing the Chair, was recognized.

Mr. H. MARSHALL. I cannot say, Mr. Speaker, that I shall oppose strenuously the *reception* of the resolution offered by the gentleman from Tennessee, but I am opposed to its passage at this time, because that yields all there is and has been in dispute as to the part which the Senate and House are constitutionally required to perform in the ascertainment and declaration as to the persons elected to the Presidency and Vice-Presidency by the electoral colleges.

Let me say here that, of course, I know and admit that Mr. Buchanan and Mr. Breckinridge have been elected; and I desire as much as does any member on this floor, or as can any citizen of this country, to have that election declared. That is not the point. The question presented here is as to the manner in which that fact shall be *constitutionally* ascertained and declared, and what part the houses of Congress play in that ascertainment and declaration, agreeably to the Constitution. The President of the Senate yesterday directed the tellers to take their places; he opened the certificates, and, one by one, he delivered them to the tellers with the declaration, "I hand to the tellers the vote of the State of Maine," and so on. *He* assumed that the certificate showed a vote, and *he* ordered it to be counted. When a member of this House desired to object to a vote, the President of the Senate repulsed him, and said no step could be taken involving the possibility of a vote of the houses upon a proposition made before them while together. While the objection of a member of this House was being attempted, the President of the Senate declared a result, but afterward he said repeatedly that the tellers had not entirely performed their duty, and he postponed a motion of a Senator that the Senate retire, by saying that the tellers had not finished their duty. As a first lesson, therefore, to us, we behold the result of the election proclaimed before the tellers had performed their duty. I have no doubt that the result had been attained—fairly attained. I do not know but that, were it not for the particular posture in which this question is placed, it might be well enough for the House to say that a result had been sufficiently attained to show the fact that Mr. Buchanan is elected President and that Mr. Breckinridge is elected Vice-President of the United States.

I am willing that we should stop on the count, there being no vote excluded but that of Wisconsin, and no question except that of the vote of Wisconsin. I am perfectly willing that the two houses, in the presence of one another, may make the proclamation of that result. I indicated yesterday that my opinion was that the two houses were in session; that they were in session in the presence of each other; that the Speaker, occupying his position, was then presiding over the House; that the President of the Senate, occupying his position, was presiding over the Senate; and that, by a joint order passed by the two houses, when the two houses came into the presence of one another the President of the Senate was, as an act of courtesy, allowed to preside over the ceremony which was being performed. But we were in session; and we, as a House, have a constitutional duty to perform. We have a constitutional duty to see that the count is properly made, and a separate resolution passing from this House to the Senate, and from the Senate back to this House, does not, according to my view, meet the requirements of the Constitution. The examination must be made, and the proclamation must be made, in the presence of the two houses.

The resolution of the gentleman from Tennessee does not come up to that question. In other words, in my opinion, it takes a false direction. There is no gentleman of any party in this House, I suppose, who does not want to reach the result which proclaims Mr. Buchanan President, and Mr. Breckinridge Vice-President of the United States for the next four years; but there underlies all this the question of how that thing is to be done, and done properly, according to the Constitution. The question, in fact, on this resolution, because this thing is to be hereafter looked back to as a precedent, is, what part are we to play? Suppose a case. Tellers were appointed. As I remarked, yesterday, who are these tellers? They are not known to the Constitution. Who appoints them? The House appointed two and the Senate appointed one. What are they? Mere instrumentalities, mere facilities, that we hold in our hands by which we perform our constitutional duty. We were counting the votes, and, by our acquiescence, the tellers acted for us. There was no challenge. But suppose a vote is pro-

posed to be counted, and a member challenges it; has he not the right to challenge it? The President of the Senate says not. I say he has. I believe Chancellor Kent, after a fashion, also says not. He has a right to challenge it, and we have a right to vote as to whether that vote shall be counted.

When the Constitution says the vote shall be counted, what does it mean? What is to count? What faculty does it involve? I say not only the faculty of enumerating, but the faculty of judging whether it is a vote or not. Suppose a case. The Constitution of the United States requires that the electors shall not vote for a President and Vice-President both of whom belong to the same State as themselves. Suppose an electoral vote, certified regularly, is opened here, and that it shows on its face that the electors of the State of New York have voted for two citizens of that State for President and Vice-President, thereby clearly violating that provision of the Constitution. Suppose that vote will decide the election: the question is whether you will count or exclude it? You are under oath to support the Constitution, and you cannot count a vote which violates that instrument, and is a breach of the privileges of the electoral colleges. I present that as a case which might arise. I might multiply illustrations. The House is in session here to count, and a member of it has the right to challenge a vote; and a vote cannot be finally declared unless it meets with the concurrent sanction of the two houses, in the presence of each other. Who gives the President of the Senate the right to declare the result? I would like to know that. The language of the Constitution is that the President of the Senate shall open all the certificates, and that then the votes shall be counted. It means that the President of the Senate is to open the certificates before any vote is to be counted. He is charged by the Constitution with the reception of all the papers—I do not know whether it is the law or the Constitution.

A MEMBER. The Constitution.

MR. H. MARSHALL. The Constitution it is. Well, the Constitution requires that the electoral votes shall be inclosed from the respective places of voting in the various States, and sent to the President of the Senate. He is, by the Constitution, made the recipient of the certificates, and on a day named he comes into the presence of the two houses with his charge, and opens the certificates in the presence of the two houses. After he has opened all of the certificates, the Constitution says, "and then the votes shall be counted." He is to open all the certificates first. Now, yesterday, he opened a certificate, and handed it down to the tellers. Who authorized them to count? Sir, the count yesterday never commenced constitutionally. It was not done at all, except by our general acquiescence in what was a wrong proceeding. The count should have commenced after the certificates had been opened, and then, as the count progressed, any Senator or Representative could object to the counting of any vote; and when an objection was made, it required the concurrent sanction of the two houses, each acting in the presence of the other, to say whether or not that vote should be counted.

You sit there, sir, as Speaker of this House, presiding over its deliberations. It was in session and you were there because you were its Speaker. We were in session then as much as we are in session now. We were in session as a House, and in session in presence of the Senate. The two houses were in presence of each other, under the requirements of the Constitution; and whenever I objected to a vote being counted, instead of addressing, except by courtesy, the president of our joint meeting, I should have addressed myself to the Speaker of the House of Representatives, and have required the action of the House of Representatives on my proposition to count or reject a vote. This is a matter that ought to be guarded. Who gives the President of the Senate the right to declare the result? My opinion is, Mr. Speaker, that you ought to declare the result as well as the President of the Senate, and that the thing is not constitutionally fixed until, in the presence of each other, you both agree to proclaim the result.

Suppose a case of the two houses standing in the presence of each other, and a single vote determines the election—take the case of the election when Clay and Polk were candidates, when the vote of New York did decide the election—suppose the two houses are in the presence of each other, and the vote of New York is challenged, and the two houses should disagree as to whether it should be counted or not, do you believe that the Constitution ever intended that the President of the Senate might proclaim the result, and proclaim the election of a President? It requires your sanction as well as his; and as a member of the House of Representatives, upon principle, I am unwilling to yield to the proposition that the President of the Senate, or any other organ, can proclaim the result. You must concur in order to produce a result, and that concurrence must be proclaimed in the presence of the two houses by you and the President of the Senate.

Therefore, I am opposed to the passage of this resolution. I merely suggest this as the best mode—the constitutional mode. It cannot affect the result. Nobody wants to change the result. Everybody knows how the election has resulted, and everybody is willing that the result shall be attained. All we want is, that as questions

have arisen, and as they may be important in the future, we shall now ascertain the right of the House, and fix it upon definite constitutional principles.

Mr. JONES, of Tennessee. I will read just one clause from the Constitution :

"The Congress may determine the time of choosing the electors and the day on which they shall give their votes, which day shall be the same throughout the United States."

I call the previous question.

Mr. PURVIANCE. I ask the gentleman from Tennessee to give way while I offer the following amendment :

Resolved, That after the announcement of the vote for President and Vice-President by the Presiding Officer of the Senate, in the presence of the two houses in joint session, the functions of the said Presiding Officer and joint session ceased, and that this House has no right to take further cognizance of the matter.

Mr. WHEELER. I object, and call for the regular order of business.

Mr. PURVIANCE. Then I hope the House will not second the previous question.

Mr. CAMPBELL, of Ohio. I ask the gentleman from Tennessee to withdraw the previous question, to enable me to offer as an amendment the resolution I introduced yesterday as an amendment to the proposition of the gentleman from South Carolina, and which fell this morning.

Mr. JONES, of Tennessee. The resolution I have offered is in the usual form. I would withdraw the previous question for the gentleman from Ohio as soon as for anybody, but I must decline to do so now.

Mr. CAMPBELL, of Ohio. Then I rise to a question of order. It is, that the proposition of the gentleman from Tennessee cannot be introduced to-day.

Mr. FLORENCE. Well, but it is in.

The SPEAKER. The Chair thinks the resolution is in order, as a necessary result from that which appears upon the Journal of this day—that a declaration of the election of President and Vice-President has been made.

Mr. WALBRIDGE. I move to lay the resolution upon the table.

Mr. CAMPBELL, of Ohio. I call for the yeas and nays.

The yeas and nays were ordered.

The question was taken, and it was decided in the negative—yeas 24, nays 167, as follows :

YEAS—Messrs. Ball, Henry Bennett, Bishop, Buffinton, John P. Campbell, Lewis D. Campbell, Caskie, Garnett, Haven, Humphrey Marshall, Millward, Moore, Morgan, Powell, Pringle, Purviance, Sage, Sapp, Scott, Spinner, Stanton, Swope, Walbridge, and Whitney—24

NAYS—Messrs. Aiken, Akers, Albright, Allen, Barbour, Barelay, Barksdale, Bell, Hendley S. Bennett, Bingham, Bliss, Bocoek, Bowie, Bradshaw, Branch, Brenton, Broom, Burlingame, Burnett, Carlile, Bayard Clarke, Ezra Clark, Clawson, Clingman, Howell Cobb, Williamson R. W. Cobb, Colfax, Comins, Covode, Cox, Cragin, Craige, Crawford, Cumback, Danrell, Davidson, Jacob C. Davis, Timothy Davis, Day, Dean, Denver, De Witt, Dick, Dickson, Dodd, Dowdell, Dunn, Durfee, Edmundson, Elliott, Emrie, English, Etheridge, Eustis, Faulkner, Flagler, Florence, Foster, Henry M. Fuller, Thomas J. D. Fuller, Galloway, Gilbert, Goode, Granger, Greenwood, Augustus Hall, Robert B. Hall, Harlan, J. Morrison Harris, Harrison, Herbert, Hickman, Hodges, Thomas R. Horton, Houston, Howard, Hughston, Jewett, George W. Jones, J. Glancy Jones, Kelly, Kidwell, King, Knapp, Knight, Knowlton, Knox, Kunkel, Lake, Leiter, Letcher, Lumpkin, Mace, Alexander K. Marshall, Samuel S. Marshall, Maxwell, McMullin, McQueen, Killian Miller, Smith Miller, Millson, Morrill, Morrison, Mott, Murray, Nichols, Norton, Andrew Oliver, Mordecai Oliver, Packer, Paine, Parker, Peck, Pelton, Perry, Pettit, Phelps, Pike, Puryear, Quitman, Reade, Ready, Ricand, Robbins, Roberts, Robison, Ruffin, Sabin, Sandidge, Savage, Sherman, Simmons, Samuel A. Smith, William Smith, William R. Smith, Sneed, Stewart, Stranahan, Talbott, Tappan, Taylor, Thorington, Thurston, Todd, Trafton, Trippe, Tyson, Underwood, Vail, Wade, Wakeman, Walker, Cadwalader C. Washburne, Elihu B. Washburne, Israel Washburn, Watkins, Watson, Welch, Wheeler, Williams, Winslow, Wood, Woodruff, Woodworth, Daniel B. Wright, John V. Wright, and Zollcoffer—167.

So the House refused to lay the resolution upon the table.

Pending the call of the roll,

Mr. PURVIANCE stated that he voted "ay," because he believed that, after the announcement of the President of the Senate, this House had no right to take any further cognizance of the matter.

The previous question was then seconded, and the main question ordered to be put ; and under the operation thereof, the resolution was adopted.

Mr. JONES, of Tennessee, moved that the vote by which the resolution was adopted be reconsidered ; and also moved that the motion to reconsider be laid upon the table.

The latter motion was agreed to.

Mr. JONES, of Tennessee. I move that the Chair appoint the committee provided for in the resolution on the part of the House.

The motion was agreed to; and

The SPEAKER thereupon appointed Messrs. Jones, of Tennessee, and Florence as such committee on the part of the House.

The SPEAKER stated that the business next in order was the report of the Committee of Elections on the contested seat from Kansas; the pending question being on a motion to lay the report upon the table, upon which the House had ordered the yeas and nays to be taken.

Mr. DUNN. I rise to a question of privilege. I would inquire of the Chair whether it is not in order to offer another resolution in regard to the election of President?

The SPEAKER. It is impossible for the Chair to decide without knowing what the resolution is.

Mr. DUNN. I send it up that it may be read for information.

Mr. SMITH, of Tennessee. I object.

Mr. WHEELER. I call for the regular order of business.

Mr. DUNN. I understand that this is a privileged question, and the House ought to dispose of it definitely and finally.

The SPEAKER. The resolution is proposed as a question of privilege, and it will be read for information.

The resolutions were read, as follows:

Resolved, That, in accordance with the requirements of the laws relating thereto, Congress being in session on the 11th day of February, A. D. 1857, being the second Wednesday of said month, the President of the Senate, in the presence of the Senate and House of Representatives, assembled in the hall of the House of Representatives, did open all the certificates of the election for President and Vice-President of the United States, and counted the votes given therefor, whereby it was ascertained that James Buchanan, of the State of Pennsylvania, had been duly and legally elected President of the United States for the term prescribed by the Constitution and laws, to commence on the 4th day of March next; and, in like manner, it was ascertained that John C. Breckinridge, of the State of Kentucky, had been duly elected Vice-President of the United States for the like term, to commence also on the said 4th day of March next.

Resolved, That it appearing that the vote of the State of Wisconsin having been attempted to be cast by the electors of that State on the 4th day of December, A. D. 1856, instead of the 3d day of that month, as prescribed by law, therefore the vote of said State could not be counted for President and Vice-President without a violation of the second paragraph of the first section of the second article of the Constitution of the United States."

The resolution was objected to, and the Speaker ruled that it could not be considered without unanimous consent.

A subsequent motion to amend the Journal, so as to include the foregoing resolution in the minutes of the previous day, was lost.

ELECTION FOR THE NINETEENTH TERM—1861.

ABRAHAM LINCOLN, President.

HANNIBAL HAMLIN, Vice-President.

IN SENATE, *February 1, 1861.*

Mr. TRUMBULL submitted the following resolution:

Resolved, That a committee be appointed by the President of the Senate, to consist of three members, to join such committee as may be appointed by the House of Representatives, to ascertain and report a mode for examining the votes for President and Vice-President of the United States, and notify the persons chosen of their election.

Mr. BIGLER objected, and the resolution went over, under the rule.

On the following day (February 2, 1861) the resolution was called up by Mr. Trumbull, and Mr. Bigler explained that he had objected simply because he desired to go on with other business.

The resolution was adopted, and the Vice-President appointed Mr. Trumbull, Mr. Foot, and Mr. Latham the committee on the part of the Senate.

IN THE HOUSE OF REPRESENTATIVES, *February 2, 1861.*

Mr. WASHBURNE, of Illinois, arose to a privileged question, and moved to take up the resolution of the Senate in relation to the mode of counting the votes for President and Vice-President.

Mr. GARNETT objected, for the reason that the motion was in violation of the rules of the House, and could not be made except by unanimous consent ; arguing, also, that it was not a privileged question.

The Speaker decided that it was a privileged question.

Mr. GARNETT appealed from the decision of the chair, and was sustained by Mr. McClelland, who, however, stated that he had no objection to the passage of the resolution.

Mr. GARNETT said he had no objection to the resolution or to counting the votes in a perfectly regular way ; but was unwilling to afford any facilities against the rules of the House for that purpose.

The appeal was laid on the table—yeas 106, noes 19.

Mr. WASHBURNE, of Illinois, offered the following resolution, which was adopted :

Resolved, That the House agree to the appointment of a committee, to consist of five members, to join said committee on the part of the Senate.

The Speaker appointed the following committee on the part of the House: Messrs. Washburne of Illinois, Adrian, Craig of Missouri, Ely, and Anderson of Kentucky.

IN SENATE, *February 5, 1861.*

Mr. TRUMBULL, from the joint committee, reported in part the following resolution, which was considered by unanimous consent and agreed to :

Resolved, That the two houses will assemble in the chamber of the House of Representatives on Wednesday, the 13th day of February, 1861, at 12 o'clock, and the President of the Senate shall be the presiding officer ; that one person be appointed a teller on the part of the Senate, and two on the part of the House of Representatives, to make a list of votes as they shall be declared ; that the result shall be delivered to the President of the Senate, who shall announce the state of the vote, and the persons elected, to the two houses assembled as aforesaid, which shall be deemed a declaration of the persons elected President and Vice-President of the United States, and, together with a list of the votes, be entered on the journals of the two houses.

The Vice-President appointed Mr. Trumbull the teller on the part of the Senate.

IN THE HOUSE OF REPRESENTATIVES, *February 5, 1861.*

Mr. WASHBURNE, of Illinois, moved to take up the foregoing resolution of the joint committee, which had just been received as a message from the Senate.

There being no objection, the message was taken from the Speaker's table and read.

Mr. WASHBURNE moved to concur in the resolution, and that the Speaker be authorized to appoint two members as tellers.

The motion was agreed to, and the Speaker subsequently appointed Mr. Washburne, of Illinois, and Mr. Phelps as tellers on the part of the House.

IN THE PRESENCE OF THE SENATE AND HOUSE OF REPRESENTATIVES,

February 13, 1861.

At twenty minutes after 12 o'clock the Doorkeeper announced the Senate of the United States.

The Senate entered the hall, preceded by the Sergeant-at-Arms, and headed by the Vice-President and their Secretary, the members of the House rising to receive them.

The Vice-President took his seat on the right of the Speaker of the House of Representatives, and presided over the joint convention of the two houses. The members of the Senate occupied seats provided for them in the area of the hall.

Mr. Trumbull, the teller appointed on the part of the Senate, and Messrs. Phelps, and Washburne of Illinois, the two tellers appointed on the part of the House, took their seats at the Clerk's desk.

The VICE-PRESIDENT then said : The two houses being assembled, in pursuance of the Constitution, that the votes may be counted and declared for President and Vice-President of the United States for the term commencing on the 4th of March, 1861, it becomes my duty, under the Constitution, to open the certificates of election in the presence of the two houses of Congress. I now proceed to discharge that duty.

The Vice-President then proceeded to open and hand to the tellers the votes of the several States for President and Vice-President of the United States, commencing with the State of Maine.

The votes having been opened and counted, the tellers, through Mr. Trumbull, reported the following as the result of the count :

Statement of votes for President and Vice-President of the United States for four years from the 4th of March, 1861.

Number of electoral votes.	States.	President.				Vice-President.			
		Abraham Lincoln, of Illinois.	John C. Breckinridge, of Kentucky.	Stephen A. Douglas, of Illinois.	John Bell, of Tennessee.	Hannibal Hamlin, of Maine.	Joseph Lane, of Oregon.	Herschel V. Johnson, of Georgia.	Edward Everett, of Massachusetts.
8	Maine.....	8				8			
5	New Hampshire.....	5				5			
13	Massachusetts.....	13				13			
4	Rhode Island.....	4				4			
6	Connecticut.....	6				6			
5	Vermont.....	5				5			
35	New York.....	35				35			
7	New Jersey.....	4	3			4		3	
27	Pennsylvania.....	27				27			
3	Delaware.....		3				3		
8	Maryland.....		8				8		
15	Virginia.....				15				15
10	North Carolina.....		10				10		
8	South Carolina.....		8				8		
10	Georgia.....		10				10		
12	Kentucky.....			12					12
12	Tennessee.....			12					12
23	Ohio.....	23				23			
6	Louisiana.....		6				6		
7	Mississippi.....		7				7		
13	Indiana.....	13				13			
11	Illinois.....	11				11			
9	Alabama.....		9				9		
9	Missouri.....			9				9	
4	Arkansas.....		4				4		
6	Michigan.....	6				6			
3	Florida.....		3				3		
4	Texas.....		4				4		
4	Iowa.....	4				4			
5	Wisconsin.....	5				5			
4	California.....	4				4			
4	Minnesota.....	4				4			
3	Oregon.....	3				3			
303	.....	180	72	12	39	180	72	12	30

Whole number of votes..... 303
Necessary to a choice..... 152

The VICE-PRESIDENT then said : ABRAHAM LINCOLN, of Illinois, having received a majority of the whole number of electoral votes, is elected President of the United States for four years, commencing the 4th of March, 1861. HANNIBAL HAMLIN, of Maine, having received a majority of the whole number of electoral votes, is duly elected Vice-President of the United States for four years, commencing the 4th of March, 1861.

The business for which the two houses were assembled having been finished, the Senate will now return to its own chamber.

The Senate, headed by the Vice-President and its officers, then retired from the hall.

IN SENATE, (after the count.)

Mr. TRUMBULL, from the joint committee, reported the following resolution ; which was considered and agreed to :

Resolved, That a committee of one member of the Senate be appointed by that body, to join a committee of two members of the House of Representatives, to be appointed by that House, to wait on Abraham Lincoln, of Illinois, and to notify him that he has been duly elected President of the United States for four years, commencing with the 4th day of March, 1861 ; and also to notify Hannibal Hamlin, of the State of Maine, that he has been duly elected Vice-President of the United States for four years, commencing with the 4th day of March, 1861.

The Vice-President appointed Mr. Trumbull the committee on the part of the Senate.

IN THE HOUSE OF REPRESENTATIVES, (after the count.)

The Speaker called the House of Representatives to order.

Mr. SHERMAN. I desire to submit, as a privileged motion, the ordinary resolution for the appointment of two members of this House, to join one member of the Senate, to be appointed by that body, to wait on the President-elect, and inform him that he has been elected President of the United States for four years, commencing 4th March, 1861.

Mr. WASHBURNE, of Illinois. I would suggest to the gentleman from Ohio that that resolution comes, ordinarily, from the Senate.

Mr. SHERMAN. It came last time from the House. I am following the usual course.

Mr. HINDMAN. I suggest that the same committee be directed to inform General Scott that there is no further need for his janizaries about the Capitol, the votes being counted and the result proclaimed.

Mr. GROW. Gentlemen seem to trouble themselves a good deal about General Scott on all occasions.

The resolution was subsequently passed, and the Speaker appointed Mr. Elihu B. Washburne and Mr. Burlingame the committee on the part of the House of Representatives.

ELECTION FOR THE TWENTIETH TERM—1865.

ABRAHAM LINCOLN, President.

ANDREW JOHNSON, Vice-President.

IN THE HOUSE OF REPRESENTATIVES, *December 19, 1864.*

Mr. WILSON introduced a joint resolution declaring certain States not entitled to representation in the electoral college; which was read a first and second time and referred to the Committee on the Judiciary.

IN SENATE, *January 27, 1865.*

Mr. TRUMBULL submitted the following resolution; which was considered and agreed to:

Resolved, That a committee, consisting of three members, be appointed by the President of the Senate, to join such committee as may be appointed by the House of Representatives, to ascertain and report a mode of examining the votes for President and Vice-President of the United States, and of notifying the persons chosen of their election.

The Vice-President appointed Mr. Trumbull, Mr. Conness, and Mr. Wright the committee on the part of the Senate.

IN THE HOUSE OF REPRESENTATIVES, *January 30, 1865.*

Mr. STEVENS moved to take up the message from the Senate requesting the House to appoint a committee to meet a like committee of the Senate to make an arrangement for counting the electoral votes.

The motion was agreed to.

Mr. STEVENS moved to adopt the resolution [which is above given] and that a committee of five members be appointed as such committee on the part of the House.

The motion was agreed to.

The Speaker subsequently appointed as such committee Messrs. Stevens, Washburne of Illinois, Mallory, Davis of Maryland, and Cox.

Mr. WILSON. I ask the unanimous consent of the House to report back from the Committee on the Judiciary joint resolution of the House No. 126, declaring certain States not entitled to representation in the electoral college. It is important that it should be acted upon at once.

Mr. LE BLOND. I object.

Mr. WILSON. I move to suspend the rules, for the purpose of having the joint resolution considered now.

The question was put; and two-thirds voting in favor thereof, the rules were suspended.

Mr. WILSON. I now report the joint resolution, and I ask the previous question upon it.

The preamble to the joint resolution recites that the inhabitants and local authorities of the States of Virginia, North Carolina, South Carolina, Georgia, Florida, Alabama, Mississippi, Louisiana, Texas, Arkansas, and Tennessee rebelled against the Government of the United States, and have continued in a state of armed rebellion for

more than three years, and were in a state of armed rebellion on the 8th of November, 1864.

The joint resolution provides that the States mentioned in the preamble are not entitled to representation in the electoral college for the choice of President and Vice-President of the United States for the term of office commencing on the 4th of March, 1865, and that no electoral votes shall be received or counted from those States concerning the choice of President and Vice-President for that term.

Mr. MALLORY. I hope the gentleman from Iowa will hear me for one moment.

Mr. WILSON. I withdraw the previous question for that purpose.

Mr. MALLORY. I would suggest to the gentleman from Iowa that the case provided for by the joint resolution which he reports ought to be met by the two houses of Congress when they meet in joint session to receive and count the votes of the various States for President and Vice-President. I do not see why we should prejudge the matter now. We are competent to settle it when we come to count the votes.

I would say further to the gentleman from Iowa that I have been instructed by the Committee on Rules of this House to introduce an amendment to the rules concerning the very case contemplated by this joint resolution, and directing the mode in which any contest as to the right of any State to cast its vote shall be settled by the two houses of Congress in their joint session. If the gentleman will allow me, I will send to the Clerk and ask him to read the report which I have been instructed to make by the Committee on Rules.

Mr. WILSON. I have no objection to its being read.

The Clerk read as follows:

"*Resolved*, (the Senate concurring,) That the following be added to the joint rules of the two houses:

"23. The two houses shall assemble in the hall of the House of Representatives at the hour of one o'clock p. m., on the second Wednesday in February next succeeding the meeting of the electors of President and Vice-President of the United States, and the President of the Senate shall be their Presiding Officer; one teller shall be appointed on the part of the Senate and two on the part of the House of Representatives, to whom shall be handed, as they are opened by the President of the Senate, the certificates of the electoral votes; and said tellers, having read the same in the presence and hearing of the two Houses then assembled, shall make a list of the votes as shall appear from the said certificates; and, the votes having been counted, the result of the same shall be delivered to the President of the Senate, who shall thereupon announce the state of the vote and the names of the persons, if any, elected; which announcement shall be deemed a sufficient declaration of the persons elected President and Vice-President of the United States, and, together with a list of the votes, be entered on the journals of the two houses.

"If, upon the reading of any such certificate by the tellers, any question shall arise in regard to counting the votes therein certified, the same, having been stated by the Presiding Officer, shall be submitted, first by the President of the Senate to that body, and then by the Speaker to the House of Representatives, and no question shall be decided affirmatively, and no vote objected to shall be counted, except by the concurrent votes of the two houses, said votes of the two houses to be reported to and declared by the Presiding Officer, and upon any such question there shall be no debate; and any other question pertinent to the object for which the two houses are assembled may be submitted and determined in like manner. At such joint meeting of the two houses seats shall be provided as follows: For the President of the Senate, the Speaker's chair; for the Speaker, a chair immediately upon his left; for the Senators, in the body of the hall upon the right of the Presiding Officer; for the Representatives, in the body of the hall not occupied by the Senators; for the tellers, Secretary of the Senate, and Clerk of the House of Representatives, at the Clerk's desk; for the other officers of the two houses, in front of the Clerk's desk and upon either side of the Speaker's platform.

"Such joint meeting shall not be dissolved until the electoral votes are all counted and the result declared; and no recess shall be taken, unless a question shall have arisen in regard to counting any of such votes, in which case it shall be competent for either house, upon motion made and submitted by its own Presiding Officer, to direct a recess not beyond the next day at the hour of one o'clock p. m."

Mr. WILSON. I think there is a majority of the House in favor of the passage of the joint resolution which I have reported, but I think it very doubtful whether a majority of the House would be in favor of the adoption of the rule which the gentleman from Kentucky [Mr. Mallory] has had read at the Clerk's desk. And as it is very important that this question shall be determined at once, inasmuch as the opening and counting of the electoral votes is to take place next Wednesday week, I think we had better act on the joint resolution now, leaving the proposed amendment of the rules to be reported and discussed at the proper time. I therefore move the previous question.

Mr. MALLORY. If the gentleman will allow me, I will offer the rule as a substitute for the joint resolution, and let the sense of the House be taken on it.

Mr. WILSON. No, sir; I cannot do that. That would create a good deal of discussion, I am satisfied, from the provision made there for the determination of the question by the two houses sitting in the same hall. I therefore move the previous question on the joint resolution.

Mr. MALLORY. I hope the House will vote is down, and let the Senate have something to do with the settlement of the question.

The previous question was seconded and the main question ordered, and under its operation the joint resolution was engrossed and read the third time.

Mr. Wilson moved the previous question on the preamble.

The previous question was seconded and the main question ordered, and under its operation the preamble was engrossed and read the third time.

Mr. Wilson moved the previous question on the passage of the preamble and joint resolution.

The previous question was seconded and the main question ordered, and under its operation the preamble and joint resolution were passed.

Mr. Wilson moved to reconsider the vote by which the preamble and joint resolution were passed, and also moved to lay the motion to reconsider on the table.

The latter motion was agreed to.

IN SENATE, *February 1, 1865.*

Mr. TRUMBULL. The Committee on the Judiciary, to whom was referred the joint resolution (H. R. No. 126) declaring certain States not entitled to representation in the electoral college, have instructed me to report the resolution back to the Senate with a recommendation that the resolution pass, and with an amendment to the preamble. I will ask for the consideration of the resolution at this time, as the electoral votes are to be counted a week from to-day, and it may avoid difficulty in the canvass of the votes if the two houses take action in regard to this matter prior to that time. No change is made in the House resolution; it is in print on Senators' tables, and they can see at once what it is.

There being no objection, the Senate, as in Committee of the Whole, proceeded to consider the joint resolution; which was read, as follows:

"Whereas the inhabitants and local authorities of the States of Virginia, North Carolina, South Carolina, Georgia, Florida, Alabama, Mississippi, Louisiana, Texas, Arkansas, and Tennessee rebelled against the Government of the United States, and have continued in a state of armed rebellion for more than three years, and were in said state of armed rebellion on the 8th day of November, 1864: Therefore,

"Be it resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That the States mentioned in the preamble to this joint resolution are not entitled to representation in the electoral college for the choice of President and Vice-President of the United States for the term of office commencing on the 4th day of March, 1865; and no electoral votes shall be received or counted from said States concerning the choice of President and Vice-President for said term of office."

The amendment of the Committee on the Judiciary was to strike out of the preamble the following words:

"And have continued in a state of armed rebellion for more than three years, and were in said state of armed rebellion on the 8th day of November, 1864."

And to insert the following in lieu thereof:

"And were in such state of rebellion on the 8th day of November, 1864, that no valid election for President and Vice-President of the United States, according to the Constitution and laws thereof, was held therein on said day."

Mr. TEN EYCK. Is this a proper time to move an amendment to that amendment as reported by the committee?

The VICE-PRESIDENT. It is.

Mr. TEN EYCK. Then I move to strike out the word "Louisiana" in the preamble.

The VICE-PRESIDENT. That is no part of the amendment of the committee. The question is on the amendment reported by the committee.

The amendment was agreed to.

The VICE-PRESIDENT. The Senator's amendment would now be in order.

Mr. TEN EYCK. I move to strike out of the preamble the word "Louisiana." I will simply state that it is a matter of history that the State of Louisiana has re-organized, or at least attempted to do so, and in the opinion of many, and perhaps most, of the loyal citizens of that State, has re-organized as a State. It is a matter of history that they have elected State officers and a State legislature; that they have elected members to a constitutional convention and framed a new constitution for that State; that that legislature passed a law authorizing the election of electors for President and Vice-President of the United States in the last presidential election, and that such electors have met and cast their votes. Under these circumstances I think there is a striking distinction between the State of Virginia and the State of Louisiana. My object in

moving this amendment is, under this state of facts, that some opportunity may be afforded to a loyal people who have suffered all the horrors of the rebellion, who have got the better of it, and put it under foot, of coming back and resuming their place in the councils of the nation.

Mr. TRUMBULL. I now insist on proceeding with the unfinished business.

The Senate, as in Committee of the Whole, resumed the consideration of the joint resolution (H. R. No. 126) declaring certain States not entitled to representation in the electoral college, the pending question being on the amendment of Mr. TEN EYCK to strike out the word "Louisiana," in the third line of the preamble to the resolution.

Mr. HARRIS. It is proper, perhaps, Mr. President, that I should say that the question as to the power of Congress to legislate in relation to the counting of votes for President and Vice-President was not considered by the Committee on the Judiciary. The question there was as to the form of the resolution and as to the recitals in its preamble. Since the discussion of this question in the committee, I have been led to doubt exceedingly whether it is competent for Congress to legislate at all in reference to the counting of the votes. The Constitution authorizes Congress to fix the time for choosing electors. It also empowers Congress to specify the time when those electors shall perform the functions of their office, when they shall vote; and, so far as I can find in perusing the Constitution, that is the extent of the power of Congress over the subject. It fixes the time when the votes shall be counted, and it declares that, in the presence of both houses of Congress, the Vice-President shall open all the certificates returned—it is careful to specify that he shall open them all—and the votes shall be counted.

I cannot find in the provisions of the Constitution any authority for Congress to pass a law (for this amounts to that) excluding any votes that shall have been returned to the Vice-President. I do not see how it is possible. I am not prepared to say that in case the rebel States had sent votes here which would be controlling in the election, that in such an extreme emergency as that Congress would not be called upon to do something—what, I am not prepared to say; but in this case I am clearly of opinion that, even though Congress may possibly have the power, it is inexpedient for us, by legislation, to declare that these votes shall not be counted. I doubt the power very much; but of the inexpediency of exercising any such power, if it exists, I am very clear.

I hope, therefore, that this resolution will not be adopted. I believe there is no necessity for it; and until an extreme necessity arises I am not in favor of exercising any such power. Whether these votes are counted or not, it is conceded the result will be the same. Why should we exercise such an extreme power as this, one so doubtful as it must be conceded to be, to declare in an act of the national legislature that the votes of a certain number of States shall not be counted? The power is not to be found in the Constitution, I am sure.

But, sir, if the Senate shall be of opinion that such a law as this is called for, then I am opposed to the recitals in the preamble to this resolution. It seems to me that these recitals are not strictly true. At any rate, I am not prepared to assert that they are true. It is true that the States specified did rebel; the first part of the recital is true; but that the inhabitants of those States and the local authorities of all of those States were in a state of armed rebellion on the 8th day of November, the day of the presidential election, I am not prepared to assert. On the contrary, I choose to leave that question open. I think it ought to be left open until the question as to whether or not the Senators who are now applying for admission here from the State of Louisiana shall be admitted shall be brought before the Senate. I do not like to have that question prejudged by a recital in the preamble of this resolution. I am therefore opposed to the resolution on both grounds. I think it inexpedient to pass any such resolution, and I am not prepared to assert the truth of the recitals in the preamble.

Mr. DOOLITTLE. Mr. President, I can see very clearly that there is a great distinction between Congress exercising the power of legislation by providing in advance in what manner the electoral votes of President and Vice-President shall be given, and a law of Congress which, after the votes are said to have been given under existing laws, by its retroactive effect declares that certain votes are null and void. The distinction is as wide as the world; it is as wide as the east is from the west. I concede that Congress could pass a law, and I believe such a proposition was pending at the last session of Congress, providing that certain States or certain people in a State of insurrection should not have the legal power to cast electoral votes for President or for Vice-President; but no such law was enacted. The laws as they existed were permitted to stand; and now, after it is said votes have been given, for Congress to assume to declare that those votes are null and void and shall not be counted, is altogether a different thing; and the point which was taken by my colleague when this question was up yesterday I think is fatal in that view of the case.

But, sir, I have very serious doubts whether Congress is clothed with any power over the subject of the counting of these electoral votes. The Constitution prescribes what powers Congress shall have:

"The Congress may determine the time of choosing the electors, and the day on which they shall give their votes; which day shall be the same throughout the United States."

In pursuance of that provision of the Constitution, Congress have passed an act on the subject, in the following words—

Mr. JOHNSON. What is the date of the act?

Mr. DOOLITTLE. January 23, 1845:

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the electors of President and Vice-President shall be appointed in each State on the Tuesday next after the first Monday in the month of November of the year in which they are to be appointed: Provided, That each State may by law provide for the filling of any vacancy or vacancies which may occur in its college of electors when such college meets to give its electoral vote: And provided also, When any State shall have held an election for the purpose of choosing electors, and shall fail to make a choice on the day aforesaid, then the electors may be appointed on a subsequent day, in such manner as the State shall by law provide."

Here by this act of January 23, 1845, Congress did exercise the power with which it is clothed under the Constitution of determining the time of choosing the electors and the day on which they shall give their votes, which day, by the Constitution, must be the same throughout the whole United States.

What is the provision of the Constitution on this subject? The provision as it now stands is contained in the twelfth article of the amendments to the Constitution, and is in these words:

"The electors shall meet in their respective States and vote by ballot for President and Vice-President, one of whom, at least, shall not be an inhabitant of the same State with themselves; they shall name in their ballots the person voted for as President, and in distinct ballots the person voted for as Vice-President, and they shall make distinct lists of all persons voted for as President, and of all persons voted for as Vice-President, and of the number of votes for each, which lists they shall sign and certify, and transmit sealed to the seat of the Government of the United States, directed to the President of the Senate."

The Constitution provides for all that, for the giving of the votes, for the counting of the votes, the sealing up of the votes, and the transmission of the votes into the hands of the President of the Senate. Then what is to be done with them? It does not say that Congress shall have anything to do with them, that Congress shall say what votes the President of the Senate shall count or shall not count, that Congress shall have any power to annul any one of these votes that are sealed up and sent to the President of the Senate. Congress is clothed with no authority whatever over the subject. They come to the President of the Senate. Certainly it will not be said that the House of Representatives have any control over the President of the Senate, but the House of Representatives are essential to constitute a Congress. Possibly you might argue that because they are sent to the President of the Senate, the President of the Senate presiding over the Senate, he might, in some measure, by appeal or otherwise, be subjected to the decision of the Senate; but certainly the House of Representatives has no control over it. But then the Constitution provides:

"The President of the Senate shall, in presence of the Senate and House of Representatives"—

The Senate and House of Representatives meet together in joint convention, the President of the Senate presiding over the convention, and the Constitution then says what shall be done with the votes:

"The President of the Senate shall, in presence of the Senate and House of Representatives, open all the certificates"—

Not open such as Congress tell him to open, but the President of the Senate shall "open all the certificates" which are sent to him—

"and the votes shall then be counted."

Here arises, Mr. President, under our Constitution, one of the most grave questions which, under certain circumstances, could possibly arise; and that is, whether the President of the Senate, presiding over this joint convention of the House of Representatives and the Senate, is, by the Constitution, made the sole judge as to what votes shall be counted or not; or whether, being the President of the joint convention, he is in some measure, by some kind of parliamentary law not expressed in the Constitution itself, to be subject to the control of that joint convention. Practically the question arose in 1856, on the vote of the State of Wisconsin. The law provided that the vote should be given on a certain day. In consequence of an extraordinary storm in that State, it was impossible to cast the vote on the day prescribed; the votes were not given on that day. The question arose whether the votes of the State of Wisconsin should be counted. Who was to decide that question? Who, in the first instance, was to decide whether the votes of Wisconsin were void or were good? Was it the Congress? Was the Committee on the Judiciary of the Senate to report upon it and Congress to pass a law about it, to decide that the vote of Wisconsin were valid or in-

valid? Not at all. The Constitution says that the President of the Senate shall open the votes and count them; and upon the President, in the first instance, is the responsibility. He, and he alone, is to decide. But then arises the other question, whether, from his decision, there is an appeal to the body over which he presides? That question arose in 1857. It was a grave question, and as it was not necessary that it should then be decided in order to dispose of the result of that election, the question was neither decided by the President nor by the joint convention over which he presided. The question was waived, just as everybody and every judge and every tribunal who acts wisely will always waive a question when it is unnecessary to be decided. If, in the decision of the *Dred Scott* case, the court had only decided the questions which were necessary to be decided, we never should have heard of such an opinion as that which has convulsed the country from one end to the other by the dogmas that are contained in it and the unnecessary opinions that were given.

In 1857, whether the votes of Wisconsin were to be regarded as valid or invalid did not affect the result, and therefore the President of the convention declared that if the votes of Wisconsin were counted Mr. Buchanan was elected; if they were rejected Mr. Buchanan was still elected; and hence it was not necessary to decide the question whether they should be counted or not. So, too, in this very case, which is to come off in the next joint convention, we all know that whether the votes of certain States, Louisiana and Tennessee, are counted or not counted, does not affect the result; and it is not necessary for Congress now to assert a doctrine which in some future time may be the very destruction of the Government, namely, that a political majority in Congress can decide that certain votes of certain States shall be canceled and others shall be received. It will never do to set that precedent. We had better follow the Constitution as it is written. Let the votes that are sent to the President of the Senate be opened by the President of the Senate, who presides over the joint convention of the two houses; and then, if it be not necessary to decide this question, it is better that it should not be decided any more now than it was in 1857. It will be time enough to raise the question in the joint convention; and whether that joint convention has, from the fact that the President of the Senate is to preside over it, a power of appeal from his decision, with a power to reverse his decision according to parliamentary law, or whether the members of both houses are called there simply as witnesses to the fact, without the power of appeal from his decision, is a very grave question under the Constitution itself, upon which I do not propose to express an opinion.

Mr. President, as I said in the beginning, even if Congress had some power under the Constitution to regulate the manner in which these votes should be given, they have no power under the Constitution in this mode to annul votes or declare void votes that have been given. But, sir, it is not my purpose to take up the time of the Senate; I have simply expressed in brief words my opinion.

Mr. HALE. Mr. President, it is refreshing at the present time to hear anybody urge any special measure in a contrary direction to the provisions of the Federal Constitution. It seems to me that upon this question, if upon no other—a question upon which depends the continuance of the Government—it is necessary to adhere to the Constitution, and to look for it and see if we have any guide or direction in that instrument. I foresaw this evil, and I introduced at the last session of Congress a joint resolution directing in advance what should be done; but, for some reason or other, (owing to the press of other business, probably, certainly not more important business,) that resolution was not acted upon. It struck me at that time—and I have not lost any of the strength of that conviction now—that it was one of the most important measures that could possibly be presented to the consideration of Congress, and it was not then without the range of possibility or probability that on that question might depend the very continuance of this Government. No one could have known to the contrary of that at the last session; for let me suppose that the result of the presidential election might have been determined by the votes of these States who have now proposed to offer them. I think there are three of them, Tennessee, Louisiana, and Arkansas; let me suppose that, in November, the votes of these three States had decided which way the majority was, would the party against whom they voted have submitted? I tell you nay, sir. If the counting of these votes had determined the result of the presidential election it would have deluged this land in blood, and another civil war would have followed, just as certain as that we have one now on hand. My friend from Michigan [Mr. Howard] shakes his head. Why, sir, what caused the present rebellion? Nothing at all in comparison with this.

My friend from Wisconsin [Mr. Doolittle] says that Congress has no power over this subject. It would be one of the strangest things that ever occurred on earth if it had not the power. The provision of the Federal Constitution is that no member of Congress or any person holding an office of profit or trust under the Federal Government shall be an elector. Suppose when the two houses meet in convention to count the votes it is palpable to them that the electoral votes of some States were given by members of Congress, has Congress no power to say that they shall not be counted?

But, sir, the Constitution is not so silent on this subject as my friend from Wisconsin

seems to imagine; for the election of President and the mode of counting the votes is one of the means and measures by which the national life is to be preserved. If this is not followed, carried out, and executed, there is an end to the Government; there is no President elected, and the whole fabric falls to chaos. Now, is it within the range of possibility or probability that the framers of the Constitution were so derelict, so blind, as not to have provided that there should be some mode of conducting, and conducting legally, the machinery of this great measure which is essential to the very life of the nation? No, sir. The Constitution would have been one of the most imperfect things that was ever created without some provision of this sort, and accordingly I find that the framers of the Constitution made the most ample provision for exactly this case. I find in the Constitution a clause declaring that Congress shall have power "to make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the Government of the United States." Is not the power to choose a President one that is vested in the Government of the United States? It is the most essential power that there is; without it all the other powers are nothing; and the Constitution says that for carrying into execution this power thus granted Congress may make all laws which shall be necessary. It seems to me that it would be impossible to frame in broader or more comprehensive terms a provision which shall give Congress exclusive jurisdiction over this matter than that which I have just read, and it is found on the 10th page of Hickey's Constitution.

Well, sir, what would be the common sense, and what the reason of the thing? What does Congress meet for when the votes are counted? Is it to see as a matter of curiosity how the thing is done? Is it to go there to see the Constitution trampled upon and not have the power to remedy it? Is it when they see that there is danger of the Constitution being violated, that they shall not provide by law against it? It seems to me that to say that Congress has no power, is to say that the Constitution itself is a dead letter, inoperative, and of no force.

I remember very well, Mr. President, and you probably remember it, although at this moment I do not recollect whether you were present or not, the occurrence that took place in 1857 on the counting of the votes. I remember that I was then utterly astonished at the announcement made by some of the Senators who are not now members of the body. I may name Mr. Mason, of Virginia, and I think others concurred with him, who expressed themselves utterly indignant that there should be any attempt to settle anything in that joint meeting. "State rights" reared up its hydra-head, and was shocked at the idea of State sovereignty being trampled under foot by the doctrine of the supremacy of a majority, and so nothing was done; the thing passed over.

Now, I contend that it is the part of wisdom, before the emergency comes, to settle this question. There never was a more favorable time for its settlement than the election of 1856 presented, and there will be none more favorable than this election presents. It is the part of sagacity, of wisdom, and of patriotism, when we see that such a contingency as this may be fraught with the consequences of revolution, to provide beforehand against it. There never was a time when you could do it, when you would be less liable to the charge of any sinister influence, because it cannot change the result, it cannot determine anything except to settle the principle; and then when an occasion occurs that evil consequences may follow from settling it one way or the other, here will be a precedent showing that Congress, at a time when there was no inducement to anything but an honest and a straightforward decision of the case, maturely settled it, and settled it in such a manner that the influence of the decision will be morally binding upon our successors, and will be preserved.

Mr. President, suppose that some of our Territories had organized a State government, and were not yet recognized by the Congress of the United States; suppose that the young State of Nevada, which has lately done herself so much honor and the Senate so much benefit by sending to it the illustrious men that she has sent—suppose that Nevada, impatient of the colonial condition, had undertaken to cast her vote for presidential electors before she had gone through the forms of the Constitution requisite to constitute her one of the States of the Union, would it not be competent for Congress in that case to say that the vote of Nevada should not be counted? If not, there is no limit, no control, no jurisdiction anywhere to exclude the votes of any persons that may take it into their heads that they have a right to vote at the presidential election.

I was not much struck by the suggestions made by the honorable Senator from New York [Mr. Harris] that it would not be competent for Congress to exclude the vote of the State of New York. I have, I think, as high a regard and respect for New York as anybody in the world has, not excepting even the Senator himself; but that very thing has been done heretofore even in regard to that State. If the Senator will take the trouble to look at the table of electoral votes for President and Vice-President, cast since the adoption of the Federal Constitution, he will find that at the first election, when George Washington was elected President of the United States, the vote of the State of New York was not counted; she had no voice in that election. The

precise manner in which that was done does not appear; but I have before me the table of electoral votes for President and Vice-President of the United States for the term commencing March 4, 1789, and terminating March 3, 1793, and I find that the States which voted were, New Hampshire, Massachusetts, Connecticut, New Jersey, Pennsylvania, Delaware, Maryland, Virginia, South Carolina, and Georgia. North Carolina and Rhode Island did not vote, because they had not then adopted the Constitution; but eleven States had adopted it, and New York was among the number; and yet, for some reason which does not appear on the face of the table, the tremendous occurrence which the Senator from New York holds up to-day as such a bugbear actually occurred, and in counting the votes on that occasion there were no votes counted from the State of New York.

It is the dictate of the plainest common sense, independent of the constitutional provision, that there must of necessity be a power residing somewhere to preside over, rectify, and govern this whole transaction; and although it would have been wise in my humble judgment for Congress to have passed this resolution preceding the presidential election, it by no means follows that it may not do it now. This law is not subject to the reproach of being a retrospective or retroactive act. Congress does not propose to say that any State shall not express its opinion. All that Congress proposes to say now is that these States being in a condition where no valid, no constitutional election was held, their votes shall not be counted; and if we cannot do that, it seems to me that we are powerless to do anything.

Mr. Trumbull obtained the floor.

Mr. DOOLITTLE. I desire to say a word in reply to the Senator from New Hampshire.

Mr. TRUMBULL. If the Senator prefers speaking now, I will yield the floor for anything personal.

Mr. DOOLITTLE. The Senator from New Hampshire stated me rather strongly as having expressed the opinion that Congress had no power over this subject. I did aver that Congress had power over it, for the Constitution gives them certain powers over the question of choosing electors, but it limits that power. The Constitution says that "each State shall appoint, in such manner as the legislature thereof may direct, a number of electors equal to the whole number of Senators and Representatives to which the State may be entitled in Congress; but no Senator or Representative, or person holding an office of trust or profit under the United States, shall be appointed an elector." Now I ask the Senator from New Hampshire if he believes Congress has power to appoint or to direct the manner of the appointment of the electors when the Constitution says that they shall be appointed as the legislature of the State may direct?

Mr. HALE. Certainly not.

Mr. DOOLITTLE. "Certainly not." The Senator agrees with me, then; there are certain powers that Congress have not got over this subject; but the Constitution goes on to say what power Congress shall have. "Congress may determine the time of choosing the electors, and the day on which they shall give their votes" after they are chosen, "which day shall be the same throughout the United States." It does say in substance that Congress shall not do some things, because it provides that the States shall direct the manner of the appointment of electors, whether they shall be chosen by the people at large, or appointed by the legislature, or chosen in separate districts, or in whatever way the State may direct. There is merely the power in Congress to determine the day on which they shall be chosen, and the day on which they shall give their votes. When Congress has done that it has passed laws to carry into effect this power under the Constitution, and all the rest belongs to the States.

My honorable friend seems to condemn this doctrine for which I contend as if it was a part and parcel of that State-rights doctrine which has involved the country in this civil war. I believe just as much in the rights of the States as they are secured under the Constitution as I do in the rights of the Federal Government as they are also secured by the Constitution. I believe in the rights both of the States and of the Union; and the party in this country that shall undertake to aver that the States have not rights secured to them under the Constitution will go against the whole history of this Government from the beginning. Such a party has had but a short history in the past, and will have a shorter history in the future, for when this war is over and the necessity for the exercise of tremendous powers by the Government to defend its existence in this conflict is past, I tell you that the doctrine in favor of reserving to the States all the powers which are secured to them under the Constitution will be the popular doctrine and the necessary doctrine to save the liberties of this people and of this country.

Mr. President, I am for giving this Government all the power which is conferred upon it by the Constitution, and not for giving it more. This country is too large, it covers too many and too varied interests, to endure the establishment of the doctrine that this is one consolidated empire, and that this Congress and this Government can exercise unlimited power of legislation over all the interests of this great people. But, Mr. President, while I say this and assert it, I am just as much opposed to the State-

rights doctrine run mad to Calhounism, and all the consequences that have followed from it, as the Senator from New Hampshire is or can be. Under the Constitution as it is I am for maintaining the rights of the States as they are secured by it, with just as much tenacity as I am for maintaining the rights of this Government against States or individuals when they undertake to rebel against it.

Now, Mr. President, what I maintain under this provision of the Constitution is that, after the votes have been given, there is no power in Congress as a legislative body to declare certain votes valid or invalid. Congress is not the tribunal to which the question is referred; but the tribunal to which it is referred is the President of the Senate of the United States presiding over the joint convention of both houses. I admit that the President of the Senate has in his hands the power in the first instance to count or not to count the votes. He is to decide whether he is to receive the votes; in the first instance to decide whether they are votes coming up from States or from Territories.

The Senator put the question, suppose one of the Territories should send up votes, what would you do? I will take the case that he supposes and presume that the Territory of Montana should send up, sealed under the seal of the Territory of Montana, three votes for President and Vice-President. The President of the Senate is to open the votes and count them in the presence of the convention; but the votes which he is to count are the votes which come from States; and as he opens the votes coming from Montana he says, "These are not votes of a State; this is a Territory claiming to be a State; I do not count these votes." And then arises another question. Suppose some other person should insist in the convention that Montana instead of being a Territory was a State, perhaps he could raise the question then on an appeal from the decision of the President to the joint body in convention assembled, the Senate and the House of Representatives. There is the tribunal. There the President of the Senate alone counts the votes, or it is the body over which he presides, having a power over his decision by appeal in the final resort to decide the question. That is what I have contended for.

Mr. TRUMBULL. I did not suppose when the Senator from Wisconsin insisted upon taking the floor, that he designed making a speech on the question generally, but I thought it was merely to reply to some remarks of the Senator from New Hampshire.

Mr. DOOLITTLE. I will say to my honorable friend that I had spoken on this question and the Senator from New Hampshire went into a long speech in reply to me, and I replied to him, taking up some of the points that he discussed. I did not intend, of course, to trespass on my friend from Illinois.

Mr. TRUMBULL. I am sorry, Mr. President, to see any manifestation of feeling on the part of any member of the Senate in reference to this question; it is not one to excite any.

Mr. DOOLITTLE. My honorable friend does not understand that I manifest any personal feeling toward anybody on this question, certainly. That I feel an interest in the question, as a grave question, I do not deny. I take an interest in all these questions, and generally have feeling.

Mr. TRUMBULL. If the Senator from Wisconsin will allow me to go on, I shall say nothing unkind of him, I am sure, and I did not suppose that he had any personal feeling in regard to any one. I thought he manifested a great deal of zeal, and I admit I was a little afraid that his zeal might run away with his better judgment.

Now, sir, this is a question that no one, I apprehend, can have any other desire than to have settled properly and rightly. I am a little surprised at the course taken by my friend from New York, [Mr. Harris.] He is a member of the Committee on the Judiciary, and I certainly understand him to agree to this resolution as reported by that committee. However, he has a right to change his views, I suppose; but the matter was pretty thoroughly discussed in the committee, and I certainly did understand that he was in favor of the resolution, though I was aware he did not like the words of the preamble. That, however, we have amended.

Mr. TEN EYCK. In the absence of the Senator from New York, I beg leave to state that I did not understand him as agreeing to the preamble to the resolution.

Mr. TRUMBULL. The Senator from New Jersey misunderstands me. I said the Senator from New York agreed to the resolution distinctly in committee. He objected to the preamble. Does the Senator from New Jersey mean to controvert that?

Mr. TEN EYCK. I do not.

The VICE-PRESIDENT. It is not in order to refer in debate in the Senate to the proceedings of committees.

Mr. TRUMBULL. I intended to state the matter as it was. I was taken a little by surprise at the opposition manifested by the Senator from New York.

But, sir, both the Senator from New York and the Senator from Wisconsin doubt the power of Congress to pass this resolution, and they place themselves upon the Constitution. The Senator from Wisconsin insists, as also does the Senator from New York, that the Vice-President, or the Presiding Officer of the Senate, is to determine this question in the first instance. The Constitution does not say that the Presiding Officer of the Senate shall count the votes even, and in the practice of the Government since

the days of Washington till this moment the Vice-President never has counted the vote. The Constitution says, "The President of the Senate shall, in presence of the Senate and House of Representatives," do what? "Open all the certificates." That is what he shall do. Then what follows? "And the votes shall then be counted." By whom? Another clause in the Constitution already referred to declares that Congress shall have authority to pass all laws necessary and proper to carry into effect every one of the granted powers. The power to count the votes is given by the Constitution; the mode of doing it is not prescribed by the Constitution; but another clause of the Constitution says that Congress shall have power to provide by law for carrying into effect every provision of this instrument; and here is a provision of this instrument that these votes shall be counted; the manner of doing it is now determined by the Constitution, and it is clearly constitutional and proper for Congress, in the exercise of its authority to carry into effect the granted powers of the Constitution, to pass the necessary laws to count the votes, and Congress has done it from the beginning of the Government. If it were not so, we would have revolution at every presidential election.

Why, sir, is the ground to be assumed here that South Carolina in a state of rebellion against this Government, her people at war with us, and it being declared by acts of Congress a felony for any man to deal with those people, they being forbidden to come within our lines or our people to go within theirs, has a right to elect a President for us; and that we have no right to declare the mode of counting the votes so as to exclude her vote? Let me ask the Senators from New York and Wisconsin, is the State of Louisiana to-day in any different position legally from the State of South Carolina, or are the inhabitants of Louisiana in any different position?

I have before me the statute of 1861, which provides that the President in a certain contingency shall be authorized to declare the inhabitants of a State in insurrection against the United States, and what then? "And thereupon all commercial intercourse by and between the same and the citizens thereof and the citizens of the rest of the United States shall cease and be unlawful so long as such condition of hostility shall continue;" and all goods going into that State shall be forfeited. And yet, forsooth, when the inhabitants of Louisiana have been declared to be in this state of insurrection, when goods taken there unless under a particular license are forfeited by the laws of the land, and when an individual trading there is taken up and tried as a felon, we are told that we cannot determine by act of Congress that they cannot elect a President for us!

Now, sir, it is said that the votes of these States will not affect the result. That may be so; we may know outside that it probably is so; but this war may last four years more. I trust in God it will not; I do not believe it will; but suppose it shall run four years longer, and the doctrine contended for here is to obtain, how do you know but that at the next presidential election your President may be selected by these very States in rebellion? Sir, I say to you here what I believe; that if the result of the presidential election depended upon the vote of Louisiana, I care not which way it was cast, if the pretended electoral votes of Louisiana were to choose the next President of the United States, after the 4th of March, decided either way, it would produce a revolution in this country unless you had some provision to settle it by law in advance.

MR. DOOLITTLE. That is what I complained of, that the law was not passed in advance. This is retroactive, operating on votes already cast. If you want to provide by a general law for the future, and declare generally that States in insurrection shall be incapable of voting, that is another thing.

MR. TRUMBULL. If the Senator admits that we can do that, he gives up the power; that abandons the chief argument of the Senator from Wisconsin. If you could provide for it in that way, you can provide, when the vote is offered, for counting it or not counting it, and that is the proper time to decide it. Suppose some other question should arise in reference to the vote from the State of Wisconsin when the votes are opened by the Presiding Officer of the Senate on Wednesday next in the presence of the two houses, how is that question to be settled? Does the Senator mean to say that it is to be settled by a vote in joint convention by appeal from the decision of the Chair? I understand him to say so. Why, sir, there is no such thing known to the Constitution of the United States as an act of a joint convention of the two houses. They meet together, it is true; but the only mode to carry into execution the powers of the Constitution is by laws of Congress. They are not enacted in joint convention of the two houses; they are enacted by the different branches, each acting within its own sphere and concurring in the passage of an act; and the only way that any question could be settled in joint convention would be, if a question arose, for the bodies to separate, and at last you would have to settle it by law or by the action of the two houses in passing a concurring resolution.

But the Senator from New York thinks it inexpedient to settle this question. It is because of the expediency and the necessity of having it settled in advance that I am urging it upon the consideration of the Senate at this time. How

will you settle it when you get in joint convention? The Senator from New York proposes to count the votes. The House of Representatives have sent us a resolution in which they say the vote shall not be counted. Now, what is your position when the vote is opened from the State of Louisiana? You have a disagreement at once, and can you ever count the vote? I propose that we have concurrent action in some shape before the vote is opened; and I hold that it is entirely competent and proper to settle the question in advance; and it is not retroactive, it does not relate to the manner of casting the vote; and in this case I will state for the information of the Senate that the people of Louisiana have not voted for electors of President and Vice-President. There has been no election of the people there voting for electors; but a body of men in Louisiana assuming to be the legislature of the State of Louisiana have appointed these electors—a legislature that was elected by less than nine thousand votes. About eight thousand of the voters of Louisiana, out of more than fifty thousand, chose what they call a legislature, and that legislature has elected certain electors of President and Vice-President. There has been no vote of the people.

MR. HENDRICKS. I wish to ask the Senator, for information, whether the legislature of Louisiana was authorized by the constitution recently adopted there to select electors in that mode?

MR. TRUMBULL. I do not remember whether the constitution made a provision on that subject or not, and I do not know that it would be material.

MR. HENDRICKS. It seems to me to be an important question.

MR. TRUMBULL. I am unable to answer the Senator as to that question. I do not remember whether there is any provision in the constitution adopted for Louisiana authorizing the legislature to choose the electors.

MR. JOHNSON. I do not think such a provision is to be found in the constitution of any of the States; it is regulated by the Constitution of the United States.

MR. TRUMBULL. The fact would be immaterial. I do not think there is any importance in the suggestion whether the constitution of the State of Louisiana provided for it or not. In fact, I do not think the constitution of a State could provide for that. The electors in each State are to be chosen, according to my recollection of the Constitution, in the manner prescribed by the legislature of the State, and, therefore, the State constitution could not regulate it. In reference to that constitution in Louisiana and its validity, and the recognition of that legislature in Louisiana, the whole question is an unsettled one, upon which at this time I do not propose to express an opinion. We have pending before us, as is known to the Senate, the application of two gentlemen for seats in this body, claiming to have been elected Senators by the same legislature of Louisiana which elected the electors. That question is yet undisposed of, and the view which the Committee on the Judiciary took in reference to this question was to report a concurrence in the joint resolution from the House of Representatives, changing the preamble slightly, so as not to declare that these people were in a state of armed insurrection on the 8th day of November last. I was not exactly satisfied with the preamble, even as it now stands. I would have preferred it in a little different form; but a majority of the committee insisted upon it in the form in which it has been amended. I am not particular about it now, but prefer for myself that the preamble should be entirely stricken out. I do not care anything about any preamble. What I wish to get at is to dispose of the question as to what is to be done with these votes brought up from the States of Louisiana and Tennessee, for I understand Tennessee has sent a vote here as well as Louisiana. Whether the other rebellious States, or the inhabitants of those States declared to be in insurrection, have attempted to send up votes, I am not advised. The object which I have in view, the object which the committee had, was to settle this question and avoid difficulty when we come to act in joint convention in opening the votes; and so far as the preamble is concerned, for one I would quite as soon it was stricken out; but it came to us from the House of Representatives, and the committee thought proper to amend it, and the amendment has been made, and I am willing to take it the way it is, although I believe I should be better satisfied if there were no preamble at all.

MR. COLLAMER. Mr. President, it is no doubt true that we are often wedded to particular forms of expression, which we have premeditated, attaching importance even to the forms, because we believe those forms are material to the substance which they contain and represent. Now, sir, in relation to the general principle of the power of Congress over this subject of voting for President and Vice-President, I do not know any difference between the provisions of the Constitution in regard to it and its provisions on any other subject. I understand that Congress is clothed with power to make all needful laws to carry into effect the powers granted by the Constitution to this Government; and when the Constitution provides a mode of electing President and Vice-President, I take it Congress have a right to make laws to carry those provisions into effect. I do not mean laws to contradict them; I do not mean laws inconsistent with them; I mean, to make laws honestly and fairly to carry into effect the declared purpose of the Constitution. If a law was presented which was at war with the provisions of the Constitution, under pretense of carrying them into effect,

there would be ground of objection; but I take it that any law not inconsistent with the provisions of the Constitution, and which really intends to carry them into effect, is entirely constitutional. The subject has been legislated upon, and necessity may show that further legislation is required.

With these general remarks I come to the consideration of this resolution. I have objections to the form in which it is. I have great objection to all particular legislation. I object entirely to legislating of and concerning any State whatever by name. I want all laws to be general in their operation, general in their application. I want them so made that every State shall become subject to their operation in a like contingency. Make your laws general for the United States, and provide that in such and such contingencies a State which falls within those contingencies shall be subject to the operation of the law now and forever.

There is one other general principle which should be borne in mind. It very much becomes us, for consistency's sake as well as our own general character as legislators, that we should legislate in view of the laws we have passed. We should shape our laws with a view to what we have already passed into law, not forgetting that, not overlooking it.

Now in relation to this resolution; its preamble declares that certain States, naming them, or the inhabitants of those States, were in a condition of armed rebellion, and have continued in that condition for a certain time, and then the resolution legislates of and concerning those States. I think that is all wrong, all uncalled-for. Let it be remembered that in 1861 Congress passed an act making a large body of provisions for the condition of things which had then arisen. It is an act entitled "An act further to provide for the collection of duties on imports, and for other purposes," which was approved July 13, 1861. In the fifth section of that act, drawn, as I know, with a great deal of thought and care, it was provided:

"That whenever the President, in pursuance of the provisions of the second section of the act entitled 'An act to provide for calling forth the militia to execute the laws of the Union, suppress insurrections, and repel invasions, and to repeal the act now in force for that purpose,' approved February 28, 1795, shall have called forth the militia to suppress combinations against the laws of the United States, and to cause the laws to be duly executed, and the insurgents shall have failed to disperse by the time directed by the President, and when said insurgents claim to act under the authority of any State or States, and such claim is not disclaimed or repudiated by the persons exercising the functions of government in such State or States, or in the part or parts thereof in which said combination exists, nor such insurrection suppressed by said State or States, then and in such case it may and shall be lawful for the President by proclamation to declare that the inhabitants of such State, or any section or part thereof, where such insurrection exists, are in a state of insurrection against the United States; and thereupon all commercial intercourse by and between the same and the citizens thereof and the citizens of the rest of the United States shall cease and be unlawful so long as such condition of hostility shall continue; and all goods and chattels, wares and merchandise, coming from said State or section into the other parts of the United States, and all proceeding to such State or section, by land or water, shall, together with the vessel or vehicle conveying the same, or conveying persons to and from such State or section, be forfeited to the United States."

In short, a state of war was declared to exist in that event. It will be observed that that statute did not make any law for the States which had attempted to secede and were in arms. It named no State whatever. It was a general law that when the people of a State are in insurrection and claim to act under the authority of the State, and the State authorities do not repudiate it and do not stop it, then the President may declare them to be in insurrection and thereupon a state of war exists; and the Supreme Court of the United States, differing about the blockade question before that, all decided that after that act was passed the state of war was complete.

Now, Mr. President, in order to conform our legislative acts to that law which we have already passed and that condition of things which exists, I propose to offer a substitute for this resolution, which I shall presently send to the desk. The President's proclamation declaring certain States to be in a state of rebellion and insurrection was duly issued under the law of 1861, which I have just read. That is all matter of public record. We know what the proclamation is. We know that it was issued according to law. It declared a state of war. The proclamation is before me, but I need not read it. It declares under the act which I have read that certain States are in a condition of war and insurrection. Has that ever been changed? Have any States declared by that law and proclamation to be in this condition ever altered their condition? The state of war certainly still continues.

In view of the statement which I have made, I propose in place of the resolution, which seems to me obnoxious to the objections I have made, to strike it all out, and also the preamble, and to insert simply this:

"That the people of no State, the inhabitants whereof have been declared in a state of insurrection by virtue of the fifth section of the act entitled 'An act further to pro-

vide for the collection of duties on imports and for other purposes,' approved July 13, 1861, shall be regarded as empowered to elect electors of President and Vice-President of the United States until said condition of insurrection shall cease and be so declared by virtue of a law of the United States."

This is not a resolution declaring any State to be in this condition and legislating for any State by name or making any distinction between particular States. It is simply a law in pursuance of the act of 1861 declaring what shall be the effect which shall follow a certain condition of things into which any State may fall. For the reasons I have stated, I desire that this substitute shall be adopted in lieu of the resolution. If put in this shape it will be a statute declaratory of the existing law declaring that States in such a condition have no power to vote for electors.

Mr. JOHNSON. The Committee on the Judiciary, I suppose from what I collected of their views, would have no objection to any change of phraseology of the resolution which will accomplish the object that the committee had in view and that the other branch of Congress had in view in adopting the resolution as it stands. The object of the committee in the report is to prohibit the counting of the votes that have been cast in the States there named, the committee assuming that the States there named are States in rebellion, and being States in rebellion are not authorized to vote for President and Vice-President of the United States.

The honorable member from Vermont prefers his mode of accomplishing that end; but virtually it is the same, provided his amendment covers the case now existing; but I rather think the form of his amendment will be found to provide only for subsequent cases and not for an existing case. It seems to me to be prospective in its provisions, and not retrospective. The case to be provided for is one which has already occurred. Nor do I see any material difference or any difference in point of fact between the preamble as it stands and the amendment proposed by the honorable member from Vermont. He objects—and in the general the objection is certainly well founded—that it is unadvisable to legislate for particular cases; but I am at a loss to see how in substance the particular case will not be provided for by his amendment. He refers to the act of July 13, 1861, under the authority of which the President was authorized to declare certain States to be in a condition of insurrection or rebellion, and he tells us, what we all know, that in pursuance of the authority so conferred the President has declared certain States to be in rebellion, and those States are the very States mentioned in the preamble to this resolution; so that the only difference between the resolution as it stands in this particular and the resolution as proposed to be amended by the honorable member from Vermont is that the States are mentioned in the resolution before the Senate and will be found mentioned in the proclamation to which the amendment and the Senator from Vermont refers.

But as I said in the beginning, as far as I am individually concerned I have no objection to such a change of the phraseology of the resolution as will accomplish the purpose, that purpose being to declare that votes cast by the States which are named in the preamble are not to be counted. Whether that is to be accomplished by naming the States, or is to be accomplished by referring to the act of 1861 and what has been done under that act, is to me perfectly immaterial, and, I think, makes no difference as to the effect of the resolution. But even if the amendment proposed by the honorable member from Vermont should be preferred by the Senate, I submit to him and to the Senate that it will be necessary to change its phraseology so as to make it very clear that it will cover the existing case.

The question, then, Mr. President, is whether Congress have any authority to legislate at all on this subject. I agree with the chairman of the Judiciary Committee and my friend from Vermont that the authority exists; and I was somewhat surprised to find that it was disputed by gentlemen of such distinction every way, and particularly in their profession, as the honorable member from Wisconsin and the honorable member from New York. The Constitution of the United States does not provide in any way a mode by which a contested election growing out of an alleged informality in voting, or an alleged illegality upon the part of those who voted, or an alleged incapacity on the part of those voted for, is to be decided. The honorable member from Illinois is right in saying that if we are governed by the mere letter of the Constitution in this particular, there is no power existing by which anything more can be done than to have the votes counted. He is right in saying that looking to the mere letter of the provision there is no authority given to the President of the Senate to count the votes. He is right, also, in saying that there is no provision in the Constitution which decides who shall declare the result of the voting after the votes shall have been counted. In relation to all these points the Constitution is silent; but the Constitution provides that certain persons shall not be voted for as President of the United States. No one who is not a native-born citizen of the United States, or who was not a citizen at the time of the adoption of the Constitution, can be voted for. Members of Congress and officers under the Government cannot be selected as electors. The States are only authorized to appoint through their Legislatures a number of electors equal to their number of Senators and Representatives. Now, if a person not a native

citizen of the United States, or not a citizen in 1789, when the Constitution was adopted, is voted for as President, or if a member of Congress of either branch or an officer of the United States is voted for as an elector, or if more than the number of votes to which a State is entitled is cast, there is no clause in the Constitution which provides a mode by which these objections may be obviated. If the Vice-President is to count the vote, and he is to decide the result, and is merely to decide the result, according to the words of the instrument alone, then he may declare that A B is elected President of the United States, although the whole country knows that A B was not a native citizen of the United States. So he may count all the votes of any one State, (for his function it is supposed is only to count;) he may count all the votes cast by the State of New York when, in point of fact, New York has cast more votes than she is authorized to cast under the Constitution.

How are these questions to be decided? As it is very clear that in the instances to which I have referred—and there are others—there is the absence of any authority given to the Vice-President or to the two Houses when meeting in convention to decide them if they should arise, one would suppose—unless we are to remain without a President, or to have placed in the presidential office a man who is not eligible, or to have one placed there by votes which there was no constitutional right to cast—that there must be some mode by which those difficulties are to be obviated.

If there is under the Constitution no authority conferred upon the Vice-President, or upon either House acting separately, or upon the two Houses when meeting in convention—and there must be an authority to settle these questions, or otherwise you visit upon the men who framed the Constitution the imputation of having been entirely unable to accomplish that work—there must be somebody, some department of the Government, vested with authority to provide for the exigency: and when you go to the legislative department of the Government you find that all legislative power is vested in the Congress of the United States, and you come to the conclusion that the Vice-President has no power to cover the particular case when the votes are being counted, nor the House of Representatives, nor both Houses meeting in convention. Unless the work of the members of the Federal Convention has been very imperfectly accomplished, the power must be vested in the legislative department of the Government.

I never heard before—I speak it with entire respect to my learned brothers—that it was doubted that it was within the province of Congress to provide for cases of this description. The doubt was, and perhaps that doubt was well founded, whether votes could be excluded by either branch of Congress or by the two when they met in convention. Nobody supposed that the Vice-President could exclude them. But I was about to say that I never heard it doubted before that such a contingency, as might well happen because of the manner in which the constitutional provision was framed, could not be provided for by legislation. Chancellor Kent, in the first volume of his Commentaries, says:

“The President of the Senate, on the second Wednesday in February succeeding every meeting of the electors, in the presence of both Houses of Congress opens all the certificates, and the votes are then to be counted. The Constitution does not expressly declare by whom the votes are to be counted and the result declared. In the case of questionable votes and a closely contested election, this power may be all-important, and I presume, in the absence of all legislative provision on the subject, that the President of the Senate counts the votes and determines the result.”

He admits that it is in the power of Congress to legislate, and doubts only whether in the absence of legislation there exists any department of the Government or any officer of the Government vested with power to count the votes and declare the result; and in relation to that he is only able to bring himself to state by way of opinion that he presumes the President of the Senate is to count the votes and declare the result. But he presumes that only in the absence of legislation. Legislation on the subject, therefore, according to the high authority of this distinguished jurist, is admissible, and of course within the power of Congress.

Now, Mr. President, the honorable member from New York—I do not understand my friend from Wisconsin as going to the extent of that objection—says that he denies to Congress the power to declare that the votes of any State are not to be counted. Does he mean to say that the votes of the States in rebellion are to be counted? I do not speak of Louisiana, because he may perhaps be able to except Louisiana out of the category of rebel States; but assuming now that there are rebel States, and assuming that Louisiana is one of the rebel States, does my friend from New York say that the votes of those States are to be counted? I presume not; and yet if we do not legislate upon the subject, where is the power to exclude them? The Vice-President of the United States may think it his duty to count them; he may think it his duty, counting them, to declare the result of the election consequent upon that count; and it makes no difference that we know outside of the balloting that the result will be the same whether those votes are counted or excluded; the principle is the same. We are not to know, we do not officially know, what the result of the election has been. Who can know (officially, I mean) how the electors have voted? There may be, for aught that

we know, a contested election by the ballots, and the result of that contest may depend upon the counting or declining to count the votes from the rebel States. Everybody will admit, I am sure nobody more cheerfully than the honorable member from New York, that if in such a contest one citizen is elected by the votes of the loyal States excluding the votes of the disloyal States, and another is elected only by including the votes of the disloyal States, the first, although receiving a smaller number of votes numerically, is to be declared elected. If we all think that, are we willing—not because we feel in doubt as to what would be the result in the particular case, but we are establishing a principle—are we willing to leave it to the Vice-President of the United States to announce as elected President and Vice-President two gentlemen who may be elected only by the votes of those rebel States? Everybody will say no. Well, if we are not willing to leave the power to him, and there must be such a power somewhere, unless the Constitution of the United States vests in him the power, and exclusively vests in him the power, why should we not at once by legislation guard against the possible mischief of such a state of things?

It is true that my honorable friends from New York and from Wisconsin, and that is my opinion as I am at present advised, think that the efforts of those rebellious citizens to take those several States out of the Union are legally imperfect; that is to say, in the contemplation of the Constitution they are still subject to the powers of the Constitution, and the war is being carried on for the purpose of making them yield obedience to the Constitution upon the hypothesis that they are responsible to all the obligations of allegiance. That is all true; but it is equally true that they are in a state of rebellion. The Supreme Court of the United States has decided unanimously that since the passage of the act to which my friend from Vermont has referred, the act of July 13, 1861, all the States named in the preamble to this resolution are now at war with the United States, and that the United States have not only the right but it is their duty to prosecute that war to a success by bringing them back, they being (not in a constitutional sense, but practically) out of the Union. Now, is it possible that the inhabitants of a State thus at war with the United States have a right to vote in any presidential election for President of the United States?

In the war of 1812 a portion of the State of Maine was taken possession of by England, and held from the month of September, or June, or August, I forget which, until the declaration of peace made by the treaty of Ghent, and it was decided by the Supreme Court of the United States, in consequence of being so held, to be a foreign country for the time. Would my honorable friend from New York have said, if the whole State of Maine had been taken possession of by the enemy and held, that Maine, at a presidential election occurring during the time of that possession, could elect electors of President and Vice-President of the United States, and that Congress was divested of all authority to exclude them? I am sure he would not; and what difference is there between a possession of that description, held by force of arms by a public enemy in an international war, and a possession held by the rebels who have raised their arms against the United States, and taken possession of certain States, and held that possession by force of arms, claiming to be independent of the authority of the United States?

Mr. COWAN. I should like to hear the honorable Senator from Maryland speak to this question, which is involved in the last clause of the amendment offered by the Senator from Vermont; suppose the rebellion to be entirely suppressed, is it necessary then, in order to restore them to their rights in the Union, that we should enact a law that it was suppressed?

Mr. JOHNSON. I have not said that. That is stated in the amendment suggested by the honorable member from Vermont. I have not expressed any such opinion, and I am not prepared to say that I shall hereafter, when I come to examine the question thoroughly, come to the same result. My own opinion has been throughout that the States are not out, in one sense; and if all the inhabitants of those States were now to throw down their arms, admit their allegiance to the United States, and elect their members to the Senate, &c., hereafter, after the rebellion was entirely terminated, perhaps they would be entitled to their seats; but I am not prepared to say whether I shall hold that opinion upon examination or not. All that I mean to say now is that it is incumbent upon us to provide by law for a contingency which has now happened, although it may never happen again, so far as the particular effects are concerned; and it is now, above all, the best time to provide for it, because, although we do not know officially that it will have the slightest effect upon the result, we do know that there is involved in an exigency of that description very great peril.

We have now, thank God, as I think—I speak it with due respect to others who differ with me, and particularly my friend from Kentucky—got rid of the disturbing element of slavery as far as we can get rid of it, and that ended, and protection provided in the future against the peril consequent upon this particular clause in the Constitution looking to the organization of the Executive, I look forward to a perpetuity of the Union, and, certainly as long as it exists, the increase of its prosperity and power.

Mr. COLLAMER. I desire to add to the amendment that I have offered these words:

"Nor shall any vote cast by any such electors elected by the votes of the inhabitants of any such State, or the Legislature thereof, be received or counted."

According to my view, when a state of war has been declared to exist, declared according to law, we cannot recognize a state of peace and reconciliation in any other way but by declaring it by law, or authorizing the President to declare it by law.

Mr. HOWARD. Mr. President, I am unwilling to give a final vote upon this very important measure without expressing my views upon it. I certainly regard it as a measure of very great importance, especially as a precedent for the future, and as indicating the opinion of Congress on the subject, to use a familiar term, of "reconstruction," or rather the rights of the States in rebellion. I do not doubt the power of Congress to legislate upon the subject of the counting of the votes in the convention which is required by the twelfth amendment of the Constitution. That provision declares that after the two Houses of Congress shall have assembled together, of course in joint convention—

"The President of the Senate shall, in presence of the Senate and House of Representatives, open all the certificates, and the votes shall then be counted."

There is no doubt about the duty of the President of the Senate on this occasion. It is simple and plain. The act which he is required to perform is the opening of the certificates. That is an especial duty intrusted to his individual care and charge, and one with which the two Houses, thus assembled, have nothing to do. I confess I do not doubt the power of Congress, should they see fit, to authorize the President of the Senate to count the votes after he has opened the certificates; but in the absence of such a statutory provision I certainly could not concur in the "presumption" of Chancellor Kent, that the President of the Senate would have the right to count the votes and declare the result. It is impossible for me to concur in this intimation of that very distinguished authority. I should, on the contrary, hold, in the absence of an act of Congress, that the duty of counting the votes devolved upon the two Houses of Congress thus assembled.

Why are they thus assembled? It is a maxim that the law never requires a nugatory act; it never requires the performance of an act which is in itself immaterial, useless, or trifling; and whatever it commands to be done is supposed to have attached to it importance and interest. Let me ask, why are the two Houses of Congress thus required to assemble in the same hall, sitting together, and composing, of course, one body? Is it for the mere purpose of acting as spectators of the process to be performed by the President of the Senate of opening the votes? Is that all?

Mr. HARRIS. I suggest to the Senator from Michigan that if he will read the very next sentence in the Constitution he will find an answer to his question. They are to proceed, in case there is no election, immediately to choose a President.

Mr. HOWARD. I shall come to that in a moment. I am speaking now of the ceremony of counting the votes. Are the two Houses thus assembled to act as the mere spectators and witnesses of the ceremony of opening the certificates by the President of the Senate? Is that the sole and only office which they are required to perform on that occasion?

Mr. CLARK. I suggest to the Senator that it is only the House of Representatives that is to elect the President in a certain contingency named; it is not the convention.

Mr. HOWARD. I know that. I am coming to that clause. It seems to me, on the other hand, that the intention of the convention which framed the Constitution was that the two Houses thus assembled should sit together as one joint body for a much higher purpose than merely looking upon the ceremony of breaking the seals of the certificates, and that they are really required to perform the office of counting the votes. This was the early construction given to the Constitution by the Second Congress of the United States, which passed the act of 1792.

Mr. CLARK. I hope the Senator will permit me to interrupt him, because I desire to hear him upon one point right here. I agree with him that the convention should count the votes; but I want to hear him on this point: if the convention is to count votes, how can the two Houses, sitting by themselves, restrict or enlarge that count by saying they shall count so and so, or only so and so? The Senator will get my point.

Mr. HOWARD. Yes, sir.

Mr. CONNESS. Suppose there be an objection made in the convention?

Mr. HOWARD. I may best answer that question by putting another. Suppose that votes were found to be embraced in this certificate which were in reality void for fraud or deception; suppose they were a mere imposition upon the Vice-President, and that the persons casting them were not really in existence, or that the certificate itself was a forgery. Is there no way to prevent the counting of such forged and fraudulent votes? And if there be any such mode, is not that question, *ex vi termini*, by the terms of the Constitution referred to this convention thus assembled together?

Mr. CLARK. I see the Senator has not got my point. I agree with him that there would be power to prevent the counting of such votes, and it would be in the convention; but not in the two Houses of Congress separately.

Mr. HOWARD. I am speaking of them sitting together in one and the same body.

Mr. CLARK. The point I made was this: if it belongs to the convention, the two Houses sitting together, to determine this question, how can it be limited or enlarged by the two Houses sitting separately?

Mr. HOWARD. Of course it cannot be limited or enlarged.

Mr. CLARK. That is the point.

Mr. HOWARD. I consider that the power of counting the votes and of rejecting votes which are void for fraud or illegality, is, under the Constitution, in the joint convention thus assembled. I have not any doubt about that, because I believe that the two Houses thus assembled are assembled for a great and protective purpose, that they are exercising the tutelary authority of the people in protecting the nation from the imposition of false and fraudulent ballots and certificates. The article proceeds:

"The person having the greatest number of votes for President, shall be the President, if such number be a majority of the whole number of electors appointed; and if no person have such majority, then from the persons having the highest numbers not exceeding three on the list of those voted for as President, the House of Representatives shall choose immediately, by ballot, the President."

Did my honorable friend from New York forget that the Constitution in this clause only referred to the matter of the election in the House of Representatives? He seems to be of opinion that it was the duty of these two Houses thus assembled together, in case there was no election of President, to proceed at once to the election of a President. That would be a very strange proceeding indeed; the Senate manifestly would have no business to intermeddle with it. It belongs exclusively to the House of Representatives sitting, not in convention with the Senate, but in their own Hall as a distinct legislative body.

Mr. President, I regret very much that the Committee on the Judiciary saw fit to strike out the last clause of the preamble; and with the indulgence of the Senate I will state briefly what my views are upon this subject. I do not wish to consume their time unnecessarily, and will not; but the question is in my judgment one of the most important imaginable. The preamble to the resolution as it comes to us from the House of Representatives is as follows:

"Whereas the inhabitants and local authorities of the States of Virginia, North Carolina, South Carolina, Georgia, Florida, Alabama, Mississippi, Louisiana, Texas, Arkansas, and Tennessee rebelled against the Government of the United States, and have continued in a state of armed rebellion for more than three years, and were in said state of armed rebellion on the 8th day of November, 1864: Therefore," &c.

It affords me a little gratification, I confess, that my learned friend from Maryland has at length found himself compelled to adopt the sentiment which I long since expressed upon this floor, that the United States, in the prosecution of this war against the rebellion, have the same power and authority over the conquered States, over the communities once States in this Union, but now conquered and subjected by our arms as the nation itself would possess over foreign territory conquered in the same way. The only difference between the two cases is this: that in the case of a conquest of a rebel State by the arms of the United States the Government hold the territory thus subdued in trust for a specific purpose, and that purpose is to restore it ultimately and in its own discretion to its original position in the Union, to the enjoyment of all the privileges, and to the performance of all the functions pertaining to or required of a State of the United States under the Constitution.

By the act of 1861, and the President's proclamation under that act, the eleven States embraced in this preamble were declared to be in rebellion against the Government of the United States, to be in insurrection. Upon the principles of the laws of nations and the laws of war, principles which have been repeatedly recognized by our own Supreme Court, all the people embraced in these rebellious States, thus declared to be in insurrection, are enemies of the Government of the United States and enemies of the remaining loyal States and people. They are our enemies in every sense in which a foreign foe would be our enemy. Have such people any political rights under the Government of the United States? Have public enemies any right to enjoy the privileges of loyalty under the Government of the United States? Have they, in other words, the right of being the enemy and at the same time the friends of the United States? Can they have their cake and eat their cake at the same time? Can South Carolina rightfully, if her people were so disposed, proceed to elect electors of President and Vice-President of the United States and forward to this Government a certificate of the election? Why, sir, the very fact that they are public enemies shows the utter impossibility and absurdity of such a supposition. The same principle covers not only South Carolina, but every foot and every inch of every one of these eleven rebellious States thus declared to be in insurrection; and that state of hostility will continue against the Government of the United States until our arms have completely triumphed, and until, in the language of my respected friend from Vermont, [Mr. Colman,] peace is restored by an act of Congress revoking and annulling the proclamation issued under the act of 1861. These communities have no right at all to enjoy the benefits of the Government of the United States further than we see fit to extend to

them those benefits; and those benefits are conferred upon them and preserved to them while the war shall last, by the points of our bayonets.

I look upon this measure as necessary, as one form in which the sense of Congress ought to be expressed against any hasty attempt to re-admit these rebellious States into the Union. For one, I am prepared to say, and I take this occasion to say it, that I shall never consciously give my vote for the re-admission, directly or indirectly, of one of these rebellious States back into the Union, either by way of admitting her Senators here or in any other form, until I am perfectly satisfied, upon due evidence, that the decided majority of the voting population of such State has become loyal to the Government of the United States, is friendly to that Government, and willing and anxious to proceed in the discharge of the functions of a State of the Union, honestly and fairly, as required by the Constitution of the United States.

The theory of our Government is different from that of almost every other government on earth. It is that the will of the majority shall govern; in common phrase, the majority of the people, but practically the majority of the voting population. That is the basis, and the sole basis, upon which our republican system is based; and that is a principle too often recognized by our public writers and public speakers, too often recognized by our judicial tribunals, to need any discussion here. The moment we abandon the fundamental idea that a majority shall govern, that moment we place the government of a State in the hands of a minority, and so far as the principle is concerned, it is immaterial whether this minority consists of one-tenth of the population or the one-thousandth part of the population, or even of one out of the whole population. We may not discard the principle that republican government, as understood on this continent, rests upon the willing assent of a majority of the people of the particular community; a willing obedience to the laws of the United States, and a disposition for the future to proceed in the regular discharge of their duty as citizens of the State. If we abandon this great principle, that a majority not only shall, but must govern, we have thrown the leading principle upon which all our governments, State and Federal, are organized to the winds; we have given up the great experiment of republican government.

Mr. President, I repeat (for I do not intend to consume the time of the Senate) that I look upon it as the bounden duty of Congress, in every case, to keep out of the Union every one of these eleven seceded States until, in pursuance of our laws, passed or to be passed, it has become perfectly evident to us that there is in such State a clear, absolute majority of its voting population friendly to the Government of the United States, and willing to proceed in the discharge of their functions as a State; and, until that is done, you may be perfectly sure, so long as I hold a seat in this body, my vote will be given against any such proposal. I never will consent to admit into this Union a State a majority of whose people are hostile and unfriendly to the Government of my country. I prefer to hold them in tutelage (for that is really the word) one year, five years, ten years, even twenty years, rather than run the risk of a repetition of this rebellion, which has cost us so much blood and treasure.

I hope, therefore, Mr. President, that this resolution will pass; and I hope it will pass precisely as it is sent us by the House of Representatives. I hope that we shall continue the language in this preamble, the recital that on the 8th day of November, 1864, each of these eleven States was in armed rebellion against the United States, which was the legal fact of the case. Why flinch from it? Why shun the declaration? Were they not our enemies?

Mr. SUMNER. Allow me to remind the Senator that that language has been struck out on the report of the committee.

Mr. HOWARD. It is not struck out yet by the Senate. I believe it was stricken out in Committee of the Whole. I shall call the yeas and nays upon that question in the Senate.

Each of these States, sir, on that particular day was, as a political community, an enemy of the United States, and all their men, women, and children, were enemies of the United States by the laws of war and the laws of nations.

This is all I have to say on the subject at present.

Mr. TEN EyCK. I am not in favor of the adoption of the substitute proposed by the Senator from Vermont, although it is always with the greatest diffidence in the world that I venture to differ from him in any well-considered proposition that he submits to the Senate. I understand his substitute to be based upon the idea that under the act of Congress and the President's declaration, we are now in an actual state of war with these eleven southern States, and that it will require an act of Congress to enable them to resume their position again in the Federal Union. That presupposes, in the first place, that they are out of the Union, a fact which I am not willing to admit and can never assent to; but I do not propose to insist upon that. The main direction of the argument is, that inasmuch as the President has declared these States to be in a condition of insurrection under an act of Congress passed in 1861, therefore it will require an act of Congress to enable them to resume their legitimate or ordinary State functions; or, in other words, it will require an act of Congress to authorize them to elect electors for

President and Vice-President, and, as a necessary consequence, to elect Senators to this body, or Representatives to the House of Representatives.

I do not mean to weary the Senate by reading at large the statute of 1861, but I may be permitted perhaps to refer to it for the purpose of showing the object, intent, and scope of that enactment. It is entitled, not "An act to declare war against the States of South Carolina, Virginia, and others," but "An act further to provide for the collection of duties on imports, and for other purposes." The fifth section authorizes the President in certain cases to declare the inhabitants of certain States to be in a state of insurrection by virtue of the power conferred upon him by the act of February 28, 1795. It goes on to declare that it shall be lawful for the President, whenever he shall call forth the militia, in pursuance of the act to which I have referred—

"To suppress combinations against the laws of the United States, and to cause the laws to be duly executed, and the insurgents shall have failed to disperse by the time directed by the President, and when said insurgents claim to act under the authority of any State or States, and such claim is not disclaimed or repudiated by the persons exercising the functions of government in such State or States, or in the part or parts thereof in which said combination exists, nor such insurrection suppressed by said State or States, then, and in such case, it may and shall be lawful for the President, by proclamation, to declare that the inhabitants of such State, or any section or part thereof, where such insurrection exists"—

Not a state of actual war—

"are in a state of insurrection against the United States; and thereupon all commercial intercourse by and between the same and the citizens thereof, and the citizens of the rest of the United States, shall cease, and be unlawful so long as such condition of hostility shall continue."

This is the object of the act. When these people, in the opinion of the President of the United States, are in the condition specified in this act, he shall issue his proclamation declaring that fact; "and thereupon all commercial intercourse by and between the same and the citizens thereof, and the citizens of the rest of the United States, shall cease, and be unlawful so long as such condition of hostility shall continue."

In pursuance of that act of Congress the President issued his proclamation, and I shall refer to a portion of it. The proclamation bears the date of August 16, 1861. It recites the act of 1861 to which I have just referred; it also recites the act of 1795, under which he derives the authority, and then proceeds to declare:

"Now, therefore, I, Abraham Lincoln, President of the United States, in pursuance of an act of Congress approved July 13, 1861, do hereby declare that the inhabitants of the said States of Georgia, South Carolina, Virginia, North Carolina, Tennessee, Alabama, Louisiana, Texas, Arkansas, Mississippi, and Florida, (except the inhabitants of that part of the State of Virginia lying west of the Alleghany Mountains, and of such other parts of that State and the other States hereinbefore named as may maintain a loyal adhesion to the Union and the Constitution, or may be, from time to time, occupied and controlled by forces of the United States engaged in the dispersion of said insurgents,) are in a state of insurrection against the United States, and that all commercial intercourse between the same and the inhabitants thereof, with the exceptions aforesaid, and the citizens of other States and other parts of the United States, is unlawful, and will remain unlawful until such insurrection shall cease or has been suppressed."

The object, design, and intent of the act was to prohibit trade with these insurgents, to prevent persons in the loyal part of the Union from carrying on commercial intercourse with them, and for furnishing them with provisions and munitions of war with which they might continue to prosecute this rebellion; and then there was an exception from the scope and effect of the act in favor of the State of West Virginia and such other States or parts of States as maintained a loyal adhesion to the Union and the Constitution, or may be from time to time occupied and controlled by forces of the United States engaged in the dispersion of the insurgents.

Now, if it comes to the knowledge of the joint convention to be assembled on Wednesday of next week that in either of these States this insurrection has been suppressed, and that the people of either one of those States have assumed the suspended functions of their State government, have re-organized a State constitution, have elected State officers, and have put their civil government into full execution and operation, and that fact comes before us attested and undisputed, I inquire whether, under the provisions of this law and the proclamation of the President, it is necessary that there should be an act of Congress passed in order to establish the fact that these people have re-organized and re-assumed their ancient loyal functions? I am as much opposed as any other Senator can be to the admission of Senators from the State of South Carolina, if such a thing could occur, or to the electoral vote of the State of South Carolina being counted in the electoral college; but, sir, if the fact appeared that that State, contrary to all its predispositions toward rebellion, had resumed its loyal functions under the ancient Union, and that there were a large body of loyal people there, sufficient for the purpose of performing all their duties under the State government and under the Gov-

ernment of the United States, even South Carolina, polluted and covered over as she is and has been with treason, might yet by possibility be permitted to resume her position upon this floor and have her electoral vote also counted in the joint convention of both Houses. Why, sir, I thought that this whole war, the expenditure of thousands of millions of dollars and of oceans of blood, was for the very purpose of restoring this Union and bringing back these shooting stars to their ancient orbits.

I differ with the Senator from Michigan, who would make the return of these States to the Union attendant with the utmost difficulty. Whenever I was satisfied that there was a true, genuine, loyal feeling among the inhabitants of any of these States to repudiate their heresies and return to their allegiance, and that there was a sufficient body of them to justify the proceeding, and to carry on all the essential, necessary operations of State governments and to perform their duties within the limits of the Union, I should be disposed to extend the hand of encouragement to the loyal people, always saving and reserving not only terms of indignation for the leaders, but the privilege and firm determination of punishing in the most condign manner the guilty authors and leaders and instigators of the rebellion. I do not believe that there is any necessity for any such act of Congress as has been referred to. I do not believe that it is, at this time, under the existing state of things, prudent, advisable, or proper, to throw these impediments in the way, to make the return of these erring States dependent solely upon the wish and will of Congress.

Inducements have been held out to them by the Executive of the United States. I know that that course of conduct on the part of the Executive has been criticised; yet, at the same time, these people, who have been like drowning men struggling in the midst of a storm, contending against their neighbors and their efforts to keep them in rebellion, have seized hold of this offer or inducement held out to them by the Executive of this nation, and have proceeded in the common, legitimate, lawful, and ordinary mode, in the mode in accordance with their ancient traditions, in accordance generally with their constitutions and the laws they had enacted in times past, to perform all the duties which good, loyal, and true citizens should perform, to manifest their devotion to the ancient Union, and to return to the ancient ark. Several of them have attempted this thing. Tennessee has made some effort toward it. Arkansas has made an effort toward it. I, however, having some familiarity with the case of Louisiana, saw fit to select that in my motion of amendment yesterday from the operation of this joint resolution, considering it, from the knowledge I had of the situation of these several States, as the strongest case that could be brought to the consideration of the Senate. It may not be so, but I so regard it.

I understood the Senator from Illinois to-day to take exception to the course pursued by the people of Louisiana. He wished to know if it were possible that some eight thousand votes cast in an election for the purpose of returning again to their ancient allegiance could be sufficient where the State had been in the habit of casting some fifty thousand votes in other elections. I do not understand the facts exactly as the Senator from Illinois understands them. I will read from a paper furnished by a gentleman who is familiar with these facts, and who has had something to do in attempting to set this new State government in operation. He states, in regard to the State election:

"It was fixed for the 22d day of February. Three candidates were presented, and the canvass was general and spirited, each party sustaining its candidates by public meetings, precisely in the same manner as in a State unaffected by the revolution.

"Eleven thousand four hundred and fourteen votes were polled at this election.

"The average vote for ten years previous to the rebellion in these parishes was fifteen to sixteen thousand."

Surely if the average vote in the parishes that voted at this State election in 1864 for the period of ten years past did not exceed fifteen or sixteen thousand, we may say that a full vote was cast by the people of these parishes in February, 1864, when they cast eleven thousand four hundred and fourteen votes, taking into consideration the wasting effect of war upon that people, and the fact that a large number of them had actually gone into the rebel army.

"The highest vote ever given [in these parishes] was in 1860, when the subject of the rebellion was considered, and the people were represented by four presidential candidates. The vote in that year was twenty-one thousand."

So that the votes cast in the State elections of 1864 in these parishes amounted to more than one-half the whole number of votes cast in the presidential election immediately preceding when there were four candidates running, and when the question of rebellion was being considered, and when it is fair to presume that every voter who could be brought to the polls was brought and his ticket deposited.

I desire now to give the statistics of the vote of the State generally for the purpose of putting the facts right before the Senate:

"The highest average vote of the State of Louisiana in ten years past was thirty-four thousand.

"The highest vote ever given was about fifty-one thousand.

"In ten years past the vote is even as low sometimes as twenty-two thousand.

"The ordinary vote of the city of New Orleans was six or seven thousand previous to the revolution.

"The highest vote ever given in the city was ten thousand.

"In these elections, therefore, the vote actually polled was more than one-third of the average vote for ten years past."

I was anxious to save the State of Louisiana from the effect of this joint resolution. I feel as anxious to save the State of Tennessee from the effect of the resolution, because I cannot conceal the fact that the Vice-President-elect of the United States is a citizen of that State. If that State be not a State in the Union, then he is an alien, and I do not see clearly how an alien can take his seat to preside over this body as the Vice-President of the United States. Still, I did not see fit to start that question or to discuss it, because I had not fully looked into it and considered it, so as to justify me in attempting to detain the Senate in any remarks which I might make on the subject.

There was another view that I entertained of this case, and that was a motive which induced me to confine my amendment to the State of Louisiana. It was to avoid a committal on the subject and to save the Senate from declaring its opinion beforehand with respect to the eligibility of the Senators chosen by that State to occupy seats upon this floor. The Senator from Illinois differs with me. He thinks by the passage of the resolution that question will be avoided, that we shall not be committed upon it. I do not think so. I do not say that that is a sufficient reason to regulate and rule the transactions of this body; and yet I think we ought not in advance to commit ourselves on this subject. Why shall we commit ourselves on the question? If we pass this resolution declaring that the State of Louisiana was in such a state of rebellion during the year 1864 that no legal election could be held there, and even as late as the 8th of November of that year, then we declare that the Legislature of that State, elected in February of the same year, was illegally elected. Then if we refuse by this joint resolution to allow the electoral vote to be counted in the electoral college on Wednesday next, on the ground that this Legislature was illegally elected, we preclude the question in relation to the election of these Senators, because they were elected by the same Legislature, in pursuance of a law enacted by themselves, under the power conferred upon them by the Constitution to enact a law providing for the election of electors for President and Vice-President of the United States. So far from avoiding a decision on this question, we, by our vote, if we pass this joint resolution, prejudice and predetermine the question in relation to the admission of the Senators from that State upon this floor, as well as the admission of the members elected to the House of Representatives.

I wish to avoid settling that question. It can make no difference as to the result. The choice of the people so clearly manifested during the last election will be acknowledged, and ratified, and carried out whether the votes of these States are cast in the electoral college or not. I should much rather prefer leaving this question to be settled and determined, if it should arise, in the electoral college, having faith in the good sense and honesty of purpose of the representatives of the people in both Houses, than to undertake to venture upon a doubtful power, claiming that the Congress, and the Congress alone, have the power to determine this question, and at the same time settle in advance other questions which we shall be called upon to settle hereafter, and which Senators on this floor declare it is their wish to avoid.

I will not detain the Senate by any further remarks.

Mr. POMEROY. I am not opposed to the object of this joint resolution, but rather to the form in which it is presented. I do not suppose that States that are not represented in either House of Congress should have a representation in the electoral college. There seems to be an impropriety and an inconsistency in admitting their votes and counting them; but this resolution as it is presented to us goes on to state certain things about some of these States which are so far from being true that they become almost offensive. In the preamble of this resolution, it is said, of Arkansas, for instance, among other States, "the inhabitants and local authorities have continued to be in armed rebellion for three years, and were so during the last election on the 8th day of November."

Mr. TRUMBULL. If the Senator from Kansas will allow me, those words to which he refers have been stricken out. The amendment reported by the committee, striking out all after the words "United States" in the preamble and substituting other words in lieu of them, has been adopted.

Mr. POMEROY. Let me inquire if the words substituted in lieu of them make any reference to Arkansas?

Mr. TRUMBULL. Arkansas is left in in the first part of the preamble, to which, I presume, the Senator from Kansas has no objection. It now reads, whereas the inhabitants and local authorities of the States of Virginia, North Carolina, South Carolina, Arkansas, and others, rebelled against the Government of the United States. The Senator does not deny that.

Mr. POMEROY. No, sir.

Mr. TRUMBULL. The rest of the preamble is stricken out, and a substitute has been adopted, the very object of which was to avoid this statement upon which the Senator is commenting.

Mr. POMEROY. I am very glad to learn that. I was not in my seat at the time that amendment was adopted. So far from the local authorities of the State of Arkansas having been in armed rebellion for three years, the authorities who did rebel have not been inside the State for a year. The rebel governor and legislature were driven out long ago, and have not been back, and cannot come back; some of them are dead, and never will come back. I thought, with such a state of facts as that, the statement in the preamble to this resolution, that the State had continued in rebellion up to the 8th of last November, was very inconsistent.

But I want to say again that the State of Arkansas has not voted at all in the presidential election. There are no votes from that State. Under the instructions and impressions that the members from Arkansas received here last session, they distinctly understood that States not represented in either branch of Congress would have no right to vote at the presidential election. They returned to Arkansas and so reported, and they never had any election; there are no votes here from that State. They have been in suspense awaiting the action of Congress, and while that state of things lasted, of course they held no election. So far as this resolution is concerned, it does not affect that State one way or the other; there are no votes to count from that State.

Mr. COWAN. I have but a word or two to say on this question. I suppose, as a general proposition, all States have a right to be represented in this election of our President; but it appears that there is a difficulty in regard to some of the States named here. I am not sure that I know exactly the condition of this preamble. I understand that Arkansas is stricken out.

Mr. TRUMBULL. No, sir.

Mr. COWAN. Do they all remain as they are here?

Mr. TRUMBULL. Yes, sir.

Mr. COWAN. And the question is on the motion of the Senator from New Jersey to strike out the word "Louisiana?"

Mr. TRUMBULL. Yes, sir.

Mr. COWAN. The preamble states the fact of the rebellion prevailing in these States, and the resolution declares that because of this fact stated in the preamble these States ought not to vote. That is the proposition from the committee. The amendment of the honorable Senator from Vermont, on the other hand, proposes to take the question in blank, and to declare that all the States which were proclaimed to be in a state of insurrection by the President ought not to vote until that insurrection has been declared by law to be suppressed. I am opposed to that amendment for divers reasons, and I think if we come to examine this question fairly we shall see that any action of ours intended to prevent Louisiana, for instance, and Arkansas from voting will be perhaps a breach of faith on the part of this Government, and a violation of that courtesy which is due from one department of it to another.

Sir, what are the facts? It is said that by the act of July 13, 1861, these States are cut out from the Union and debarred from all their privileges as States, political as well as others. I do not so read the act of July 13, 1861; nor do I conceive that that was its purpose, because in endeavoring to get at a fair construction of a law, it is always necessary to ascertain what was the purpose of the lawgiver. I apprehend, so far from its being the purpose of that law to put these States out of the Union, it was its intention to keep them in; that is, it was intended to be a means to keep them in, although for the purpose of better achieving that end all commercial intercourse was cut off with them, but not political intercourse. They were not deprived of any of their rights as States, or from exercising any of the functions of States, provided they were able to do so in due time.

In pursuance of that act of Congress, the President, by his proclamation of August 16, 1861, declared Louisiana a state of insurrection. By the proclamation of January 1, 1863, he exempted thirteen parishes of the State from the operation of the emancipation proclamation. Why? Because he says in that proclamation that the rebellion does not exist in those thirteen parishes; that that condition of things upon which he was allowed before that time to issue his proclamation did not exist in those parishes, and therefore he exempted them. We recognized the validity of that proclamation, I believe; at least we have always treated it with that respect which is due to the act of another department of this Government when it is not grossly in violation of law or of the Constitution. By the proclamation, however, of the 8th of December, 1863, the President invited the people of Louisiana and of all the other States to resume their State rights and State functions, provided one-tenth of them would agree to make the proper organization.

Now, as I understand the question here, it is simply this: in pursuance of that invitation extended by the President, and upon the footing of his proclamation declaring that those rights should be restored to them, and that they would be protected in the exercise of them, the people of Louisiana, in numbers sufficient to bring them within

his terms, have organized a State government, and have it now actually in operation in the State of Louisiana. The question simply is, whether we will carry out that arrangement of the President in good faith, or whether we will violate it; and that is the question which presents itself distinctly upon the propositions now before this body. The President has invited a number of the people of these States which have been oppressed with the rebellion to go to work to re-organize their State governments, and has promised that he will extend, and this Government will extend, to them the protection guaranteed by the Constitution; and he goes so far as to state that phrase of the Constitution *in hæc verba*. Will we stand by it? That is the question. Will we carry it out in good faith? If we are willing to do so, then there is no difficulty; and this one-tenth of the people, or whatever the number may be, will become for this occasion the State of Louisiana, and the State of Arkansas, or any other State that sees fit to accept those conditions.

I may here remark, Mr. President, that no member of the Senate has yet undertaken to determine what number of people in a State shall be in rebellion in order to deprive the residue of the population of their rights. It is perfectly clear, I take it, the State being a corporation, that if the officers of the corporation refuse to do their duty, refuse to carry out the laws of the franchise, that that does not destroy the corporation. The corporation still remains, and a court would appoint trustees for the purpose of sustaining it, and for the purpose of carrying out the original intent with which it was created. If a portion of the people of a State, say ten thousand, were to drive away the State officers, or even if the State officers were to leave themselves, and for the time being suspend the functions of the State government, it is perfectly clear that that would not affect the rights of anybody else who had not been engaged in the original enterprise, however much they might have obeyed those who obtained the control of that government, and which exercised its authority over them. Then if ten thousand cannot do it, can twenty thousand, can thirty thousand, or can any number of people in a State, being rebellious and disloyal, deprive the loyal of the privileges granted to them under the Constitution?

Those are questions which have not been settled. Those are questions upon which I have not heard an opinion. Can the majority of the people of a State destroy that State? They may derange and disorder its functions as such, but the moment they are suppressed and put down, and the usurpation removed, I would like to know whether the rights do not all remit themselves to the loyal people and those who have not been engaged in the enterprise?

I am not prepared to say that these rights have all come back to these people in Louisiana. I am not prepared by any means to determine that question, simply because the President has better means of ascertaining and determining it; and I think the question remains with him. It was his business as the agent, the Executive, in fact, of the United States Government, to put down this rebellion, to relieve the people from its oppression, and to restore them precisely to where they were when the rebellion found them. If that is done, in ten days after his proclamation, *co instanti*, the people resume their rights and functions; and in this case I understand they are not only in possession of the right, but are actually in the enjoyment of it, having a regularly-organized government with all the machinery necessary and proper to a government. Whether it is a government of so many people as will be enabled to maintain its supremacy over the whole State is a question, but it is a question which the Executive is to decide, because he is to sustain it there and make it able to be supreme within the limits of that State; and if I understand it that is just exactly why we are now giving him men and money, armies and navies. It is in order that he may bring about that desired result.

Mr. President, this involves a direct conflict between the legislative and executive bodies of this Government, and at this time I am of opinion that we cannot afford to enter into that conflict. We cannot afford to quarrel now, because the game would not pay for the candle. There is no practical value in the question that is raised here at any rate, because it will not alter the result of the presidential election a hair's breadth whether the electoral votes of Louisiana and Arkansas are counted or are not counted; and it is admitted to be a very grave question, and one upon which our people will be likely to divide. Then why should we raise it when it is not necessary? By not raising it we are left free to decide it when it shall be a material question before us really. By raising it now upon an issue in which it is not wholly involved or wholly eliminated, we may be precluded hereafter from deciding it as we would desire to decide in such a case.

Therefore I think, for my own part, that it would have been better not to moot the question now, seeing that it can have no practical result, that the only possible consequence which can follow it is to divide and distract the various departments of this Government. I am unwilling to do that. I am willing at the present time to submit to anything that is not materially fatal. I am unwilling to raise any question which does not cross our path distinctly and in front of us while this war is pending, because—I have my own notions about that—it is war, and I would devote the whole

energies of the nation to the successful conduct of that war, such a conduct of it as will enable us when it is brought to a successful conclusion to meet and adjust these questions in freedom and without having impending over us the prospect that all the questions may be futile even if they are decided.

Mr. DAVIS. I believe the honorable Senator from Pennsylvania is about through, and with his permission I will occupy the floor for a few minutes. [Laughter.]

Mr. COWAN. Very well.

Mr. POMEROY. I desire—

Mr. COWAN. O, I hope the Senator from Kentucky will be allowed to make a speech. I shall be exceedingly sorry to see him prevented from enjoying that rare privilege. [Laughter.]

Mr. POMEROY. I merely wish to make a single correction, if I may be allowed to do so. I want to say to the Senator from Illinois, the chairman of the Committee on the Judiciary, that the modification which has been made is not such as I understood him to say it was.

Mr. DAVIS. I do not yield the floor.

The VICE-PRESIDENT. The Senator from Pennsylvania having yielded the floor, to the Senator from Kentucky, the latter is entitled to it and will proceed.

Mr. DAVIS. It seems to me that a good many questions have been brought into this debate that are foreign to the point in issue. The presidential election has taken place; it remains now to count the vote. The question is how the vote is to be counted, and by whom the vote is to be counted. Preliminary to the count of the vote the Presiding Officer of the Senate has by the Constitution one office to perform, and what is it? Simply to open the votes. He is to perform no other function or act than to open the votes. When the votes are opened they are still to be counted, and who is to count them? The two Houses in convention are to count them. I have no doubt of that fact. And the question now under consideration is, Have the two Houses of Congress in their legislative capacity the power to lay down certain rules by which this office of counting the vote may be performed? I think that they have. The clause in the Constitution read first by the Senator from New Hampshire and subsequently by other Senators, seems to me to confer full and plenary power in relation to the manner of counting the votes upon Congress; and Congress may declare by its legislative action certain rules to regulate the count of the presidential vote. This may be declared by an act of Congress or by a joint resolution passed previously for the purpose of convenience and to prevent disorder in the matter of counting the vote. The vote is to be counted in the presence of the two Houses, and would it not be competent for Congress to pass a law directing that as the certificates are opened by the Presiding Officer of the Senate they should be counted in the presence of the two Houses by the Secretary of the Senate and the Clerk of the House of Representatives jointly?

Mr. COWAN. Will the Senator allow me to ask him how the question can possibly be raised, until after we get into joint convention, whether the vote of a State shall be counted or not?

Mr. DAVIS. Just as any other question could be.

Mr. COWAN. I ask the Senator whether to-day Congress could pass a law that the vote of Pennsylvania should not be counted for any reason whatever?

Mr. DAVIS. It could if it pleased.

Mr. COWAN. Would the law be valid?

Mr. DAVIS. It is only the vote that is counted that rules the presidential election. Whatever vote is counted in that election decides the question of the election to the Presidency. Who is to perform that office of counting the vote? I maintain that it is to be done by the two Houses or in the presence of and under the supervision of the two Houses. The question now is whether the two Houses in their legislative capacity may lay down certain principles and regulations to prevent disorder and confusion in the act of counting the presidential votes? I think they may.

Where the Constitution directs an act to be done it invests all needful power to enable that act to be conveniently done. As I understand the Constitution, the power to count the votes is vested in the two Houses of Congress. That is a power to be executed under the Constitution. A general provision of the Constitution provides that Congress may pass all laws necessary and proper to carry into execution any power vested by the Constitution in the Government of the United States or in any of the departments or officers thereof. This power to count the presidential votes is certainly vested by the Constitution somewhere. It is vested in the two Houses. The manner in which the count shall be made is not prescribed by the Constitution. Then comes in the general power given to Congress to pass all laws necessary and proper to execute any of the powers vested by the Constitution in the Government or in any department or officer thereof.

I understand that that incidental power is simply proposed to be executed by this joint resolution in declaring certain principles and forms by which the count shall be made. This count is to be made in subordination to the Constitution. The Constitu-

tion declares that no man shall be eligible to the office of President unless he be a native-born citizen or a citizen of the United States at the adoption of the Constitution. Suppose the State of Louisiana had voted for a man who did not come up to that qualification, who was not a native citizen of the United States, or who had not resided in the United States at the time of the adoption of the Constitution, would it not be the duty of the two Houses, in counting the vote, to decline to count the vote of Louisiana that had been cast for a person for President in direct conflict with the spirit and the letter of the Constitution? It certainly would. The vote must be counted. How can it be counted until it is ascertained? The vote must be identified. It must be identified and ascertained in obedience to certain principles of the Constitution. One of those principles is that the candidate voted for must be thirty-five years of age; another is that he must have been a citizen of the United States at the time the Constitution was adopted, or he must be a native-born citizen. Any vote cast in opposition to these plain and palpable provisions of the Constitution would be null and void; it would not be a vote for President in conformity to the Constitution, and therefore it would be void. To ascertain whether this vote is so cast or not, the two Houses of Congress, acting in the count of the vote, must decide whether any State has voted for a man under thirty-five years of age, or voted for an alien, against the provisions of the Constitution. They are to ascertain whether such votes have been given or not, before they can make a constitutional count of the votes.

Now, sir, as I understand the effect of this joint resolution, it is simply in a form to do that duty; that is, to ascertain whether the vote of certain States has been cast in conformity to the Constitution or not, and deciding that they have not been cast in conformity to the Constitution, to exclude them from the count. Some gentlemen here think the election in Louisiana was illegal for one class of reasons; I think it was illegal for another class of reasons; but as we both come to the same conclusion, it is immaterial upon what ground. The vote of the State is illegal. If I assume that it is illegal on one reason, and the Senator from Michigan [Mr. Howard] assumes that it is illegal upon another reason, I shall not dispute with him about the grounds that brought him to the conclusion to exclude the vote of Louisiana, but I will agree that he shall vote to exclude it upon his reason and I will vote to exclude it upon mine.

But, sir, the position I intended to state and upon which I rely, is simply this: that Congress, for the convenience of the two bodies when they are in convention, and to prevent disorder and confusion at the time and place of counting the presidential votes, may previously by joint resolution declare certain principles upon which that count shall take place; that the resolution now under consideration simply does that, and therefore it becomes legitimately and properly within the exercise of an incidental power of Congress to pass such laws as shall be necessary and proper to enable any expressly granted power in the instrument to be executed; and it is simply for that purpose that this resolution was offered, and it ought to pass.

MR. POWELL. I am opposed to the amendment of the honorable Senator from New Jersey to strike out "Louisiana" from the preamble, and I am also opposed to the substitute offered by the honorable Senator from Vermont to the resolution reported by the Committee on the Judiciary. The Senator from New Jersey yesterday, speaking of Louisiana, referred to a statement made by General Banks before the Judiciary Committee, in which he declared that the recent election in that State were conducted without any interference from the military; and he read this clause in the statement of General Banks:

"I desire to state in the most unqualified terms, that no effort whatever was made on the part of the military authorities to influence the citizens of the State either in the selection of candidates or in the election of officers, and that the direct influence of the Government of the United States was less in Louisiana than in the election probably of any other State of the Union."

I do not concur with General Banks in that statement, and the paper in which it is contained entirely overthrows the position taken by General Banks about the non-interference of the military authorities with the election in the State of Louisiana. General Banks in this paper tells you that the military authorities prescribed the qualifications of voters in that State; that they allowed persons to vote who were disqualified from voting by the constitution and laws of the State of Louisiana. Under the constitution and laws of Louisiana persons in the Army and Navy are not legal voters. General Banks tells you that he modified that provision and allowed those persons to vote. He tells you further that the voters were required to take and did take every one of them the oath prescribed in the President's amnesty proclamation of December 8, 1863; and that the military authorities not only prescribed the qualifications of voters and the oath they should take, but fixed the rule for the eligibility of candidates to office.

The amnesty proclamation of the President, of December 8, 1863, it will be borne in mind, requires each person to swear not only that he will support all the laws of Congress passed on the subject of slavery, but all the proclamations issued by the President on that subject or that he may hereafter issue. That was a condition-precedent

to anybody being qualified as a voter at these elections in Louisiana. Although these facts all appear in this very statement of General Banks he comes here and tells you in another part of the statement that the interference of the Government in the elections in Louisiana was probably less than in any State of the Union! Did General Banks think for a moment that the members of this body were so grossly ignorant of public affairs as not to know that his statement was incorrect?

I ask you, sir, what greater interference there could be by the governmental authorities with the elections of a State than to prescribe qualifications of voters different from those prescribed in the constitution and laws of the State? Will General Banks tell me that in any State of the Union (except in some parts of Kentucky, where the military authorities did pretend to prescribe the qualification of voters) the authorities of this Government have the power to prescribe those qualifications? Has it been done in any of the adhering States save in some localities in the border States? Has the Government of the United States, by any or all of its departments, presumed to prescribe the qualifications of a voter in the State of New Jersey, or the State of New York, or the State of Ohio? No, sir. And yet General Banks tells you in this paper, which is relied upon by the Senator from New Jersey, that there was no governmental interference with the elections in Louisiana, or, at least, less probably than in any State of the Union. General Banks is greatly mistaken when he asserts that, and the very paper that he submits clearly and palpably stamps the statement as erroneous.

I am opposed to admitting on this floor persons who are elected under the bayonet influence in any way whatever. I very well know that there was no free expression of the people of Louisiana in these elections. I know that they but obeyed the behests of the military, whatever commanders may say about it. General Banks tells you in this very statement that the military authorities there undertook to alter the constitution and laws of the State of Louisiana, and by military proclamations and orders to prescribe the qualifications of voters. Does any man tell me that an election held under such circumstances is a free election? No, sir. My friend from Ohio [Mr. Wade] says it is a farce, and but for its tragical results upon republican liberty it would be the greatest of farces. Its effect upon the liberty of the people, and upon every principle of self-government, and every principle of republican government, is most tragic and disastrous. While I hold a seat here or have a voice anywhere, never with my consent shall any man take position in the councils of the nation who was elected by force of military power. The military must stand aloof from elections. Let them fight the armed enemies of the country, and let the people in their civil capacity go forward, and, uninfluenced by anything else than their own good judgments, vote as they please. Let the constituted authorities of the States prescribe, as they have a right to do, the qualifications of their voters and of their candidates for office. Whenever you depart from that principle, you stab in the most vital part our system of government, you overthrow the representative republican system, and you establish on its ruins a military despotism. I will not consent to it in any form or in any manner. So much for the elections in Louisiana.

I am opposed to the substitute offered by the distinguished Senator from Vermont to the resolution before the Senate. There is in his amendment a power given to the President of the United States which would enable him, if he had almost any strength, to re-elect himself. That amendment declares that the vote of any State which may have been declared to be in rebellion by the proclamation of the President made in pursuance of the act of July 13, 1861, shall not be counted. Now suppose—I will merely suppose the case for illustration—that at the next presidential election Mr. Lincoln should be again a candidate; and suppose on a general survey of the political field he should find that it was necessary that the votes of New York and Ohio, for instance, should be excluded in order to secure his re-election; and then suppose that in order to prevent their votes from being counted, which if counted would certainly defeat his election, he should manage to have a little row kicked up there, and then declare Ohio and New York in a state of rebellion: what would be the result? According to the amendment, their votes could not be counted, and that would insure his re-election. It is a power which I will never by any vote of mine clothe the Executive with.

For the reasons which I have thus briefly stated, I cannot support either the amendment offered by the Senator from New Jersey, or that offered by the Senator from Vermont, but prefer to adhere to the resolution as it came from the Committee on the Judiciary.

I believe that the States in revolt are still States of the Union. I believe they are not out of the Union. I believe, furthermore, that when they choose to lay down their arms, and to elect officers of their State governments who acknowledge this Government, and to send members to the House of Representatives, and Senators to this Chamber, they have the right to do so, and I believe that they ought to be permitted to do so. While I say that, I know of course that each House is the judge of the qualifications of its members, and each House is to judge for itself whether the resistance to the Government in any State has sufficiently ceased to entitle it to repre-

sentation here, and hence it is that each case must stand upon its own merits as it is presented here. For myself, I would vote to-morrow to receive Senators in this Hall from every State that is in revolt, provided I believed that a majority of the people of those States, unawed by the military power, uninfluenced by any outward force, of their own good will, in the exercise of their own volition, had in good faith elected those men in the way prescribed by their constitution and laws. I think, whenever they manifest such disposition to return, a majority of the people will indicate that it is our duty to allow them to return. We, of course, and the other House, must be the judges of that matter to a great extent; we must sit in judgment upon each case; and we must decide whether or not a majority of the people of the State have ceased their resistance to the authority of the United States, and whether or not the parties who present themselves were elected by the free suffrages of those people, unawed by the military or any other power.

MR. COWAN. Allow me to ask the honorable Senator what he would do if a majority of the people of a State were to establish a monarchy?

MR. POWELL. The Constitution guarantees a republican form of government.

MR. COWAN. The remedy is to be found in the Constitution, to make war upon it and overturn it. But suppose they persist in it continuously, would the Senator hold them by conquest, or would he help the minority to preserve a republican form of government and control the monarchical majority?

MR. POWELL. I think it is the duty of the United States, under the Constitution, to see that every State has a republican form of government, and I would always do my duty as I understood it. But, sir, the question which the Senator puts is not one that has anything to do with the subject which I am discussing. I am speaking of facts as they are. I say, believing that these States are States in the Union, that they are not out of the Union; whenever a majority of the people in either one of these States shall of their own free will cease to resist the authorities and Government of the United States, and shall elect of their own free will Senators and Representatives to Congress, I will only inquire as to the fact whether they have ceased their resistance and whether a majority of the people have determined to be loyal to the Constitution and Government of the United States; and that fact being established so as to leave no doubt upon my mind, I would then be ready to admit their Representatives as our equals here. That is my notion of the matter, and I believe the proposition presented from the Judiciary Committee is about the best we can pass under the circumstances. It does not preclude us hereafter from deciding upon any of the questions which have been incidentally alluded to in debate. I supported the resolution in committee and I shall vote for it here.

MR. COWAN. The inquiry which I put to the Senator from Kentucky I think is one which reaches to the very marrow of this question. The people of a State are divided; about half of them desire to preserve their connection with the Union, to give it their allegiance; but the other portion, say a majority, refuse, and insist upon secession. We are bound by the Constitution to preserve the Union and to preserve the rights of the people under the Union: not merely the rights of a majority, but the rights of the people, of all the people, and of any number of the people, however small. What are we to do? A minority of the people come forward and say, "If you aid us for a while we can preserve this State and keep her in the Union." "But no," according to the doctrine advanced here, "there must be a majority of you before we can recognize you as in the Union." Suppose they answer you, "The majority, by persisting in abandoning the Union, can destroy forever the State and deprive us of our rights which were guaranteed to us as a portion of the people of the State."

A portion of the people of Louisiana come here and say, "We are loyal, we owe you allegiance, we have a State government organized and in operation, and if you will aid and assist us we will keep it in organization and operation, and we will control and dominate after a time the rebels and secessionists." What is it proposed to answer to them? "You cannot come back; there are not enough of you." That will be very poor encouragement for the loyal men of the rebel States to try and bring back their people to reason, and it presumes another thing that never was true, that the people, the masses of a country under circumstances like those which surround us, ever were in rebellion. The masses of the people even in the Southern States never were in rebellion against the Government of the United States. They never could have been. The masses never go into rebellion unless they have wrongs to redress and injuries to avenge. That was not the case in this rebellion. It is a rebellion of leaders, and the masses are deluded away by falsehoods industriously circulated everywhere and inflammatory speeches made. It is impossible for them to get back unless we create some such scaffolding in the rebel States as these governments of Arkansas and Louisiana will furnish. We ought to cultivate them. We ought not, I think, to stop and inquire whether they constitute a tenth or a twentieth of the inhabitants; we ought to make the most of them. They are all we have there; and if we repulse them and take away their authority, what is left in those States, what have we there? Will not those loyal men say, "What is the bounty to loyalty that you propose? Why, that we

wait without any State government, that we submit to this military rule and dictation, which is so much deprecated, until we can convert more than a majority of the people so establish a State government."

Mr. President, I have one more word to say, and I was about to say it when I yielded the floor to the venerable Senator from Kentucky, [Mr. Davis.] This question, I take it, is here prematurely. It ought not to be here at this present time. It is not legitimately raised now. It can only be raised, I take it, in the joint convention which will meet on next Wednesday for the purpose of counting these votes. The Constitution provides that the President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates, and the votes shall then be counted, not by the Vice-President, for that does not follow, but shall be counted by that body there assembled in joint convention. Are we to undertake to decide beforehand what shall be done, without knowing what votes are to be presented there? We cannot tell what votes you have now in your drawer, Mr. President, to be presented to that convention. We cannot tell whether the governors have returned them. We cannot tell whether you have received them by mail or received them by the hands of the governors, or whether you have received them from the district judges, who are to hold them as a last resort, so that you may get them. We cannot tell anything about that. Then why raise the question?

Mr. SHERMAN. I should like to trespass on the good nature of my friend from Pennsylvania to ask him a question. As I saw an experiment of this kind once tried, I should like to ask him, if this power of ours can only be exercised after we have formed a joint convention, what rules would regulate the conduct of that joint convention? I will tell him a little circumstance which occurred eight years ago, when a somewhat distinguished individual of his own State was elected President of the United States. I was then a member of the House of Representatives. The Senate came into the Hall of the House with great form and ceremony, two and two, Mr. Mason, of Virginia, the arch-traitor, at their head. He took his seat as President of the Senate by the side of Mr. Speaker Banks. A question arose as to the vote of the State of Wisconsin. On account of a heavy snow-storm, the electors of that State could not meet on the day fixed by law, and consequently the vote was not cast on the day prescribed by law. When that fact appeared on reaching the vote of that State, a row, as we called it in the House, commenced. Mr. Humphrey Marshall wanted to make a speech and addressed "Mr. President." Mr. Mason refused to recognize him, but Mr. Banks recognized him; they were both sitting side by side. Then some Senators wanted to say something, and in five minutes we were in such complete confusion that Mr. Mason left his place at the Speaker's desk, went out, some of the Senators following him and some remaining behind, amid the general jeers of the whole convention. That was the condition of affairs then, and it will be the condition of affairs perhaps next week if we leave this question open. As I happened to be present at that scene and saw it, I want to guard against its recurrence.

Can the Senator tell me by what rules the joint convention is to be governed; how they shall vote, whether *per capita* or by States; who shall preside; who shall put questions; whether the rules of the Senate as to debate shall prevail or the rules of the House of Representatives? because if the rules of the Senate prevail in the joint convention, we never could get through until a second President was elected. Surely that would be so in a convention of two hundred men, when we find it very difficult here in a body of forty or fifty to get to the end of any controverted matter. The votes would not be counted that day if the rules of the Senate prevailed as to debate, and the law prescribes that they shall be counted on that day. Who would put an end to the discussion? The question came up in the instance I put, when Mr. Humphrey Marshall proposed to speak and the President of the Senate would not recognize him, and would not recognize a Senator, and the Speaker of the House did recognize Mr. Humphrey Marshall; and the consequence was we got into disorder and confusion, and the joint convention broke up. It was one of the most ridiculous spectacles I have ever seen in a legislative body, and I hope never to see another such.

Mr. COWAN. I am only to take the Constitution as I find it written; and it is no argument to me that a general law has not been made by which to regulate the proceedings of this joint convention, if such a one is necessary. Perhaps the legislative department in this case has not deemed it necessary that there should be a general law to regulate the action of that convention when it was in session. Yet they are perfectly competent to make it. Perhaps they could not force that it would behave in such an extraordinary and ridiculous manner as has just been represented by the Senator from Ohio. What I mean to say is, that whether it has any law made beforehand to govern its action or not, it is unquestionably clothed with the power of receiving there and counting the votes.

I have no objection to the passage of a law by Congress that the Vice-President of the United States shall preside in that convention or that the Speaker of the House shall preside in it, and that the rules of the Senate or the rules of the House of Representatives shall be adopted for its governance. If the disorder spoken of did occur,

why did it occur? It did not occur because it was improper to clothe that body with that power, but it occurred because it was *casus omissus*, no provision had been made for the governance of the body in joint convention; but that it has the power and that it is the only tribunal which can count these votes and can settle the question as to what votes shall be counted, I take to be indisputable from this provision of the Constitution. If there is the mischief attendant upon it that has just been described, as I have stated before, that mischief should be cured by law. It is not to be cured by our usurping the functions of that convention while we are separate and distinct bodies. It is not for us to provide by a law for this particular case, and to decide before we go there what votes shall be counted or shall not be counted, because if the convention cannot decide that question what is it there for?

Some honorable Senators have said that the members of the two Houses are there present only as witnesses, idle spectators of a scene in which they can take no part and over which they have no authority. If that be the case, then there is one instance in this Constitution, magnificent monument of human wisdom as it is, which is utter, sheer absurdity. Are the two Houses there, as the jockeys say, merely for the purpose of "seeing fair," or are they there in some capacity in which they have power and authority to determine such questions as may arise while the counting is going on? I take it they have the authority, and that if they did not adopt rules for their governance, if they did not appoint a President, if they only went there loosely as a mob, a herd of men without organization, they could not expect to adjourn in anything less than the row which resulted upon that occasion.

I have only to repeat that I think this question is premature, that it is here improperly, and that nothing but mischief will come of it if we entertain it in this shape: that, no matter what we do with it, it will have no practical bearing upon the great end for which the whole of this machinery was created, that is, the election of a President and Vice-President. That election will not be influenced a hair's breadth one way or the other by our determination, no matter what we may do, and, as to the mischief of this thing, the mischief is just as much on one side as the other. If the President may fabricate fictitious States in order to give him votes, so, if we have the authority to declare who shall and who shall not vote, we may destroy actual and loyal States in order to carry out our party purposes. I hope neither of these propositions will pass.

Mr. WADE. Mr. President, about a year ago Congress, anticipating that such questions as this might arise, in my judgment very wisely framed a law and passed it through both branches with the hope of settling this matter in advance. That law was made upon great deliberation in both bodies of Congress; it received a very large vote in each House. It was very proper in my judgment that Congress should fix the matter then, because everybody could anticipate that a question of the most serious danger to the Republic might arise in the then approaching presidential election which might endanger the stability of our Union, and which might under certain circumstances precipitate these Northern States into a civil war. Apprehending that such a question might arise, Congress wisely, in my judgment, provided against it, but the President did not agree with them, and he vetoed their bill, leaving the question open with all its dangers, which, thank God, have not arisen.

What would be our condition now, if in the presidential election which has just passed the vote had been so balanced that in order to carry the election for one or the other of the candidates it was necessary to resort to some of the States that are now sought to be recognized as part and parcel of the present Government? Could we ever have settled the question? I fear that we could not, and I was the more apprehensive of it because I was present on the occasion to which my colleague has alluded. I saw even there, when we were in joint convention and there was an irregularity as to the vote of a single State, a mere technicality and nothing more, it created a sensation in that body which threatened the stability of the Government. There was not a right-minded man present there who did not fear that even then that technicality, which would not affect the result whichever way it was decided, might lead to the setting up of pretensions which were dangerous to the stability of the Government.

Now, sir, it is time that we should settle the question by some legislation that will reach the whole subject. In my judgment, the proposition of the Senator from Vermont is the wisest, the most far-reaching, and the best adapted to settle the controversy for the present occasion and for all time to come. I do not like to have such questions unsettled so long. I suppose the bill to which I have referred was vetoed by the President because—

Mr. JOHNSON and others. It was not vetoed.

Mr. WADE. I speak of it as having been vetoed because I do not care much about the form of the thing. It amounted to a veto. He put the bill in his pocket.

Mr. JOHNSON. If he had vetoed it, it might have been passed over his head.

Mr. WADE. We might or might not have passed it over the veto. The President prevented our making it a law, and he did so constitutionally. He did not transcend, in that respect, the powers which the Constitution vested in him. We passed the bill

less than ten days before the session expired, and therefore he had a perfect right to withhold his assent from it, and give us no reasons for so doing. He chose to do that, and, as I suppose, he did it in defense of the proclamation which he had put forth, declaring that whenever a tenth part of the people of a State would come back he would recognize them as the State and as part and parcel of this Government—a proposition which, with all my respect for the Chief Magistrate, I am bound to say is the most absurd and impracticable that ever haunted the imagination of a statesman. A man imbued with republican principles must know that the foundation of all free government depends upon the elective franchise. The ingenuity of man has failed to devise any other way whereby people can govern themselves except submission for the time being to the will of the majority, constitutionally and legally expressed. If you cut loose from that principle you have nothing else to regulate your conduct. So far as human sagacity in the way of government has yet gone, I say if you cut loose from that great principle there is nothing left, and all before you is open sea, all anarchy, all confusion; and I must say of that proclamation of the President that it was the most contentious, the most anarchical, the most dangerous proposition that was ever put forth for the government of a free people.

What, sir, one-tenth part of the people of a State govern the rest? The thing is impossible, impracticable; it cannot be done. Take away your military power from those States, withdraw your Army, and leave the one-tenth to govern the remaining nine-tenths in the State, and where would they be? The result would be to sacrifice every Union man in the Southern States. When the General Government abandons them, when it leaves the one-tenth in the hands and under the dominion of the nine-tenths, what will be their condition? I had a conversation with the now Vice-President-elect of the United States on that subject and with other gentlemen on the Union side in the Southern States, and I do not know of one of them who was not filled with the deepest apprehension that if this principle should prevail they would be annihilated by the nine-tenths.

Can any portion of the territory of a State attempt to govern the whole? Suppose you have got one loyal county in a State, can it control the destinies of all the rest of that State? If you have by military authority within the lines of your encampment a great city or a portion of a State where there is a population, is it very difficult for the President or for the commanding officers there to get up all the paraphernalia of a State upon a ten-acre piece of land? When you have done that, and under the shadows of your armies attempt to elect all the magistrates and all the officers necessary to perfect the machinery of your government and put it in operation, can you be so blind as to suppose that when you have by military power, for it is nothing else, clothed these men with authority to govern, it is a republican government? Sir, it is just as much a military government as it was before you went through the farce of selecting those officers. There is your military governor; has he ever been withdrawn from Louisiana; or if another governor has been substituted, by whom was he substituted? By the Commander-in-Chief of all the armies of the United States. When the mandate went forth from the President to Mr. Hahn, "Be governor of that State," he did not consult the Senate, he did not consult anybody in particular; but the mandate issued from the President of the United States unaided, unknown, uncomseled by anybody, "Mr. Hahn, be governor of that State, call a convention, declare what your status shall be in the Republic, elect your representatives, organize in form the shadow of a State government, and you shall be a State government." They could make out the semblance, but it lacks all the reality of a government, because it does not represent the will of the people, or at least we have no evidence that it is the will of the people of the State.

There is no alternative. If you have a rebellious people who are determined that they will not submit to the laws and authority of the General Government, if the majority of a State are thus inclined, a free government in that State is impossible. You need not talk to me about your one-tenth. The Senator from Pennsylvania wants to know if it takes a majority to govern a State. I wish he was here, because I want to put the question to him, how do you understand it; "how readest thou?" is there any principle of free government that has decided that anything less than a majority of the people of a State, or of the voters of a State, can govern its destinies? I mean upon republican, democratic principles. I speak not of the farce of a civil government overshadowed by a military governor, a wheel within a wheel, a military governor dominating your whole political community, and inside of that and under it and subordinate to it, a civil government pretending to be a free government! I say it is a farce; it is unworthy of the American Senate to give it a moment's consideration.

Let us look the fact right straight in the face. You can have no peace, you can have no free government, you can have nothing but the shadow and semblance of one, until the majority of the people of a State are loyal. Why make this false pretense? It is a government upon false pretenses. Withdraw your Army from Louisiana to-day, and what would be its condition? Have you any evidence as to what that people would do to-morrow if you withdrew all your military force from there? Have they voted, have they given any evidence to show that they are loyal to the Government of the

United States? Not a lisp of it, not a word of it. More than four-fifths of the territory of that State now is trampled down beneath the feet of military power, just where it ought to be for its rebellion, and you dare not withdraw your armies from there; and yet you talk of free republican State government there! Sir, you cannot have it.

MR. DOOLITTLE. If the Senator will allow me, I should like to ask him a question on that point. He seems to think the presence of an army is opposed to all free government. Where would the Senate and House of Representatives be if you withdrew the Army of the Potomac? Where would they have been any time these last three years? Is there no army here?

MR. WADE. We have not, thank God, been captured yet. This capital has not been overrun yet by the enemy. If it had been, and Mr. Davis's army were predominating in this capital, I think our legislation would be a mere sham. Does the gentleman suppose that our legislation would be endured, provided the armies of Mr. Davis predominated in the capital? That would be like Louisiana now beneath the feet of the Federal Government. They cannot act freely. That is what I contend for. Neither could we if we were in like condition, and if we pretended to be a free people it would be the merest mockery and farce. These armies somehow must be got rid of before legislation can take place. Where armies are the law is silent.

But I do not wish to argue this question; I have argued it; the Senate and House of Representatives have argued it, and we have sent forth our will on this subject. I am astonished to find now any considerable difference of opinion in a body that so unanimously passed the bill to which I have referred, less than a year ago. Has anything occurred since to change our opinions? It is true that there has been an effort in Louisiana to get up a delegation, and they have come here. How much of the State do they claim to represent? How much of it was able to hold a free election? Can you really claim that that portion of it was free even where your Army was? The Senator from Kentucky [MR. POWELL] has already told you that you did not govern according to the laws of that State; you did not even found the basis of your government upon the laws of the State, but your military authorities regulated the elective franchise there. Is there any freedom in that? No, sir.

I make these observations because I am exceedingly jealous of military power, and I never will consent that a people predominated over by a hostile military power shall found an American republican State. They cannot do it. To do it they must be free as the air, and until they are in that condition it is impossible to have a free government there; and until some evidence shall be presented to us that such is the condition of a majority, you may talk about your State government until doomsday; but every man imbued with American principles of democracy knows it is a falsehood, a mere semblance, and not a fact.

We are asked if the loyal men in the State ought not to govern it, whatever their numbers may be. I know it is very unfortunate for a man to locate himself in a community of law-breakers, whether they commit one kind of crime or another. If a great majority of them are traitors to the best Government on God's earth it is his misfortune that he has fallen into such a den of thieves. Statesmen proceeding upon general law and regulating great communities cannot take into consideration the fact of the individual hardship of this man or the other. He is surrounded by a great number of men who outvote him, who declare that the Government under which he has lived is all wrong. They have declared war against the old Government. He may not concur with them, but if they outvote him and outfight him, and establish another government, what remedy have you but that of force? You cannot select him out and protect him. If he cannot live there he must make his way as best he can out of the community, and you cannot make laws to reach his individual case when there is a majority of his neighbors against him. How can you prosecute a man for treason there?

How can a man who is injured in that State because he is a loyal man, a man who is repressed upon, whose person is violated by those who are in flagrant war with the United States, obtain redress? Are their courts open to him for the redress of his wrongs? Can he have redress? You know he cannot. What a farce, then, to contend that because there are a few Union men scattered through these communities a statesman can undertake to protect each one in his individual rights! The thing is impossible; the statesman that conceives it is blind.

If a majority of the people where I live and from which I come—provided the supposition can be entertained for a moment—or a controlling number of them, should turn violent traitors to the Government under which we live, what rights should I have, claiming to be a Union man? I might endeavor to maintain the laws of my country; but in that case they would have declared that to be a crime punishable by imprisonment or death, and I, standing by the old Constitution, should be amenable to this vile law of theirs. Could you rescue me? Could you say that there was a good government there? Could I appeal to the courts administered by traitors and get my rights there as a Union man? The thing is impossible. Why do you struggle to maintain impossibilities?

Sir, these States must remain under military dominion, but I hope with all the equi-

ties that can be extended to a people thus unfortunate, until such time as they manifest to the people of the United States that they are able to govern themselves properly and subject to the laws of the General Government. There is no middle course. The bill which we passed last year provided for that. We knew that nothing less than a majority at least of the loyal men could maintain a loyal State government, because we knew of no rule except that of proceeding by majorities, and therefore we provided in the bill that whenever the provisional governor believed there was such a majority, it should be his duty to appoint commissioners to take a census of the State and ascertain the number of the people; and if there was a majority who were willing and anxious to submit to the General Government, a convention should be called and should be invested with immediate power to frame a government upon democratic principles in their own way. That is the just and equitable bill which the President vetoed in order to vindicate his anarchical principle of 10 per cent. of loyalty.

This resolution, if amended as proposed by the Senator from Vermont, meets my approbation more fully than any proposition which has been offered, and therefore I shall vote for it. Gentlemen have spoken of South Carolina, and said they cannot recognize her now, and they would not count her votes. I think the Senator from Pennsylvania said he would not count the votes of South Carolina if she sent them here. Why not? What is the difference between this case and that of South Carolina? Can anybody tell me? There is territory enough under the flag of the United States in South Carolina to get up a State Legislature just as good as that of Louisiana. We have nearly as much of South Carolina under the dominion of our flag as there is of Louisiana. Why then reject the one and admit the other? They both stand upon like principles. If you only measure by acres what dominion we have, what difference is there?

In my judgment, the only sensible plan is to leave these communities until in some way we can have at least reasonable evidence to show that a majority of them are loyal and in a condition to maintain a free republican government of their own. Then I shall be the first man to re-invest them with the power. Let them have it so. Nobody regrets more than I do that any State of this Union has placed herself in a condition where we cannot trust her with the power to govern herself. I wish to God we could. Whenever it can be done I shall be the very first man to claim, as I have always claimed, that the people shall govern themselves, wherever they can do it; nor will I yield to military despotism or to outside domination and pressure, getting up the semblance of a Legislature and calling it a fact. It is not a fact, and your legislative action cannot make it so. I thank God that in the last presidential election we were strong enough to carry our principles through, so as not to involve us in this question which might have launched us in civil war at the North. Let us keep clear of all such questions. Let us settle now and forever the principle that the President of the United States cannot in times of civil war, wherever he happens to have an army in a State, improvise by military force a Legislature, and call it the power of a State in such sort as to count that semblance in his favor as a fact. If it were attempted I know for one that I would not put up with it. I ask any Union man on this floor, suppose the States which now claim to be represented here had chosen electors in favor of General McClellan, and given him their votes, and those votes would have elected him President, would we submit to it? I do not believe there is a man on this floor who would. There is not one here who would not spill the last drop of his blood before yielding to such a thing. We would have said at once, "These communities were improvised; these powers were conferred on them by the military power of the United States; they do not represent the people, and therefore they shall not be represented on this floor or in the electoral college."

Mr. JOHNSON. It would be the same thing, I suppose, if those votes would have elected Mr. Lincoln. There would be the same opposition.

Mr. WADE. Just the same; and I intend to say that although I was strongly against Mr. McClellan and in favor of Abraham Lincoln, yet if it had taken these semblances, these counterfeits, to make out his title to the Presidency, before God I would not have consented to receive them. If the man whom I opposed had received the votes of the nation, he should have had the position, and that would be the feeling of every Senator here I have no doubt. There is not a man here now who will rise in his place and say that if these votes could have been so changed as to elect our opponent we would have yielded to such state of things. Would any one have done it? I want to hear the Senator who will rise and tell me that he would have permitted these counterfeits, these disloyal States, these States which have declared war upon the General Government, to select a President for us. I say they have declared war against the General Government and they have never revoked that declaration of war, for I believe there is no one of these States which has yet revoked its act of secession and declaration of war. It is important to know how that fact is. Have the people that claim to be represented in this body as a State by any vote repealed their act of secession and war? Are gentlemen here contending that men in flagrant war against the United States shall send a delegation here to represent them? Is that so? If nobody can answer my question I will apply to the case a well-known principle of law. The last we heard

from them was that they had declared themselves out of the Union, and in flagrant war with the Union, and if nobody can show the contrary, that state of things exists to-day, for whoever contends that a state of things once proved to exist has been changed must submit to the fact that it exists now, unless he produces proof to the contrary.

Mr. HENDERSON. I will state, with the Senator's leave, that my understanding is that Louisiana, Arkansas, and Tennessee, all three, by their conventions, have passed an ordinance repealing the ordinance of secession. By stating that fact I am not attempting to confute the argument of the Senator, but I merely state the fact as a fact. My recollection is that all three of them have done so.

Mr. WADE. I do not know whether it is so or not, but it is a mere sham if they have done so. They might as well have done that as any other part of this business, because all that was done was done by such voters as your military power prescribed, and they would have voted precisely as they were wanted to vote, whether to repeal the ordinance of secession, or to elect members to come here and claim seats. It is all of a piece. The great argument against it all is that these men do not represent the people of the State. The Senators who claim seats here from Louisiana cannot assert that they are here by the assent of a majority of that people fairly expressed. They represent nothing but the military power of the United States, and God knows that if I can prevent it they shall not sit here upon equal terms with me, who claim to be here by the voice of a majority of the State to which I belong. I will have no such company if I can help it, nor shall they ever be recognized by me. Sir, this great question should be settled now and forever before we meet in joint convention.

Mr. DOOLITTLE and Mr. WRIGHT sought the floor.

The VICE-PRESIDENT. The Chair will award the floor to the Senator from New Jersey, both he and the Senator from Wisconsin rising at the same time, and the Senator from Wisconsin having already spoken upon the question.

Mr. WRIGHT. I move that the Senate do now adjourn.

Mr. TRUMBULL. I ask the Senator from New Jersey to withdraw his motion for a moment to allow me to say one word.

Mr. WRIGHT. Certainly.

Mr. TRUMBULL. I trust that we shall not now adjourn. This question ought to be settled. Let us sit here and dispose of it. If gentlemen wish to make remarks let us go on until we can get a vote. I think we had better hold on. I hope the Senator will not persist in his motion.

Mr. WRIGHT. I renew the motion to adjourn.

Mr. TRUMBULL called for the yeas and nays, and they were ordered; and being taken, resulted—yeas 16, nays 25: as follows:

YEAS—Messrs. Anthony, Chandler, Dixon, Doolittle, Grimes, Harlan, Harris, Henderson, Hendricks, Howard, Howe, Nesmith, Pomeroy, Ramsey, Sumner, and Wright—16.

NAYS—Messrs. Buckalew, Clark, Collamer, Conness, Cowan, Davis, Farwell, Foster, Johnson, Lane of Indiana, Lane of Kansas, Morgan, Morrill, Nye, Powell, Sherman, Sprague, Stewart, Ten Eyck, Trumbull, Van Winkle, Wade, Wilkinson, Willey, and Wilson—25.

ABSENT—Messrs. Brown, Carlile, Foot, Hale, Harding, Hicks, McDougall, Richardson, Riddle, and Saulsbury—10.

So the Senate refused to adjourn.

Mr. COWAN. The honorable Senator from Ohio is mistaken when he supposes that I said I would not count the vote of South Carolina in the coming convention.

Mr. WADE. Some gentlemen on that side of the question said so; I thought it was the Senator from Pennsylvania.

Mr. COWAN. It is not very material; I merely wished the correction to be made. I have only to say that if South Carolina was in the condition of Louisiana and Arkansas, if her capital, as I hope it will be shortly, was in the possession of our armies, if there was no rebel government within her borders, if there was one-tenth of her people willing, anxious, to establish, organize, get up, and sustain a State government, I would receive her vote; I would acquiesce under the proclamation of the President, although perhaps if I had been making that proclamation in the first place I would not have couched it in his phrase, I would not have subjected it to his terms; but as he has done it, as he has invited these people to enter upon the work on that basis, I am willing in good faith to carry out the stipulations that he has made with them. I would recognize them, and I would do as I believe he would do if he were a member of this body—he would submit to that vote. I do not see why he should not do so, and I have no doubt he would.

That is all that I desire to say except this: that these governments having been formed, a nucleus around which the loyal men are to gather, and clothed with the authority which is so potent among men, and which is so well calculated to bring them to any co-operation, I think they ought to be encouraged, and encouraged by all means.

Mr. WADE. Will the Senator permit me to ask him a question?

Mr. COWAN. Certainly.

Mr. WADE. The Senator says he would permit one-tenth of the people to govern the State. Now I want to know of the Senator what protection that one-tenth will have when you withdraw all external power from them, and leave them to themselves? What chance will they have with the nine-tenths opposed to them?

Mr. COWAN. That is the very question that we must now meet. It is the question now whether we will maintain State governments there in connection with the Union or whether we will treat these people as a conquered people, as conquered provinces; whether we will assume the task of governing them entirely or whether we will do that which the President is endeavoring to do now. I am very free to say that I am in favor of his plan; I very much prefer it; and I have no doubt that the one-tenth of the people of a State organized with the reins of State government in their hands, the means of enforcing its authority, aided by the General Government, will finally bring back all these States to obedience, allegiance. I have no doubt about it. But repulse this one-tenth, repulse the loyal people of the States who are endeavoring to bring them back, drive them away into rebellion, what then? If you have not the one-tenth, you have nothing. If you have not these people who are your friends in Louisiana and Arkansas and the other States, whom have you? Are you determined to drive them all into utter and inextinguishable rebellion, or are you willing that the repentant, as well as those who have always been loyal, shall come back and endeavor to establish themselves in such form that the Union may be restored? To state the question, in my judgment, is to answer it.

It is said that the tenth of the people do not represent the whole people. They may not represent the whole people, loyal and disloyal, but they represent the loyal people, and it is the loyal people of these States for whom we have made this tremendous struggle. Is there a Senator on this floor who would have embarked on this war if it were not to rescue the loyal people of these States from the usurpation which oppressed them? Certainly not. What right should we have had to do so? If the whole of this people had gone away into secession, what right should we have had to restrain and control them?

We began with the belief that this was a conspiracy on the part of a few to lead away the masses, and that the masses, so far as they had an opportunity of expressing their preferences and giving their opinions by their votes, were loyal, and it was a contrivance and conspiracy that led them away into rebellion; and now, when that is broken up, when they are willing to come back, I am willing to receive them as they come, and I am not disposed to cavil upon the ninth part of a hair as to whether they constitute a majority or not. It is enough for me to know that they are loyal people and that they desire the restoration of the Union; they desire to be reunited to the great body-politic as members, part and parcel of it; and if they represent the loyal people, it is enough.

Mr. SHERMAN. I am afraid we shall not get through with this matter to-night, and there are two bills which I am anxious to have taken up and acted on, and I therefore ask the indulgence of the Senate to allow the bill fixing the duty on printing-paper and the legislative, executive, and judicial appropriation bill to be now taken up and made the special order for to-morrow at one o'clock.

Mr. WILSON. Let us vote on this question.

Mr. SHERMAN. My impression is that this is going to lead to a general debate, and I do not think it ought to stand in the way of ordinary legislative business. I am willing to have it go over and occupy the morning hour to-morrow, but I want an arrangement made by which the bills that I have referred to may be considered.

Mr. TRUMBULL. I cannot consent to the proposition of the Senator from Ohio that this resolution shall go over and occupy the morning hour to-morrow. Every person who has spoken on the subject regards it as necessary that we should do something to settle this question. I will state to the Senate that a committee has been appointed to devise the mode of canvassing the votes for President and Vice-President on Wednesday next, the time fixed by law for that canvass. That committee cannot act very well while this proposition is pending; and if they do act they will have to report some way to canvass the votes, and then this difficulty will be upon us again. We ought to settle it, and we ought to settle it now. It is important that we should settle it at once. We have but a few days to make the necessary reports and get them adopted, to canvass the vote in the usual way; and if we cannot sit the resolution out to-night, which I should prefer, I shall insist, so far as I am concerned—of course the Senate will control it—that we go on with it to-morrow to the exclusion of all other business until we dispose of it. I think no other business should interfere with this question.

Mr. SHERMAN. I certainly have not taken any time in the discussion of this matter. I had hoped it might be voted on to-day, but it has occupied two days, and from our recent experience on a resolution on the passage of which not even the yeas and nays were called for, but which was debated here for ten days, my impression is that this resolution will be pending on next Wednesday, when we are ready to form in procession to march to the House of Representatives to count this vote.

Mr. JOHNSON. Hardly.

Mr. SHERMAN. It looks very much like it; and therefore I think we had better proceed with other business.

The VICE-PRESIDENT. The Senator from Ohio asks the unanimous consent of the Senate to proceed to the consideration of the bill named by him for the purpose of making it a special order.

Mr. TRUMBULL. I object.

The VICE-PRESIDENT. Objection being made, the bills cannot now be taken up.

Mr. SHERMAN. Can I make a motion at this time to postpone all other orders for the purpose of proceeding to the consideration of that bill? If I can, I make that motion.

The VICE-PRESIDENT. The Senator from Ohio moves to postpone the further consideration of the pending bill for the purpose of proceeding to the consideration of the joint resolution relating to the duty on paper, and that is the question now before the Senate.

Mr. TRUMBULL. I hope the Senate will not agree to that motion.

Mr. CONNESS. I feel a great interest in the settlement of the question now proposed to be called up by the honorable Senator from Ohio, the chairman of the Committee on Finance, but it appears to me that his own suggestion in regard to this measure is the greatest reason why we should continue and resolve to come to a vote upon it. It is certainly a question of no secondary importance, but on the contrary a question of the first consequence, and I cannot vote as I usually do with the honorable Senator to take up measures from the Committee on Finance.

I desire, with the leave of the Senate, for a reason that will be apparent, to ask leave to be excused before I take my seat from serving further upon the Select Committee on Slavery and Freedmen. There are other Senators that have arrived here who have not a place on committees, and I do it with that view. I hope the place will be filled by motion from some Senators. I asked to be excused from serving on that committee.

The VICE-PRESIDENT. Is there any objection to receiving that motion? The Chair hears none.

The motion to excuse the Senator from California was agreed to.

Mr. SUMNER. I move that the Chair be authorized to fill the vacancy.

The motion was agreed to by unanimous consent, and the Vice-President appointed Mr. Nye to fill the vacancy on the Committee on Slavery and Freedmen; he also appointed Mr. Stewart to fill the vacancy on the Committee on Public Lands occasioned by the absence of Mr. Harding, who in consequence of the state of his health has received leave of absence for the residue of the session.

Mr. FARWELL. I suggest to the Senate that a recess for one hour be taken. ["Oh, no!"]

The VICE-PRESIDENT. The question before the Senate is on postponing the pending joint resolution for the purpose of proceeding to the consideration of the bill relative to the duty on paper.

Mr. SHERMAN. I simply want to promote the business of the Senate; and as I see some of the members of the Committee on Finance will not vote to take up the bill I referred to, I withdraw the motion in the hope that by to-morrow at one o'clock we may get a vote on this question.

Mr. LANE, of Indiana. I desire to make a motion, and preliminary to that to state in a very few words my position. I am opposed to any legislation whatever upon this subject at this time. The right of a people of a State to vote for President is a constitutional right, and cannot be restricted or modified by any joint resolution of Congress. The right to count the vote in joint convention is devolved on that joint convention, and not upon this Congress. I do not believe that Congress has the constitutional power to say in advance what States shall be counted and what not. I will trust the convention when the certificates are presented of the votes from the several States. I do not believe we have the power here as an act of legislation to control the counting of the votes in joint convention. I therefore move the indefinite postponement of the resolution and pending amendments.

Mr. HENDERSON. I move that the Senate adjourn.

Mr. TRUMBULL. If the Senator will withdraw his motion and let us take a vote on the indefinite postponement of the question, we may settle it.

Mr. HENDERSON. I am perfectly well satisfied we cannot get through with this question to-night. There are several Senators who desire to speak.

Mr. CONNESS. Let us try.

The VICE-PRESIDENT. The question is on the adjournment, and it is not a matter of debate.

Mr. HENDERSON. I insist on my motion to adjourn.

Mr. TRUMBULL called for the yeas and nays, and they were ordered; and being taken, resulted—yeas 15, nays 21; as follows:

YEAS—Messrs. Anthony, Collamer, Cowan, Dixon, Doolittle, Farwell, Harlan, Harris, Henderson, Howard, Howe, Powell, Sprague, Sumner, and Wilkinson—15.

NAYS—Messrs. Buckalew, Clark, Conness, Davis, Foster, Hale, Johnson, Lane of In-

diana, Lane of Kansas, Morgan, Morrill, Nesmith, Nye, Sherman, Stewart, Ten Eyck, Trumbull, Van Winkle, Wade, Willey, and Wilson—21.

ABSENT—Messrs. Brown, Carlile, Chandler, Foot, Grimes, Harding, Hendricks, Hicks, McDougall, Pomeroy, Ramsey, Richardson, Riddle, Saulsbury, and Wright—15.

So the Senate refused to adjourn.

The VICE-PRESIDENT. The question now is on the motion of the Senator from Indiana to postpone the joint resolution indefinitely.

Mr. LANE, of Indiana, called for the yeas and nays, and they were ordered.

The Secretary proceeded to call the roll.

Mr. HARLAN (when Mr. GRIMES's name was called) said: As this is in the nature of a test vote, I am authorized to state that my colleague is paired with the Senator from Kansas, Mr. POMEROY, and that if my colleague were here he would vote for a resolution similar to the amendment proposed by the Senator from Vermont.

Mr. LANE, of Kansas, (when Mr. POMEROY's name was called) said: My colleague is absent, having been paired off with Mr. GRIMES.

The result was announced—yeas 11, nays 26; as follows:

YEAS—Messrs. Cowan, Doolittle, Farwell, Harlan, Harris, Howe, Lane of Indiana, Nesmith, Ten Eyck, Van Winkle, and Willie—11.

NAYS—Messrs. Anthony, Buckalew, Clark, Collamer, Conness, Davis, Dixon, Foster, Hale, Henderson, Howard, Johnson, Lane of Kansas, Morgan, Morrill, Nye, Powell, Sherman, Sprague, Stewart, Sumner, Trumbull, Wade, Wilkinson, Wilson, and Wright—26.

ABSENT—Messrs. Brown, Carlile, Chandler, Foot, Grimes, Harding, Hendricks, Hicks, McDougall, Pomeroy, Ramsey, Richardson, Riddle, and Saulsbury—14.

So the motion was not agreed to.

Mr. WILKINSON. I move that the Senate adjourn.

The motion was agreed to, there being, on a division—ayes 20, noes 16; and the Senate adjourned.

IN SENATE, *February 3, 1865.*

The VICE-PRESIDENT. The hour of one o'clock having arrived, the unfinished business of yesterday now comes up. The joint resolution (H. R. No. 126) declaring certain States not entitled to representation in the electoral college is before the Senate as in Committee of the Whole, the pending question being on the amendment of the Senator from New Jersey [Mr. Ten Eyck] to strike out the word "Louisiana" from the preamble.

Mr. DOOLITTLE. Mr. President, the question pending before the Senate will have no practical effect whatever in disposing of the result of the presidential canvass. Whether the votes of the States named in the preamble to this resolution are counted in or counted out or not counted at all, the result is not to be changed. So far, therefore, as that question is concerned, this whole discussion is perfectly immaterial. The action of the Senate one way or the other has nothing to do with the result.

But the honorable Senator from Maryland [Mr. Johnson] says that now is the time to fix the law which shall perhaps have effect on some future presidential canvass. Why the necessity of acting upon it now any more than at any time within the next four years? There cannot be another presidential canvass until four years from last fall. Why this haste, and why the necessity now of acting upon a matter which has no practical reference to the present canvass and can have no reference to any other canvass for at least four years to come? At any day of any session of Congress from this time forward for four years, we can just as well act on the question as we can act on it now.

My honorable friend from Ohio [Mr. Sherman] says that for the good order of the convention when the Senate and House of Representatives meet together to canvass these votes, he thinks some legislation is necessary, for he says that in 1857, when the Senate of the United States, under the presidency of Mason, of Virginia, went into the House of Representatives, some proceedings occurred there that were discredit and ridiculous, and that Mason, for some supposed offense or other, undertook to take the Senate out of the joint convention and marched out at the head of some Senators, they following him two and two, presenting a ridiculous aspect to the country and the civilized world. They went out amid the jeers of all who were present, my friend says.

But 1857 was an exceptional case. We have had eighteen joint conventions of the Senate and House of Representatives: did my friend from Ohio ever hear of any discredit proceedings on any other occasion than in 1857? Never. Have we no confidence in ourselves; have we no confidence in the Senate of the United States and the House of Representatives, that they can sit in joint convention and yet not be guilty of any breaches of decorum or gentlemanly conduct? Are we to suppose that now the Senate of the United States has Mason, of Virginia, to preside over it? We know who is the presiding officer of the Senate, and we know the Senate; we know the House; and we have as much confidence in them as was felt in any House, or in any Senate,

or in any presiding officers of either of the two bodies from the beginning of the Government. I have as much confidence in the present presiding officers to keep order and decorum in these proceedings as I have in any of the presiding officers of these two Houses from the beginning of the Government to the present time.

Mr. President, I said yesterday that in my opinion Congress has no power in its legislative capacity, acting as we are now acting, to declare, in relation to votes that have already been given, that those votes are null and void. Sir, the question is not before us; the votes are not before us; and we cannot act on those votes to ratify or to annul them. The votes were given by the electors of the several States, sealed up under the provisions of the Constitution, and sent to the President of the Senate, the seals unbroken, and there is no power that has the right to break them until he meets the joint convention of the two Houses, and then, under the constitutional provision, they are to be opened in their presence, and I say that it is usurpation on the part of Congress to undertake to act upon those votes which are sealed up from them, and which they have no power to look at, either to affirm their validity or to declare them null.

I maintain, too, sir, that it is a most dangerous precedent for Congress to undertake to speak of votes that have already been given, declaring them to be null and void. It is possible, as I said before, that by some legislation in advance of the giving of those votes Congress might make provision by law on this subject. I have some doubts, however, in relation to that; but upon that question I shall not occupy the attention of the Senate. I said yesterday all I desired to say in regard to it. But, sir, I shall come now to the immediate question, the one pending, the question of Louisiana, which the Senator from New Jersey moves as an exception to the other States that are mentioned in this resolution.

And first of all, the interest which I feel in this question is because, in my judgment, the resolution of the Senate upon this incidental question expresses its opinion upon the validity or the invalidity of the constitution adopted by the people of Louisiana. Believing, as I do, that that is a most important question; believing, as I do, that it is wholly unnecessary for us now in this incidental way to enter upon the discussion and decision of that question, I think it unwise to press this resolution at the present moment. But, sir, the question seems to be raised, and gentlemen express their opinion upon it; and I propose to call the attention of the Senate to some points involved in it and to some of the facts bearing on the validity of this present constitution of Louisiana. And what are the facts? The Senator from Kentucky [Mr. Powell] declares that this election of the people of Louisiana was carried by military power, by military authority, and is the result of military dictation and military despotism over the people of Louisiana. The Senator from Ohio [Mr. Wade] responds to this with all his heart. He says it is a mere military dictation, a military election, and, more than all, he says it is a miserable farce.

Mr. President, we look upon a strange spectacle here when the two extremes in this body come together in this way. One would suppose that Pilate and Herod had joined hands both to attack the Administration in its policy on this subject, and to see if they could crucify the free State of Louisiana. Sir, let us look at the facts of this case, strip off a little of this passionate declamation, and come down to the naked truth.

On the 22d day of February, a year ago, an election was held at which there were cast eleven thousand four hundred and fourteen votes for this constitution of Louisiana. But the Senator from Kentucky and the Senator from Ohio say it was the military authorities that controlled this election in Louisiana. Sir, I take issue with them upon the fact. It is not true that the military authorities controlled the election. The election was fixed for the 22d day of February, says General Banks.

Mr. WADE. Will the Senator tell me who authorized the election for a convention; who initiated it?

Mr. DOOLITTLE. General Banks issued his order notifying the people of the State of Louisiana to hold an election. I am speaking of that election.

Mr. WADE. Let me inquire if the request of a military commander is such a case is not just about equal to a command. Is there any real difference?

Mr. DOOLITTLE. I shall have occasion before I finish my remarks to discuss this question in the aspect of what my friend calls a military despotism over the people of Louisiana, and I think I shall be able to satisfy him even, although it is a great undertaking to do it, that the only possible mode in which a military government can be surrendered to the civil administration of the people of a State must be that the initiative shall be taken in the first instance by the governor in military command inviting the people in their civil capacity to enter upon the election.

Mr. POWELL. If the Senator will allow me, I would like to ask him a question.

Mr. DOOLITTLE. If it is a question bearing on this subject I have no objection; but I propose to submit some observations on the subject and the Senator can reply when I get through.

Mr. POWELL. The Senator has indicated that the Senator from Ohio and the Senator from Kentucky were incorrect in saying that there was military interference. I ask the Senator whether the military authorities did not prescribe the qualification of

voters? Did they not assume by military orders to alter the constitution of Louisiana and prescribe different qualifications for voters from those fixed by that instrument?

Mr. DOOLITTLE. On that point the constitution of Louisiana was adopted as the rule prescribing the qualifications of voters, with this exception, that the citizens of Louisiana who had enlisted into the armies of the United States were permitted to vote. The only change, the only alteration was, not that citizens of other States were permitted to vote, but that citizens of Louisiana who had enlisted into the Army and were then serving in Louisiana, shall be entitled to vote.

Mr. POWELL. I call the Senator's attention to the fact that General Banks states in this paper that they were required to take the oath prescribed in the President's amnesty proclamation of December 8, 1863, and that of itself was prescribing a qualification of voters different from the prescription made by the constitution and laws of Louisiana.

Mr. DOOLITTLE. I will read what General Banks says:

"The order relating to the election is herewith inclosed. It was fixed for the 22d day of February. There candidates were presented, and the canvass was general and spirited, each party sustaining its candidates by public meetings, precisely in the same manner as in a State unaffected by the revolution.

"Eleven thousand four hundred and fourteen votes were polled at this election.

"The average vote for ten years previous to the rebellion in these parishes was fifteen to sixteen thousand."

Eleven thousand four hundred and fourteen voting now where there were but fifteen or sixteen thousand before the rebellion began.

"In this election no person voted who was not by the constitution and laws of Louisiana a voter, except one class of persons. These were the soldiers who, as citizens of Louisiana, had enlisted in the armies of the United States.

"A provision of the constitution prohibited men enlisted in the Army or Navy from voting. It was understood to be the intention of this provision of the constitution that soldiers or sailors should not become voters under a mere residence in the State while under orders as soldiers or sailors.

"While it would be perfectly just that a citizen of another State sent into Louisiana under military orders should not be permitted to gain a residence while acting under these orders, it was not thought to be just that a citizen who enlisted in the Army of the United States for the defense of his own States should be deprived by such enlistment of the right of suffrage. It was thought that any Legislature of the State would change that provision, and the order of election directed the change upon this principle."

That was the only change that was made by military authority, a change authorizing citizens of Louisiana who had enlisted in the Army of the United States in Louisiana to vote. We have done the same thing in Wisconsin, in Ohio, in Pennsylvania, in New York, all growing out of exigencies which have occurred since this rebellion began, passing laws authorizing men, although in the Army of the United States, still to take part in the elections, providing that they should not be deprived of their rights of citizenship because they had enlisted in the Army to bear all the sacrifices which are necessary to defend their country in this struggle. And, sir, I maintain that there was nothing wrong in this. But even if it were wrong, it did not affect the result in the slightest degree, for there were only eight hundred and eight of all the soldiers who voted. Out of eleven thousand four hundred and fourteen voters, I say to the Senator from Ohio, but eight hundred and eight soldiers voted; and do you complain of this as a military election and held under military dictation? Was the election carried by soldiers' votes or by military power and military authority? These soldiers who voted did not all vote one way; a part of the soldiers voted on one side and a part voted on the other. They voted with perfect freedom, without any restraint or constraint whatever. There are nearly ten thousand persons enlisted in the Army of the United States from Louisiana, including both whites and blacks. General Banks says:

"Of these, in the election of the 22d of February, eight hundred and eight soldiers and sailors voted at the different military posts.

"A separate registry is made of their votes, a copy of which is with the Committee of Elections of the House of Representatives."

He says further:

"I do not believe that five hundred persons voted in this election of the 22d of February who were not citizens of the State previous to the rebellion, and every candidate for office was either a native of the State or had been identified with its public affairs for fifteen or twenty years."

It was no imported election into the State of Louisiana. It was no election by soldiers or sailors who were under the authority of any military commander imported into the State of Louisiana. It was only the people of Louisiana and the soldiers of Louisiana who were voting upon the adoption of a constitution for themselves. All these charges of a military usurpation and military dictation, and that it was a mere farce, fall to the ground together. They are not true.

Nor was it an election controlled by Federal office-holders. What General Banks

says is true, that the Federal office-holders of Louisiana, civil and military, did not assume to exercise so much influence upon the result of the election in Louisiana as they do in New York, Massachusetts, and every other State in the Union where Federal officers are appointed. Allow me to read from his statement again on that subject:

"Neither of these elections were controlled by the officers of the Government, civil or military. On the contrary, the influence of the officers of the Government, both civil and military, was indifferent, if not hostile, to the organization."

We all know that the officers who were appointed in Louisiana under the control of one of the Departments of this Government, taking a certain ground, as they did, in the affairs of Louisiana, looked rather with hostility than with friendship upon the effort at the re-organization of that State and the construction of its free constitution, and accordingly we find that—

"The registrar of voters states that of one hundred and twenty persons employed in one department of the Treasury offices, only twenty-five voted for or against the abolition of slavery in the election of the 5th of September."

How much interest did the office-holders in the State of Louisiana take in attempting to get up this State organization, which the Senator from Ohio denounces as a miserable farce, and which the Senator from Kentucky says was a military usurpation? They did nothing at all. General Banks says again:

"And in each of the general elections the soldiers who voted followed their own inclinations, as shown by the record, voting for or against the different candidates and constitution as they chose."

Does this show that there was a command of some military officer requiring a certain constitution to be adopted or a certain course to be carried, when, of the very soldiers under his command, some were voting for and some against it, voting indifferently, following their own inclination, without the slightest intimation of an opinion or wish to control the action of those men in that State?

"At one post the entire vote in the election of February would be in favor of one candidate, while at another military post the larger majority or entire military vote would be in favor of another."

This shows that there was no concert among the military commanders of Louisiana coming from the commander-in-chief of the department requiring votes to be given or a certain constitution to be adopted. There was no concert, no conspiracy, no domination. It is all a false assumption, from beginning to end. I believe there is no man who knows General Banks that questions his word for truth and veracity, and his honor is as unimpeached and unimpeachable as that of any gentleman who sits on this floor. General Banks says:

"I desire to state, in the most unqualified terms, that no effort whatever was made on the part of the military authorities to influence the citizens of the State, either in the selection of candidates or in the election of officers, and that the direct influence of the Government of the United States was less in Louisiana than in the election probably of any other State of the Union, and that the officers representing the Government, both civil and military, were divided so far as they entertained or expressed opinions upon the question of candidates and upon the policy pursued in the organization of the government."

Here is his unqualified declaration of a fact which he himself, the commander-in-chief of the department, is the only living man who certainly knows; and upon his word of honor as a man and as commander-in-chief of that department, he avers that there was no influence undertaken to be exercised by the military authorities to control or to influence the determination of those elections. And yet my friend from Ohio [Mr. Wade] says it is a farce; and the Senator from Kentucky [Mr. Powell] joins with him, and says it is a military dictation and a military usurpation! Sir, am I too strong in my language when I say the extremes join hands together here in their war on the Administration and in their determination to crucify the free State of Louisiana asking for her representation on this floor and the floor of the other House?

Now, Mr. President, let us go a little further into these figures. I do not propose to be blinded, nor led off the track by this kind of passionate denunciation and declamation that we have heard on this subject. What are the facts? When you come down to the figures you find that the average vote in the State of Louisiana, for ten years, has been thirty-four thousand. The highest vote that was given in ten years has been only fifty-one thousand. Where are those voters now? Forty thousand have enlisted in the rebel armies. The voting population and the fighting population of a State run along together, almost *pari passu*. I refer now to the white population of that State. We know that our voting population in the free States and our fighting population are very nearly the same. Fifty-one thousand was the highest voting population of Louisiana in any election in ten years, and forty thousand have enlisted in the rebel armies. Undoubtedly three-fourths of those are in their graves, and those that live are still in the rebel armies, for the conscription of the rebels, wherever they have had the opportunity to do it, has been almost universal, taking every able-bodied man in

whole counties and townships and parishes into the army of the rebellion. If you deduct from fifty-one thousand, the highest vote which Louisiana has ever given in ten years, the forty thousand who have gone into the rebel armies, how many remain? Eleven thousand would remain, if their voting and fighting population were equal in numbers; and the vote shows that eleven thousand four hundred and fourteen freely gave their votes at the election which occurred on the 22d day of February, 1864. Does the Senator from Ohio stand up here denouncing this as a miserable sham, when a vote has been given equal to the difference between the rebel population enlisting into the rebel armies and the whole voting population of Louisiana during the last ten years? Sir, this kind of declamation will not bear the test of examination when you come down to the truth and look into the facts and figures in this case.

Mr. HENDRICKS. If the Senator will permit me—

Mr. DOOLITTLE. I hope the Senator will allow me to finish my remarks. I do not desire to take up a great deal of time, and I prefer to go through with what I have to say; and then I will answer any question the Senate desires.

Mr. President, I do not assume that in all cases the voting population and the fighting population are the same, but they run along nearly the same, and it is but fair to count the one as about equal to the other. But suppose there is a considerable difference. In my opinion, the vote of 11,414, which was given for this constitution, is two-thirds, if not three-fourths, of all the loyal men of Louisiana now alive and living within Louisiana. Gentlemen fail to consider the vast difference in the condition of these States where this war has been going on, as it has in Louisiana. We captured and took possession at an early day of about one-third, I suppose, of the real territorial extent of the State of Louisiana; we captured and took possession of the rivers; and from the very conformation of Louisiana, it is upon the banks of the rivers that her good lands all lie, and when you go back from the rivers, you go into those interminable morasses and swamps where men can hardly live at all; so that, although we do not cover the whole of the State of Louisiana by our military lines, we do cover and do hold by far the greater portion in value and the greater portion which is capable of being cultivated and inhabited as a State.

Mr. President, I was observing that men seem to forget the terrible destruction of the population in these States, both black and white, caused by the war. I have no doubt that if you could at this day take the census of both the living and the dead, it would be found that one-half of the whole population of Louisiana, white and black, is beneath the sod, growing out of the terrible convulsions which this war has produced, and the terrible sacrifices and sufferings and deaths that have followed in its train. General Banks estimates it at very nearly the same figure. He says the whole population of Louisiana now existing does not exceed four hundred and fifty thousand, although in the beginning of this contest it was between seven and eight hundred thousand. Not only have the white men who were the voters in Louisiana enlisted in the rebel armies to the amount of thirty thousand, but multitudes of those who were subject to do so have fled from Louisiana and have gone abroad to Europe; they have left the State; they are not there; they perhaps will never be there again. But of the loyal people now living two-thirds, three-fourths, I believe, took part in the election on the adoption of this constitution.

The Senator from Ohio, in the course of his remarks, undertook to denounce in very strong terms the policy adopted or suggested by the President of the United States in his message as the policy upon which he would attempt the re-organization of civil government and civil institutions in the States where the insurrection had prevailed. There has been so much said about it, and so much misrepresentation also, that I desire for a few brief moments to call the attention of the Senate to that proposition.

Every person knows that there must be some form of government in these States. If, with our armies, we enter into a State or country, and take possession of it by military power, some form of government must be established—military, of course, in the first instance. The civil government is displaced, so to speak, by military power. In the midst of arms the laws are silent, is the old expression of the Romans, *inter arma silent leges*. When the people of a district become so far obedient to their obligations of loyalty to the Government which thus assumes, by military power, to put down an insurrection, an attempt may be made to surrender the military power and establish a civil administration by the people themselves. For a time the form of government may be, to a certain extent, a mixed form, both of civil and military power, each leaning upon the other. As the thing progresses and grows still further, the military power may be more and more withdrawn, and still greater power and authority given to the civil administration and the civil officers of the Government.

Now, sir, what is the actual state of the case in relation to Louisiana? When we first captured New Orleans, and by our forces took possession of the rivers and the lands adjoining, there could be no government but that of a military character. But after an experience of one, two, or three years, the people there became so well satisfied of the great mistake of going into rebellion against the Government of the United States and of the necessity of submitting to its authority and its jurisdiction, that they

began to come back to their allegiance to this Government, and were willing to join in the organization of the civil government of the State, and resume their relations to the Government of the United States. Accordingly we find that when asked to do so eleven thousand four hundred and fourteen of the loyal citizens of that State joined in the organization of a new constitution, which was submitted to the people, adopted by them, and a Legislature and other officers chosen by virtue of it, and the whole machinery of civil government put into full operation in that State. By virtue of the authority of that constitution, they now have their own government, their own Legislature, they are making municipal laws and regulations for themselves. Their courts are sitting every day in judgment upon the rights of individuals. Under the authority of this new constitution all the relations of life are now being regulated. Under the authority of this new constitution, I tell my friend from Ohio that nearly ninety thousand slaves, who were not reached by the emancipation proclamation, have had their fetters knocked from their limbs and freedom given to them. Yes, sir, freedom has been given to ninety thousand slaves by this very constitution which he would undertake to trample under his feet as a military usurpation and as a miserable farce. Can he stand up in the face of this country, when Louisiana presents herself in this attitude as a free State, knocking off the chains from ninety thousand of her slaves whom the emancipation proclamation did not reach, (for they were excepted,) and deny to free Louisiana her rights of representation here, and her right to be heard as one of the free States of this Union in voting upon the very constitutional amendment which we have submitted to the States for their ratification?

Mr. WADE. Does the Senator—

Mr. DOOLITTLE. I shall soon be through, and I will then hear the gentleman from Ohio at length.

Mr. WADE. No, you will not.

Mr. DOOLITTLE. Well, I will hear him, then, very briefly.

Mr. WADE. You will not hear him at all. [Laughter.]

Mr. DOOLITTLE. That perhaps will be better yet.

Mr. President, I can very well understand why the Senator from Kentucky [Mr. Powell] is opposed to recognizing this free constitution of Louisiana, which sets free almost ninety thousand slaves; but I did not expect that the Senator from Ohio would object to it for that reason, among others. I expected that the Senator from Ohio, and the friends of freedom on this floor, would take the free States by the hand, one after another, as they presented themselves here, and welcome them into the family of free States. I did not expect opposition from the Senator from Ohio as I did from the Senator from Kentucky. He could consistently oppose it; for he is opposed to emancipation, opposed to the adoption of the free constitution of Louisiana, opposed to allowing Louisiana to vote on the constitutional amendment which we have just submitted to the States, and whose vote may be necessary to its ratification. It requires, as I am informed, twenty-seven votes, or the votes of twenty-seven Legislatures of the different States, in order to ratify the constitutional amendment; and by no ciphering of mine can I see how they are to be obtained unless you allow the Legislature of the free State of Louisiana to express her voice on the subject. Is the Senator from Ohio prepared to prevent that? Go tell it to the free people of this country that upon the floor of the Senate the Senator from Ohio, who has been looked upon as the champion of freedom, is now taking position side by side with the Senator from Kentucky to denounce as a military usurpation and as a miserable farce the adoption of a free constitution by the people of Louisiana.

But, sir, to return once more to this much-denounced policy of the President. It is denounced as a military usurpation. It is directly the reverse of that. It is an attempt on the part of the President to lay down the military power, to put it into the hands of the civilians; to take it from the Army and to give it to the people. What does he say? He says this in substance: "Whenever one-tenth or a portion of the population equal to one-tenth of the whole voting population of the district or the State before the rebellion began are willing voluntarily to undertake the business of administering civil government, I, as President of the United States and Commander-in-Chief of the Army, pledge to them my good faith that I will stand by them and try and enable them to do it." That is all there is of it. So far from being a military usurpation, it is an attempt on the part of the President to lay down his military power; and under that provision of the Constitution which compels this Government to guarantee a republican form of government to every State in the Union, the President is endeavoring in good faith to do it.

Sir, how else can it be done? These gentlemen who are denouncing with so much glibness the policy of the President had better point out some better policy. How can you lay down your military power without building up a civil power to take possession of the government? How can you do it unless you make a beginning? If you cannot begin with the whole of the people of a State, you must begin with what loyal people there are in the State; and if you can get as many as one-tenth of those who are there, or a number equal to one-tenth of the voters of the State who are willing to

join in the attempt, is it not the duty, and the bounden duty, of the Executive to make the trial, or shall he continue to hold them as mere military conquests governed by military officers and military law? Shall there be no attempt at civil administration? We all know what martial law is. There is no people under the canopy of heaven who do not desire to get rid of martial law as fast as they can. I join with them in the desire to get rid of military law and military administration; and if you can get one-tenth of the population in a State like Louisiana, where three-fourths have joined the rebellion and enlisted in the rebel army, who are willing to take hold and aid in the administration of the government, it is enough to begin with. I do not say that where they amount to but one-tenth their Representatives ought to be admitted to seats in Congress. The President does not recommend anything like that. But this case of Louisiana does not go upon the basis of one-tenth. I have demonstrated to the Senate, and I defy the Senator from Ohio or any other Senator to show to the contrary, that at least two-thirds of all the loyal people of Louisiana, and more than two-thirds of the difference between the number of rebels who have joined the rebel armies and the highest vote Louisiana has given in ten years, have joined in adopting this constitution for the free State of Louisiana.

But, Mr. President, in relation to that recommendation made by the Executive, he made it as a suggestion. He did not commit himself to it as if that was the policy to be pursued and he would not pursue any other. He is willing to join hands with anybody who will propose any better policy for the re-organization of these States; but he is willing to begin even with one-tenth to attempt to build up something like civil government in these States. That does not apply, however, to Louisiana; for, as I have shown you, more than two-thirds, if not three-fourths, of all the loyal men that now live in that State joined in electing the delegates to this convention and in adopting this constitution. Does my friend from Ohio propose to allow the rebels of Louisiana to take part in the government of that State? Have we not already provided by law that they cannot vote unless they take the oath of allegiance, and swear to support the Constitution of the United States, and renounce all allegiance to any other or pretended government? It is the loyal people of a State alone that have a right to vote.

Sir, I believe that each department of this Government takes part in the recognition of the authorities of the several States. The Supreme Court takes its part in that recognition. For instance, there is a tribunal now erected in Louisiana purporting to be a court of the State of Louisiana. A case arises, of ejectment, if you please, deciding the title to a township of land. An appeal is brought from the decision of that court to the Supreme Court here. Some lawyer rises up in the Supreme Court of the United States and, adopting the view of the Senator from Ohio, says, "May it please the court, that court is a humbug; the constitution of Louisiana is a farce; it was adopted by military usurpation; you must not hear an appeal from that court; I move that it be dismissed." The Supreme Court look into the question, pass on the case, and they decide that the court is a regular court of Louisiana or is not. They, therefore, in that decision, perform a high office as the supreme judicial power of this Government in recognizing the judicial power of the State of Louisiana.

So, too, the Executive has his office to perform in recognizing the power of the States of the Union. When you look into the Constitution you find that one of the greatest powers conferred upon the Executive of the United States is this very power of recognizing the authority of the State governments of the States of the Union. How does it arise? It arises just in this precise case. An insurrection breaks out in one of the States. There are two parties, and you may say they are nearly equally balanced, one for one government, one for another. Each chooses its governor; each chooses its Legislature; each chooses their various officers of administration; and they commence a conflict, and there is an insurrection. Then comes an appeal to the Executive to put down an insurrection, just the case that arose in Rhode Island in the time of Dorr's rebellion, as it is called. The appeal is made to the Executive; and then is cast upon the Executive the most important question that the Executive is ever called to pronounce upon, and that is, which party is the rebellion and which party is the true government of the State where the rebellion exists. The President decides that question, and from his decision there is no appeal. That was precisely the case in Rhode Island. Dorr's rebellion arose against the existing government. They had their two legislatures and their two executives, and were ready to enter into a conflict of arms and the shedding of blood. An appeal was made to the President of the United States to put down the insurrection, and the President of the United States decided that Dorr's party were the party in rebellion and must be put down; and that ended the controversy; for in the little State of Rhode Island they would not undertake to contend when the whole power of the Government was thrown in upon one side.

Here is a power of the Executive in recognizing the existing power of a State, whether it be the true State government or the insurrectionary State government, that belongs to no other department of this Government. It does not belong to Congress. The appeal is not made to Congress to put down the insurrection in a State. It is made

to the President, and the President alone can decide that question. The Supreme Court, in that case from Rhode Island, expressly decided that it was a political question over which the court had no control, nor Congress either, but which belonged to the Executive, and the Executive alone; and the Executive having decided which party constituted the rebellion and which party constituted the true government of Rhode Island, the court were bound to acquiesce in the decision of the Executive, and did so acquiesce, and sustained the old government of Rhode Island against the Dorr government.

But, Mr. President, I do not deny that Congress also has a power of recognition of these States, but it is Congress acting separately in the two Houses of Congress, and in no other way. How do we act? Two gentlemen present themselves for admission to this floor as Senators from Louisiana. The question is at once raised. One gentleman says there is no State of Louisiana; it is a mere Territory; it is a mere farce to call it a State.

Mr. WADE. Do you say that I said that?

Mr. DOOLITTLE. You did not say that; but you said it was a mere farce to call it a State; that the election was a farce.

Mr. WADE. Yes, that is it.

Mr. DOOLITTLE. The question is raised, first, is there any State of Louisiana? Secondly, was there a Legislature chosen in Louisiana who could elect Senators? And thirdly, do these men possess the requisite qualifications to become Senators of the United States? Those questions are raised here, discussed here, and the Senate act upon those questions and decide them, and from our decision there is no appeal.

Mr. CONNESS. Will the Senator permit me to ask him a question?

Mr. DOOLITTLE. Is it on this point?

Mr. CONNESS. Yes, sir; it would not be pertinent otherwise, I apprehend.

Mr. DOOLITTLE. I will hear the Senator.

Mr. CONNESS. With the Senator's consent, I ask him if he holds that the right of Congress to act upon the question of the organization or admission of the States now in rebellion can only occur and take place when Senators present themselves from those States here, or if the Senator denies to Congress a right to participate in the question of their re-organization as States? I desire the information, because it is important.

Mr. DOOLITTLE. My opinion is very clear that we act upon the question when it is presented to us, and the Senators appear here and ask admission, first, whether there is a State to represent; secondly, whether a Legislature has been chosen which can send representatives; and, thirdly, whether the men who appear here have the constitutional qualifications; and on this subject our decision is final. The President has nothing to do with it; the House of Representatives has nothing to do with it; we have the sole and conclusive jurisdiction.

Mr. CONNESS. Will the Senator again permit me to ask him a question? I do not wish to do so if it is the slightest interruption to the Senator.

Mr. DOOLITTLE. The question raised by the Senator is not one that I have discussed in this argument. It is a very distinct and different question from the one I am now discussing, and I do not intend to go into a discussion of it now. Possibly on some other occasion it may come up, and I may discuss that question; but I understand it is a very different one from that I am now arguing.

Mr. CONNESS. I so understand it; and I understand the Senator; but I understood him to say that upon the question of the admission of Senators from those States only could our right to act on the question occur or come up; and therefore I asked the Senator if he held the opinion that Congress has no right and no power to act upon the question of whether those States should be re-organized or not; because, although the Senator may not believe that the latter question is involved in the proposition now before the Senate, I differ with him, and believe it is involved in it. Therefore I asked the Senator the question.

Mr. DOOLITTLE. I do not intend to go into the discussion of that question, which leads into a much broader field of inquiry, and there are certain other provisions of the Constitution that would have to be discussed that I do not intend to take up now. I prefer to go on with my train of argument, and finish what I have to say on the point directly under consideration.

I was saying, Mr. President, that our decision on that question of the admission of Senators is without any appeal, and whatever law might be passed by Congress would not in any way whatever abridge our supreme jurisdiction over the question of the admission or rejection of Senators in this body. The House and the Senate act entirely independent of each other on that question. Take the case of Virginia. We have Virginia represented on this floor. The House of Representatives refused Virginia any representation in that body. We act upon our own responsibility, each for itself. We determine whether men shall come in here and sit as the representatives of States. The House determine whether they shall go into that body as the Representatives of the districts of the several States.

There is another question, it seems to me, that may be involved in this decision. If

we assume to say, as is contended for by the Senator from Michigan, [Mr. Howard.] I believe, that these several States which have been declared to be in insurrection have ceased to be States of the United States, and are to be regarded as mere subjugated provinces or Territories, as if acquired from some foreign power; if that doctrine is to prevail—a doctrine which finds support in some circles and places—this other consequence will follow—

MR. HOWARD. I am quite sure the honorable Senator from Wisconsin does not intend to misstate what I said, and in order that he may understand me more clearly, I hope he will allow me to make the correction here.

MR. DOOLITTLE. I have no objection.

MR. HOWARD. What I stated, or intended to state, was this: that the power of the United States over a conquered State which has been in rebellion is the ordinary power of the conqueror over conquered territory; but that in this particular case there is superadded to the rights and duties of the conqueror a trust, growing out of the Constitution of the United States, which is to be performed by the United States in its discretion and in due time, in the shape of a restoration of the conquered State to the Union. Congress may take its own time to bring about this restoration. There are no limitations in the Constitution in regard to the mode or time in which it is to be done. The Territory, however, having been once a State, must be restored to its condition of a State by the action of Congress at some time and according to the discretion of Congress, carrying out honestly and fairly the obligation of the Constitution; but in the mean time, understand me, I hold that while in this conquered state it is subject to be governed by military authority, by a provisional government, or by any other means which Congress may see fit to adopt; and I hold it to be the duty of Congress at an early day, as early as is reasonable and practicable, to pass an act which shall apply to all such cases, and not to leave it to the unlimited discretion of the Commander-in-Chief of the armies of the United States.

MR. DOOLITTLE. The point that I understood the Senator to make the other day, and I am not quite clear now whether I understand him to controvert it, was, that these States once declared in insurrection cease to be States of the Union. If I was mistaken in that I am glad to be corrected.

MR. HOWARD. If the Senator will allow me a moment—

MR. DOOLITTLE. Certainly; I do not wish to misunderstand the Senator.

MR. HOWARD. If they are States in insurrection, as they have been pronounced to be by the constituted authorities of the United States, then as States, as political communities, they are enemies of the United States. Can a community which is an enemy of the United States be treated as one of the United States? It is only necessary to ask the question to answer it. *De facto* these States are out of the Union, and all the gentleman's argument and all he may imagine cannot, *de facto*, constitute them States until our arms have triumphed.

MR. DOOLITTLE. I of course did not wish to misunderstand or misrepresent the Senator from Michigan. I understand him now to say that they are out of the Union.

MR. HOWARD. *De facto*.

MR. DOOLITTLE. *De facto* out of the Union.

MR. HOWARD. Undoubtedly.

MR. DOOLITTLE. *De facto* out of the Union; they are no longer States of the Union. I do not wish to charge upon that Senator doctrines that he does not entertain. I know that it has been advocated in certain other quarters that those States, by virtue of their insurrection, have ceased to exist as States, are no longer States of the Union; that they are not only out of the Union, but have ceased to be States at all. I do not understand precisely whether the Senator believes in that or not. He perhaps raises a distinction between States *de facto* and States *de jure*. Perhaps he admits that *de jure* they are States in the Union, but *de facto* they are States out of the Union. But I do not wish to go into an argument with him as to his views on that subject. I simply wish not to misunderstand him.

Now, I understand the Senator from Michigan to say that he regards them as States *de facto* out of the Union, and as States hostile to the United States, as public enemies. There is another provision of our Constitution that ought not to be forgotten: and that is, that when we elect a President and Vice-President they must both be residents of some State of the Union. We have elected Mr. Lincoln from Illinois. Undoubtedly that is a State in the Union. We have also elected Andrew Johnson from the State of Tennessee as Vice-President of the United States. Is he a public enemy? Does he live in a State of this Union, or does he live in some subjugated territory?

Sir, whatever fine-spun theories gentlemen may give loose to in their imaginations, I tell you that the doctrine that any one of these States is out of the Union is the very doctrine which we have been fighting against from the beginning. The very ground on which we stand is, that they are not out of the Union, that they have no power to go out of the Union; and it is to maintain that doctrine that we have poured out our treasure and our blood like water upon every battle-field. In my opinion the doctrine—I do not say that the Senator contends for it, for I do not precisely understand his posi-

tion—but the doctrine that says these States are no longer States of the United States is one huge, infernal, constitutional lie, that would stamp all our conduct from the beginning as murder and cover us all over with blood. When it comes to be discussed, it is the most abhorrent doctrine that can be presented to the American people. And I tell you that whatever fine-spun theories politicians may adopt here at Washington or elsewhere, when the convention came to meet at Baltimore freshly representing the people of the United States, they trampled the miserable humping under their feet by nominating Andrew Johnson, of Tennessee, as Vice-President of the United States—Tennessee still a State of the United States, although its people have been driven into insurrection and rebellion.

Mr. SUMNER. Will my friend allow me to interrupt him—right there?

Mr. DOOLITTLE. I am nearly through.

Mr. SUMNER. I understood the Senator a few moments ago to say that the Constitution required that the President and Vice-President should come from two different States.

Mr. DOOLITTLE. Not be residents of the same State.

Mr. SUMNER. I think the Senator has not quoted it correctly. I have it before me. It is as follows:

"The electors shall meet in their respective States and vote by ballot for President and Vice-President, one of whom at least shall not be an inhabitant of the same State with themselves."

All that is required is that the candidate shall be a citizen of the United States, and I presume nobody ever questioned that Andrew Johnson was a great and loyal citizen of the United States.

Mr. DOOLITTLE. The Constitution also provides that—

"No person except a natural-born citizen or a citizen of the United States at the time of the adoption of this Constitution shall be eligible to the office of President."

And there is another provision in the Constitution requiring their residence in the States of the Union.

Mr. President, I insist that on this incidental question as to how the joint convention of the two Houses shall be conducted, which has been conducted heretofore during eighteen different sessions with no difficulty whatever, except in the single case of 1857, when some indecorous conduct under the lead of James M. Mason, of Virginia, occurred, there is no necessity that we should enter upon the discussion and the agitation of the questions which have been debated here and urged as the foundation for the adoption of this resolution. There is no necessity for the friends of this administration in the midst of this gigantic war still pending to keep up one continued attempt to attack its own administration and to destroy its influence and its power with the people of the country. There is no necessity to make this onslaught upon the free constitution of Louisiana—a free constitution which gives liberty to ninety thousand slaves that the emancipation proclamation did not reach. I undertake to say that it is unnecessary, unfounded, and unjust. I do not say that all the Senators who support this resolution maintain the doctrines contended for by the Senator from Ohio or the Senator from Kentucky. I understand the Senator from Illinois who introduces the resolution to express the wish to avoid the question of the validity of the constitution of Louisiana. In what I have said I do not refer by any means to all Senators here, but I have directed my attention more particularly to the objections taken by the Senator from Kentucky and the Senator from Ohio, where the two extremes are meeting in one common purpose to attack the administration and to crucify the free State of Louisiana.

Mr. SHERMAN. Mr. President, I shall detain the Senate but a few moments, and only to state my own position on this question.

I regret that debate has occurred as to the existence of the State of Louisiana. I have no doubt that Louisiana is just as much a State in the Union as the State of Ohio. I do not agree with the sentiment of other gentlemen who think that Louisiana by its attempted secession has gone out of the Union or is out of the pale of the law of the United States; but that is not the question now before the Senate.

The question is, what votes shall be counted at the meeting of the joint convention next Wednesday? What rules shall govern the convention when it meets? Shall the whole thing be postponed until the two Houses get together without any rules or organization, so that confusion will probably occur the very moment the question arises? Upon that question I have very clear convictions, and my convictions upon that point will control my vote.

I alluded incidentally yesterday to the scene that occurred in the joint convention eight years ago. If we do not determine this question now, we know that any member of either House may present it to us in the joint convention. We know that the Senator from Wisconsin, or any other Senator who believes that the vote of Louisiana ought to be counted, may demand that that vote shall be counted. Suppose the Vice-President should decide that Louisiana, having been declared in a state of insurrection, cannot vote in the electoral college; what then? Is his decision final? Is it so that under our system the Vice-President may throw out the vote of any one or more

States, and his decision be final? Is there no appeal? If there is an appeal, how can it be taken? Suppose the Vice-President should reject the vote of the State of Ohio, and I, a representative from that State, should demand that his decision should be reversed; how can it be done? How can any question be taken there?

These difficulties must be met beforehand; and to say that we cannot by law prescribe the mode and manner in which these questions shall be decided before the meeting of the joint convention, is to declare the framers of the Constitution fools. So it seems to me; because if the Vice-President should decide in the case I have named that Louisiana is not entitled to vote, the Senator from Wisconsin may demand an appeal from that decision. Who shall decide that appeal? Shall Senators and Representatives vote *per capita*? Shall they vote by concurrent resolution? If so, then the right of debate grows up. Shall Senators debate? If so, must they debate in the presence of the House of Representatives? How can they vote? All these difficult questions are to be decided.

The honorable Senator from Wisconsin says he has great confidence in the present Vice-President; that he is not Mr. Mason. So have I, just as much confidence as he has; but that is not the point. The difficulties are insuperable: and any man, whatever may be his political tenets, may raise the question of difficulty in the presence of the convention, and that convention will be utterly powerless, and will be the laughing-stock of the gallery. In the case I mentioned eight years ago, when there was a totally immaterial question raised in that convention, when the State of Wisconsin was prevented from voting by an unforeseen event, the happening of a great snow-storm in the Northwest, and when objection was made to counting the vote of the State of Wisconsin, a debate sprang up, members of the House addressed themselves to "Mr. Speaker," members of the Senate addressed themselves to "Mr. President," the one gentleman recognized one person and the other gentleman another, without any preliminary understanding as to the form of putting the question, without any preliminary understanding as to who should preside over the joint convention, without any rules for its government.

I say, these same questions of difficulty will present themselves again, and they will be presented by the counting of the vote of the State of Louisiana. Suppose in the joint convention the Vice-President shall take up a piece of paper in his hand, a thing that will inevitably occur, and say, "I have here what purports to be the certificate of the State of Louisiana;" suppose he should say that the State of Louisiana is in rebellion against the Government; that by the proclamation of the President it is declared to be in a state of insurrection, and that that condition of affairs has been recognized by both Houses of Congress; "I therefore will not allow the vote of Louisiana to be counted in the electoral vote." Suppose he should so decide. The Senator from Wisconsin would object at once.

MR. DOOLITTLE. Not at all. He may decide just as he likes; it does not make a bit of difference to me. He may rule it in, or rule it out, and he shall find me making no objection.

MR. SHERMAN. Probably my friend from Wisconsin would make no objection, but any member from the House of Representatives or any member of the Senate who is of opinion that the vote of Louisiana ought to be counted, will at once enter his protest, and say that Louisiana has a right to vote. How shall that question be decided? Shall the Vice-President decide it, and shall his decision be final? I say not. There must be—

MR. COLLAMER. Some member of the convention would object to the counting of an illegal vote, because they do not know, officially, what the other votes are.

MR. SHERMAN. Certainly not. They cannot tell that until the votes are counted. Suppose the Vice-President were to take it into his head to reject the vote of the State of New York; and in a possible case he might reject enough votes to elect General McClellan, a scarcely possible event. We are now prescribing rules and making precedents for history. We cannot expect to travel through many presidential elections in the history of our country with so unanimous a result as at the last, and we are now making a precedent—

MR. FARWELL. If the Senator will allow me—

MR. SHERMAN. I would prefer to go on and finish what I have to say.

MR. FARWELL. I was going to ask a single question. Suppose the Vice-President does undertake to reject the vote of New York, will this resolution settle it, or has that got to be settled in the joint convention?

MR. SHERMAN. I do not suppose this resolution will settle all the questions that may arise. Suppose, on the other hand, the Vice-President should believe that Louisiana is a State in the Union, and should decide in favor of the view of the honorable Senator from Wisconsin, my colleague would object. I know he would.

MR. WADE. Mighty quick.

MR. SHERMAN. I know the Senator from Massachusetts [Mr. Sumner] would say that Louisiana is not in the Union, and therefore the vote must not be counted. If they would not, there are members in the House that would; and how is the question

to be decided? Then the joint convention assembled under the Constitution to do the highest act of perpetuating the Government of the United States may find itself in a wrangle; and it is in just such scenes as these that revolutions are born. It was in such scenes as these that Poland witnessed all the struggles which finally led to the destruction of her nationality. In my judgment, therefore, every question that will affect the organization of the joint convention ought to be settled beforehand by some decisive vote; and therefore it is that I am in favor of having this matter decided now.

But I have said that I believed Louisiana was a State in the Union. I have no doubt of it. My views upon that point concur with those of the honorable Senator from Wisconsin; but the question is not whether Louisiana is a State in the Union, but whether Louisiana can now vote in the electoral college. What is the record? By the proclamation of the President, Louisiana is declared to be in a state of insurrection; by the votes of both Houses of Congress that condition is recognized; all the loyal, legal authority of Louisiana is overthrown, and we have now a provisional governor; we have had military governors in the State of Louisiana, and have now. That is the case presented to us by the record.

But the honorable Senator says that there have been movements made in Louisiana to re-organize the State of Louisiana; that there is a local government now there representing the loyal people of Louisiana. Suppose I admit that fact. Can I tell from the reading of the papers he has read here to-day that that is so? What tribunal has decided that question? He says the President; but I cannot agree with him that the President must decide that question. By the Constitution, each House must decide upon the qualifications of its own members; and I say that no vote can be cast for Louisiana in the electoral college until she can vote in Congress; and she cannot vote in Congress until the Senate and House of Representatives concur in her voting here. The idea that Louisiana shall vote in the electoral college and make a President for us when no man can speak for her here, and no man can speak for her in the House of Representatives, is, in my judgment, an absurdity. The very moment that the loyal people of Louisiana shall form a government which is recognized by both branches of Congress and by the President, that moment she will have a right to vote in the electoral college; and the idea that she should attempt to vote before her condition is fixed by Congress, it seems to me, is wrong.

I do not wish to criticise the action of our friends in Louisiana. I recognize the loyal people who have formed this new movement in Louisiana as loyal and true men. I recognize Louisiana as a State in the Union; but until their action, whatever it is, is approved and sanctioned by Congress with deliberation and premeditation, she ought not to appear here to claim her vote in the electoral college. That is my judgment; and in saying this I do not assail the President. I think my friend from Wisconsin stated the point too strongly when he said that in voting for this joint resolution we sought to cast censure upon the President.

Mr. DOOLITTLE. That is not what I said or intended to say. I said that the Senator from Ohio [Mr. Wade] in the doctrines he advanced, and the Senator from Kentucky [Mr. Powell] by responding to him, may join hands together to attack the Administration. I did not say that the resolution was intended for that at all. I was dealing with the doctrines of the Senator's colleague.

Mr. SHERMAN. Then I misunderstood the Senator. I have no doubt that the President of the United States may recognize the local tribunals there, and may seek to blend the loyal people of Louisiana into the form of a State government, and I will aid him in doing it; but I must be satisfied that such portion of the people of Louisiana are in a condition to conduct a free government, to found and re-organize or re-establish the State government overthrown by the insurrection. The very moment that is done, I am willing to give their seats upon this floor; I am willing to give their members seats in the House of Representatives; but until then their condition is fixed by the proclamation of the President, sanctioned by Congress; and that is, that Louisiana is in a state of insurrection, and until that insurrection is so far overcome as to enable a portion of her people to establish a form of government and the right of suffrage may be protected, she has not a right to representation here, nor to a vote in the electoral college.

Nor will I now pass judgment upon the question whether her Senators are entitled to seats here. I will hear what they have to say. That question has not yet come up before us. If I am satisfied of some of the facts stated by the honorable Senator from Wisconsin, that a majority of the people of Louisiana have taken part in this organization, that they have had an opportunity to vote, and have voted, I will recognize the right of the loyal people of Louisiana to representation here.

I do not, therefore, commit myself upon the question of the right of these Senators to take their seats by my vote on this resolution; but I know, as the case now stands, with the record before us, that Louisiana is declared by law to be in a state of insurrection, and that we have no official decision that she has resumed her place in the Union. We have evidence read from a pamphlet; but we have no decision that she is in the Union and entitled to vote in the electoral college. I thought, therefore, that

the resolution of the House of Representatives—which, I believe, passed there without much objection—when it came here, and was reported from the Committee on the Judiciary, was a wise measure to avoid contention and strife, to avoid raising prematurely a question of great difficulty, which ought to be settled so far as the action of the convention was concerned by the deliberate vote of Congress. All the questions that may grow out of the admission of Louisiana I am prepared to decide when the case is fairly argued and discussed before us; but at present I am perfectly clear that the vote of Louisiana, no matter by whom cast, ought not to be counted in the electoral college, and that we ought now to settle that question, so that it will not trouble the Vice-President of the United States when he comes to count this vote. If this resolution is passed, the Vice-President, when he comes to these papers, as he must present them to the body, will say, that by the concurrent action of Congress, or of both Houses, which must pass upon the condition of Louisiana, the State of Louisiana is in insurrection and cannot vote in the electoral college; and that is the end of the matter. I think we ought to assume that responsibility rather than to throw it upon the Vice-President.

Mr. HARRIS. I do not rise to protract this discussion. My belief is that the Senate are quite weary of it now, and that it may be brought to a close as well now as any other time. But, sir, I have embodied in a preamble and resolution the views that I have heretofore expressed in relation to this subject, which I desire to submit to the Senate. The recitals in this preamble are what is conceded to be the truth by every Senator; and although it is not in order now, yet my friend from New Jersey shall be satisfied to adopt this amendment, it will be in order if he should withdraw his proposition to strike out the State of Louisiana. I will read the proposition, which I intend to submit at the proper time:

“Whereas in pursuance of an act of Congress, approved on the 13th of July, 1861, the President did, on the 16th of August, 1861, declare the inhabitants of certain States, and among others the State of Tennessee and Louisiana, to be in a state of insurrection against the United States; and whereas, with a view to encourage the inhabitants of such States to resume their allegiance to the United States and to re-inaugurate loyal State governments, the President did, on the 8th of December, 1863, issue his proclamation whereby it was declared, among other things, that in case a State government should be re-established in any of said States in the manner therein specified, such government should be recognized as the true government of the State; and whereas the loyal inhabitants of the States of Tennessee and Louisiana, invited so to do by the said last-mentioned proclamation, have in good faith established said State governments loyal to the United States, or attempted so to do; and whereas such loyal inhabitants at the recent presidential election have chosen electors for President and Vice-President, who have, in pursuance of the requirements of the Constitution, cast their votes for President and Vice-President: and whereas doubts exist as to the validity of such election of presidential electors in the States of Tennessee and Louisiana; and whereas it is well understood that the result of the presidential election could in no way be affected by the votes of said States, whether the same shall be counted or not: Therefore,

“*Be it resolved, &c.,* That it is inexpedient to determine the question as to the validity of the election of electors in the said States of Tennessee and Louisiana, and that in counting the votes for President and Vice-President, the result should be declared as it would stand if the votes of said States were counted, and also as it would stand if the votes of said States were excluded, such result being the same in either case.”

It seems to me that this covers the whole ground; it recites the whole truth in relation to it; it is what no Senator will deny; and it seems to me that for us to go on to vote for anything beyond what is contained in this proposition is to vote for the merest abstraction in the world. It is to anticipate a question which may possibly arise, but which will probably never arise in the history of this country. I hope to have an opportunity to present this proposition, and I shall ask the vote of the Senate upon it.

Mr. POWELL. Mr. President, the Senator from Wisconsin [Mr. Doolittle] seemed to think that he had made a most happy and striking comparison. He commenced his speech by comparing the Senator from Ohio and myself to Herod and Pontius Pilate, and about the center of his speech he repeated the comparison, and at the very close he announced it for the third time. Hence I come to the conclusion that he thinks it a very powerful statement. I think I understand the Senator's tactics perfectly well when he tries to amaze the Senate by the statement that extremes have met; that the honorable Senator from Ohio [Mr. Wade] and myself agree on this measure. The Senator from Wisconsin but resorts to one of the artful dodges that are sometimes resorted to by some speakers who have been not inaptly called demagogues—I do not apply that term to the honorable Senator, however—when they wish to excite the prejudices of the crowd. I do not think the honorable Senator can, by that kind of dodge, affect the vote of any Senator on either side of the Chamber. I am sure no Senator on this side of the Chamber—and when I use that term I mean the democrats and conservatives that are here—can be driven from what he conceives to be his duty because he

has the assistance of the Senator from Ohio; and I am certain that there is no Senator on the other side whose intelligence is so low, whose mind could be so governed by his prejudices, that he will be driven from his position because some members on this side advocate a proposition of which he is in favor.

I do not know whether the honorable Senator intended to liken me to Herod or to Pilate; but he said that the two Senators, the one from Kentucky and the other from Ohio, like Herod and Pilate, desired to crucify this young free State of Louisiana. I was not aware before that Herod had much to do with the crucifixion. I knew that Pontius Pilate judged on that occasion, and his judgments have been decreed infamous. However, I shall make no defense of the Senator from Ohio; he is in the Senate, and is fully able to defend himself. But, sir, if the comparison should be applied to anybody, the Senator from Wisconsin ought to apply it to the Executive and to General Banks. It is they, if anybody; and I will not charge that they desire to crucify the free State of Louisiana.

Herod and Pontius Pilate were wicked and cruel aggressors upon the civil and divine rights of the people. I, sir, resist the aggressions of usurping officials; the Senator is their advocate. Had I lived in Judea in the day of Herod, I would have denounced the cruel and bloody decrees of that wicked king as I do here arraign the President for his usurpations, his violations of the Constitution, and his assaults upon the civil liberties of the people. I would have denounced in the harshest language the infamous judgments of Pontius Pilate, the governor, as I do the unlawful, wicked, and unconstitutional military orders of General Banks. Judging from the Senator's course here, had he lived in the day of Herod and Pontius Pilate, they would have found in him an able and zealous advocate.

Perhaps my views of a free State are a little more expansive than those of the honorable Senator from Wisconsin. I regard a State free that is governed by the laws made by the sovereign people of that State without the dictation of presidents or major-generals. I regard that State as a free State which is governed by law, knowing that there is no freedom save in the supremacy of the law. The honorable Senator from Wisconsin in his contracted view seems to suppose a State is free, provided no African is held in slavery. May not white men in Louisiana be kept in chains as well as black men? I confess I have more sympathy for the white than I have for the black race. Not so with the honorable Senator. He is willing that the decrees of the Executive and the orders of General Banks shall go forth to alter the constitution of the people of Louisiana, and prescribe the qualifications of their electors and of candidates for office, and to hold the white men of Louisiana in slavish submission to those decrees; and he calls a State so formed and so conducted a free State, merely because its constitution indicates that involuntary servitude shall not exist there. Away, sir, with such a free State! It is the veriest slavery, slavery of your own race, slavery of your own kith, slavery of your own kin. It is a striking down of every principle of republican liberty for the purpose of elevating a few miserable Africans.

The Senator from Ohio and myself are in accord on this matter. He desires to vindicate the right of the people of Louisiana, in the exercise of their own sovereign power, to decree their own form of government, unbiased, uninfluenced by outside dictation, whether from the Executive Mansion or from the headquarters of a major-general. The Senator from Wisconsin takes the very converse of that position. He is amazed that the Senator from Ohio should advocate these propositions, but he is not at all astonished at the course of the Senator from Kentucky, because the Senator from Ohio is for freedom and the Senator from Kentucky is opposed to emancipation. I do not know what right he has to say that I am opposed to emancipation by those who have the power to decree emancipation. I am not opposed to the people of the State of Louisiana or Georgia or any other State of this Union declaring, if in their sovereign capacity they choose in a legal and formal manner to decree, that they will have no slavery existing there. Nor should I be opposed to the people of the State of Wisconsin, if they choose so to decree in the exercise of their sovereign power, declaring that slavery should exist there. These are matters that are left by our fundamental law to the people of each State; and, when they exercise the power in the manner prescribed by their constitution and laws, it is a matter of their own concernment, and will receive no opposition from me.

If, however, the Senator means that I am opposed to the amendment of the Constitution of the United States on that subject, he is right. I was opposed to that amendment of the Constitution when it was pending in this body. I spoke against it and I voted against it; and I think the day will come when the Senator himself will regret that faithless act. What is that act? It decrees that millions upon millions of property held under the constitutions and laws of the States by virtue of the Constitution of the United States shall be taken from the owners without compensation. I regard that as nothing else than bad faith and legislative robbery. The Senator may regard it as he pleases. Regarding it as I do, I am opposed to it. I hold that by that amendment you upturn the whole system of our Federal Government, because if there is one characteristic feature of this form of government it is that the States are at liberty to form

and regulate their domestic institutions in their own way, and you have as much right to amend the Constitution so as to regulate the condition of master and slave as you have to amend it in regard to the regulation of the relation of husband and wife, guardian and ward, parent and child, and no more. If you have a right to pass that constitutional amendment, you have a right to decree that this shall be an empire or a kingly form of government. It is destructive of the system, in my judgment. I think it is in bad faith. I think it overthrows and disregards vested property rights. I fear that the day will come when, in view of our vast and accumulating debt, some demagogues will desire to repudiate it. I never expect to be of that number, but when that is done, and you rich men of the North shall talk about property rights and the faith of the Government pledged to pay its debt, they can be told that by legislative enactment, by constitutional amendment this vast amount of property was destroyed in the slave States without compensation to the owners, and their mouths will be stopped.

But, Mr. President, enough of such matters. I will say to the Senator that if the people of any State in the Union choose to abrogate slavery in their own way, it is their matter, not mine. I have a right to speak on that subject in no State of this Union but one, and that is the Commonwealth of Kentucky, and there I have been opposed to emancipation.

But, sir, the Senator tells us that General Banks's statements are all true, and that the statement of the Senator from Ohio and myself, that there was military interference with the election, has no foundation in truth. Let us bring the honorable Senator to the facts on that point, and see who is in error. Who has the right to prescribe the qualifications of voters in a State of this Union? There is not a Senator in this Chamber who will not answer, the people of that State. That is the very foundation of your republican representative form of government. What power has the President, what power has Major-General Banks, to prescribe the qualifications of a voter in Louisiana? Tell me not, sir, that there has been no military interference with the elections in that State, when the Executive and the military commander of that department have prescribed the qualifications of voters. Make me a major-general and clothe me with the power to prescribe the qualifications of voters, and if I had a hundred followers in the State of New York I could carry that Empire State by prescribing such qualifications as would exclude all but those on my side. The Senator sees that; he knows it; he cannot deny it, and yet he says there was no military interference. I was astonished that a Senator usually so candid and fair in his statements to the Senate should allow his judgment to be so warped by his zeal as to maintain for a moment that there had been no military interference with the elections in Louisiana.

Mr. DOOLITTLE. With the Senator's permission, I will say that I stated precisely wherein and to what extent I understood the order of General Banks to have affected the elective franchise, by directing, what the constitution of Louisiana did not direct, that the soldiers who were citizens of Louisiana enlisted in the Army might be permitted to vote; and that of the whole number of those citizens in the Army there were only eight hundred and eight who voted, while the total number of votes cast was eleven thousand four hundred and fourteen.

Mr. POWELL. So far as the principle is concerned it does not matter if there was but one; it was an infamous usurpation; and I speak of it as infamous because it violates the Constitution of the country.

Mr. DOOLITTLE. I have no objection to the Senator drawing his own inferences; but he seems to express the idea that I had maintained that there was nothing done under the military authority. I stated expressly, as I mean always to state, the facts as I understood them.

Mr. POWELL. Here is the constitutional provision on the subject of the qualification of electors: "The House of Representatives shall be composed of members chosen every second year by the people of the several States, and the electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State Legislature." That is the only clause of the Constitution on the subject. Was that constitutional test applied to the electors in Louisiana? It certainly was not in more instances than that admitted by the honorable Senator.

In the statement of General Banks, which I hold in my hand, he admits that he altered the constitution of Louisiana concerning the qualifications of voters so far as to permit soldiers and sailors in the public service to vote. What right had Nathaniel P. Banks, major-general of the United States Army, to lay his hand upon the constitution of the State of Louisiana? When he did it he committed a usurpation and violated the law, and so far from being lauded he should be censured in the harshest possible terms.

But that is not all. General Banks says, in this paper, that everybody who was registered and voted in Louisiana took the oath prescribed in the President's amnesty proclamation of December 8, 1863. Now, let us see what was the oath contained in that amnesty proclamation:

"I, ———— do solemnly swear, in the presence of Almighty God, that I will henceforth faithfully support, protect, and defend the Constitution of the United States, and

the Union of the States thereunder; and that I will, in like manner, abide by and faithfully support all acts of Congress passed during the existing rebellion with reference to slaves, so long and so far as not repealed, modified, or held void by Congress, or by decision of the Supreme Court; and that I will, in like manner, abide by and faithfully support all proclamations of the President made during the existing rebellion having reference to slaves, so long and so far as not modified or declared void by decision of the Supreme Court. So help me God."

After having prescribed the oath, that proclamation goes on to declare:

"And I do further proclaim, declare, and make known that whenever, in any of the States of Arkansas, Texas, Louisiana, Mississippi, Tennessee, Alabama, Georgia, Florida, South Carolina, and North Carolina, a number of persons, not less than one-tenth in number of the votes cast in such State at the presidential election of the year of our Lord 1860, each having taken the oath aforesaid and not having since violated it, and being a qualified voter by the election law of the State existing immediately before the so-called act of secession, and excluding all others, shall re-establish a State government which shall be republican, and in nowise contravening said oath, such shall be recognized as the true government of the State, and the State shall receive thereunder the benefits of the constitutional provision which declares that 'the United States shall guarantee to every State in this Union a republican form of government, and shall protect each of them against invasion, and, on application of the Legislature, or the Executive, (when the Legislature cannot be convened,) against domestic violence.'"

The President in his proclamation says that if one-tenth of the voters shall take the amnesty oath they may form a State government, and those taking the oath shall be qualified voters, and that they alone shall be voters who were qualified voters under the constitution and laws of Louisiana as they existed before the rebellion. General Banks in his order has violated the proclamation of the President. The President's proclamation says that the government may be formed by persons "each having taken the oath aforesaid, and not having since violated it, and being a qualified voter by the election law of the State existing immediately before the so-called act of secession, and excluding all others."

Does General Banks exclude all others? Does he not allow soldiers and sailors to vote? He does. He extends and adds to the President's proclamation prescribing the oath; he enlarges it. All the President requires is that this oath be taken; and that makes a man a qualified voter, provided he was otherwise a qualified voter under the laws of Louisiana. I admit that the requisition of this oath was usurpation: but General Banks enlarges even upon that. The President says that this oath shall be sufficient; but General Banks goes further and says that the soldiers and sailors may vote. Under the President's proclamation they could not vote, being prohibited by the constitution of Louisiana, but General Banks allowed them to vote.

Is it compatible with the Senator's notions of a free State that one-tenth of the qualified voters, provided they take a humiliating oath which would degrade them in many respects, shall legislate for the nine-tenths? The one-tenth fixed by the President is one-tenth of the qualified voters as they were by the State constitution and laws before the rebellion; that is, one-tenth of the white people over twenty-one years of age entitled to vote under the constitution of the State, excluding Sambo. The population of the State of Louisiana is about equally divided between whites and blacks, and the Senator advocates the proposition that one-tenth of the voters of the white race, and a bare majority of that one-tenth, shall form a government for all the other people of the State; and because the Senator from Ohio and myself choose to resist that most antirepublican feature, to resist this tyrannical encroachment on the rights of the people, we are to be likened to Herod and Pontius Pilate crucifying a free State. Was there ever such a monstrous utterance?

I suppose that if the Senator from Ohio and I were to oppose the admission or recognition of a State formed by one-twentieth of the legal voters the Senator from Wisconsin would think we were trying to crucify a free State. Why, sir, if there ever were sentiments uttered that crucified free States and free republican governments, they are to be found in the speech of the Senator from Wisconsin in defense of the usurpations of the President and of General Banks. These are the sentiments of crucifixion complete; there is nothing left for the Senator from Ohio and myself to crucify. The Senator from Wisconsin has crucified and utterly destroyed the great principles that underlie civil liberty: he has killed every principle of civil liberty; he has become the advocate of the tyrannies and usurpations of the Executive and Major-General Banks. He supports the act of the President in prescribing the qualifications of voters in the States and declaring that if one-tenth of them take the oath he prescribes they shall have power to establish a government to rule over the nine-tenths. The Senator is the advocate of those who commit these usurpations, and he denounces those who oppose them as Pilates and Herods.

In my judgment the decree of Pontius Pilate was a great wrong, that of Herod was cruel. The latter was that all the children of Bethlehem under two years of age should

be destroyed; but infamous as the decree of Herod was, it is not half so infamous as the principles advocated by the Senator from Wisconsin, for that affected but individuals; it took the lives of tender infants, who, if they died, under his Christian code the Senator would believe went directly to heaven: but the Senator crucifies free States, and puts under his iron heel every principle that underlies a free Commonwealth; and after murdering those principles he denounces those of us who in our humble way resist, as Pilates and Herods. He, in my judgment—I say it with great deference—has out-Heroded Herod. If anybody should be called Herod or Pontius Pilate, I think it is those who govern affairs as they are governed in Louisiana. The Senator tells us that one-half of the whole population of Louisiana at the time the war began, whites and blacks, have gone under the sod—are dead. The population of the State of Louisiana in 1860 was about seven hundred thousand souls. Under the policy of these rulers you have killed about four hundred thousand of those people. One-half of all the negroes there, the Senator says, are dead. Instead of attending to Sambo, such has been your policy that you have put about two hundred thousand of the sable people of that State under the sod. The decree of Herod was not half so cruel as that, because it only took the children under two years of age; and here you take not only them, but you take blooming virgins and the young men in stalwart youth, and the aged, decrepit, and infirm, and you sweep them all away with one remorseless blow.

Now, sir, I think I have disposed of King Herod, and I come to look at the Pontius Pilate part of the proceeding. I do not know whether the Senator from Wisconsin intended to liken me to Herod or to Pilate. I told the Senator from Ohio that he might take either; if he thought he was likened to Pilate, he might defend Pilate, and if he thought I was likened to Herod, I would stand on that. He stated he did not care a toss of the copper which. [Laughter.] How is it that the Senator from Ohio and myself have been likened to Pontius Pilate sitting in judgment upon this matter? We have not judged at all; we are now in the council chamber; but I will tell the Senator who did sit in judgment upon that free State. It was the President and Major-General Banks. It was they who violated the fundamental principle of constitutional and civil liberty. It was they who put the knife to the throat of that free State. When I speak of a free State here I speak of the initiatory measure to form a government for the State to come back into the Union, although I believe she never was out.

The first bulletin that was issued from the executive chamber on the subject declared that if one-tenth of the qualified voters would take the prescribed oath which I have recited they might form a State government. What was that oath? Not alone that they should be true and faithful to the Constitution and laws of the Union, but that they would support all the laws and resolves passed by Congress and all the proclamations that had been issued by the President on the subject of slavery since the beginning of the rebellion, and not only that, but that they would support all proclamations on that subject which the President might hereafter issue. I ask the Senator from Wisconsin, would he so lower his manhood, would he so far debase himself as to go and crouch at the footstool of executive power and take that oath before being admitted to the rights of a free-born citizen? Would he take the oath to support proclamations which might afterward be issued? That would be swearing in the dark, as they say out West, and no honest man would do it; yet that was the requirement of the President. That was the first ukase which was issued to murder the great principles of civil and republican liberty in Louisiana. That was received there, and then General Banks issued his ukase and he set aside a clause of the constitution of Louisiana which the President in his proclamation allowed to stand and be in full force concerning voters, and that was, that soldiers and sailors in the service should vote, when it was declared in the constitution of Louisiana that they should not vote. Banks found that the President had not carried the thing far enough, and he, too, must not only carry out the unconstitutional edicts of the White House, but he must make an unconstitutional edict of his own, which he did, by proclaiming that soldiers and sailors, who were not qualified voters by the constitution of Louisiana, should be qualified voters.

That is the attitude in which General Banks and the President stand, and the Senator from Wisconsin is their advocate. He denounces the Senator from Ohio and myself because we resist this usurpation. I am willing for myself to receive the fulminations of the Senator from now until doomsday. While I am so intrenched in the right I fear not the assaults of the Senator, no matter how strong his armor, how keen his cimeter, for the blows will fall harmless at my feet; the truth will be my protection; the advocacy of just and correct principles my shield.

But, sir, General Banks did more. I did not intend to criticise that learned statesman and, as I have no doubt the honorable Senator from Wisconsin would say, able general. He issued a proclamation concerning this subject. I regret that I have not that proclamation here; but I have an extract from it, which I will read to the Senate: "Opinion is free and candidates are numerous. Open hostilities cannot be permitted. Indifference will be treated as a crime and faction as treason."

That is the proclamation of this most worthy Solon, General Banks: indifference will be treated as a crime and punished with an iron hand. If a man, after submitting

himself to these humiliating conditions and having taken his oath, refuses to vote. General Banks says he will treat that as a crime. Was there ever a more atrocious sentiment uttered in a free Government? The reason why General Banks put that clause in his proclamation is obvious. He knew that not even one-tenth of the voters of Louisiana, if left unbiased, would come up to vote at his election the way he wished them to vote; and hence he said, All that have taken the oath and are thus qualified shall vote, and if you do not vote, your indifference will be treated as a crime. A more atrocious sentiment was never uttered, and yet the Senator from Wisconsin says that is a free election where the major-general commanding says who shall be entitled to suffrage, and further says that all entitled to suffrage who do not vote shall be treated as criminals and punished. He put the iron heel on them.

Is that what the Senator calls freedom of election? There was not a scintilla of freedom in the whole matter; and when General Banks announces, in the statement which has been read, that there was less interference by Government authority in that election than perhaps in the election in any State in the Union, he never made a more erroneous statement. He must have known that it was not true. Suppose that the major-general in command of the military forces in the Senator's State should undertake to prescribe the qualifications of voters in Wisconsin, and the qualifications so established by him were different from those prescribed by the constitution and laws of the State, and, in addition to that, he should issue a decree that those who did not vote, that all who exhibited indifference, should be treated as criminals and punished with an iron hand, would the Senator think there was much freedom of election there?

General Banks thought he would make a great reputation by bringing back Louisiana into the Union, and giving his friend, the Senator from Wisconsin, a chance to make assaults on others for their attempts to crucify the young, free State of Louisiana. The general had made several efforts, in a military point of view, without winning many laurels. I believe that, if General Banks had devoted himself as assiduously to his military duties and to fighting armed rebels as he did to controlling elections and issuing ukases on that subject, he would not have met with the disaster which he encountered on Red River. I hope I am mistaken in this opinion; but I think that if he had had more love for the glory of great achievements in arms, and less for political trickery, and less hankering after cotton, he would not have been so disastrously and disgracefully defeated as he was on the Red River. His vocation, it seems, was twofold. Being a politician of some success, he thought he could run the political machine best; and he did run it, and he ran it with a vengeance. He ran it over, and destroyed every principle of republican liberty.

Let me tell the Senator that we are not to be driven from our advocacy of the right by being likened to Pontius Pilate or to Herod. We will do what we believe is right. We will meet him in the argument on every point. Let him prove to the Senate that the President or General Banks had any power under the Constitution, under our system of government, to prescribe the qualifications of voters and of candidates for office in the States. Unless he can do that they must stand confessed, in his own judgment, as usurpers. I use the word "usurpers" to indicate those who administer the functions of their offices in violation of law. It was a maxim of the Athenians, the wisest of the ancient commonwealths, that all who administered the functions of their office in violation of law were usurpers. It is in that sense that I use the term. However good their intentions may have been, I say that in their exercise of power in Louisiana they overthrew the Constitution and laws of their country which they had sworn to support; and hence, in my judgment, they are technically usurpers.

While we are not to be driven from our position, I think nobody is going to be dismayed or deterred from doing their duty by the Senator announcing here that extremes have met. I would to God that we could have more frequent meetings of the extremes. The Senator from Ohio and myself are regarded as on the extreme verge of opposite opinions here. I am willing, whenever the Senator from Ohio draws his sword and makes a charge on those who are overthrowing the dearest rights of the people and destroying the constitutional liberty of the citizen, to fight under his banner; and, sir, he is a sturdy old leader.

I was gratified when the Senator from Ohio made his manly speech on this subject. I am willing to fight under his banner, and I will follow him to the fight when the Senator from Wisconsin and the Executive and major-generals make crusades against the civil liberties of the people. I differ from the Senator from Ohio upon many subjects; but there is a blunt honesty and manhood and candor about him which I admire. He is unlike the Senator from Wisconsin in one thing. While his philanthropy and his love of freedom are most expansive, I believe more so than my own, for I do not think the negroes are going to be near as well off free as they are in slavery, while he wants them free, and goes even as far as the Senator from Wisconsin on that point, he has a just appreciation of the constitutional and civil liberties of the white man. He is willing to fight for the liberties of the white man. Just at that point, however, the Senator from Wisconsin falls off, and goes off with a sickly sentimentality for the woolly-headed negro, and cares nothing for "the poor white trash" of Louisiana. The

Senator from Ohio stands manfully in the breach when their rights are assailed. When he defends the poor down-trodden white man of Louisiana, he defends the people of the whole land. It is their common defense against those who assail the great principles of constitutional and civil liberty. We will stand to our guns on that point, notwithstanding the denunciations of the Senator from Wisconsin, and we will fight the battle out and will not surrender. As I have enlisted under the Senator from Ohio in this fight, I am not for yielding, and I do not think he is for yielding, and we both, I believe, are animated by honest convictions to defend the white people of the country against those who seek to overthrow their constitutional and civil liberties, and I believe we will do battle to the very end; and I trust and hope we may conquer and overthrow all the enemies of constitutional and civil liberty. So long as the Senator from Ohio is engaged defending the constitutional and civil liberties of the white man, he will find me a faithful ally.

MR. TRUMBULL. Mr. President, I am not going to prolong this debate by attempting a reply to the position assumed by the Senator from Wisconsin in his excited remarks this morning. We have had everything brought into the debate. The Administration has been defended when nobody has assailed it. Pontius Pilate and Herod have been assailed and defended. We have had a general discussion about reconstruction, and an excited debate upon a question which it seems to me should have called for no excitement; and all I have to say to the Senate now is to appeal to its members that, however much they may be disposed to crucify over again Pilate or Herod or the free State of Louisiana, they will not crucify us here by bringing in all these extraneous circumstances and prolonging this debate. I think every Senator understands the question. All we wish to settle is to determine whether, on Wednesday next, when the canvass of the votes for President and Vice-President takes place, the votes from the States unrepresented in Congress, in a condition of rebellion against the Government, into which goods are not permitted to go, with whom we have no friendly intercourse, shall be counted as votes cast for President and Vice-President of the United States. We neither determine that those States are in the Union or out of the Union.

That is the question; and I appeal to Senators to let us vote upon it. Business is pressing; the chairman of the Committee on Finance is urgent with his bills. I think every Senator understands this question. Although I have no doubt every Senator could reply to all that has been said inconsistent with the views he himself entertains, if all will forego the making of those replies, we may have the vote, and settle the question. I trust that course will be adopted.

THE VICE-PRESIDENT. The question is on the amendment of the Senator from New Jersey, to strike out "Louisiana" from the preamble.

MR. TEN EYCK. I ask for the yeas and nays.

The yeas and nays were ordered.

MR. JOHNSON. I beg leave to say that my colleague [Mr. Hicks] is confined to his room by sickness, and has been for the last two or three days.

The question being taken by yeas and nays, resulted—yeas 16, nays 22; as follows:

YEAS—Messrs. Cowan, Dixon, Doolittle, Farwell, Harlan, Harris, Howe, Lane of Indiana, Lane of Kansas, Nesmith, Pomeroy, Ramsey, Ten Eyck, Van Winkle, and Willey—15.

NAYS—Messrs. Brown, Buckalew, Clark, Collamer, Conness, Davis, Foster, Henderson, Hendricks, Howard, Johnson, Morgan, Morrill, Powell, Saulsbury, Sherman, Sprague, Sumner, Trumbull, Wade, Wilkinson, and Wright—22.

ABSENT—Messrs. Anthony, Carlile, Chandler, Foot, Grimes, Hale, Harding, Hicks, McDougall, Nye, Richardson, Riddle, Stewart, and Wilson—14.

So the amendment was rejected.

MR. LANE, of Kansas. Is it in order to move to strike out the preamble?

THE VICE-PRESIDENT. It is.

MR. LANE, of Kansas. I make that motion, and I ask for the yeas and nays upon it.

The yeas and nays were ordered.

MR. TRUMBULL. The Senator from Kansas will observe that if the preamble is stricken out the resolution will be unmeaning, and we shall then have to put into the resolution the names of the States. To strike out the preamble and do no more would leave the resolution unmeaning.

MR. LANE, of Kansas. I should like to have the preamble and resolution read.

MR. POMEROY. If the Senator from Illinois will modify the preamble by using the words "in such a condition," instead of "in a state of rebellion," the preamble will not be objectionable to me.

MR. TRUMBULL. I have no objection to that if the Senator makes the motion; but I have no authority to make the modification.

MR. POMEROY. As it is in order to modify the preamble before the question is taken on striking it out, I move to amend it by substituting the words "such a condition" instead of "state of rebellion."

MR. TRUMBULL. That is in the part of the preamble which was amended on the report of the Judiciary Committee.

Mr. SUMNER. As I understand it, the amendment of the Senator from Kansas is not now in order; he proposes to amend words which have been voted into the preamble on the motion of the Committee on the Judiciary.

The VICE-PRESIDENT. If that be the case the amendment is not in order.

Mr. SUMNER. The Senator may make his motion at another stage.

Mr. LANE, of Kansas. I asked the Chair if my motion was not in order, and he announced that it was.

The VICE-PRESIDENT. The motion of the Senator was to strike out the preamble to the resolution, upon which the Senate had not voted; but an amendment to alter words which the Senate have already inserted is not in order.

Mr. LANE, of Kansas. I suppose I can make my motion at a future time.

The VICE-PRESIDENT. The Senator's motion is in order. It is the amendment of his colleague which is out of order.

Mr. TRUMBULL. Is it in order to strike out a preamble which, if stricken out, will leave an unmeaning resolution? By looking at the resolution you will find that it refers to the preamble, and if you strike out the preamble the resolution will have no meaning.

The VICE-PRESIDENT. The motion to strike out is clearly in order.

Mr. TRUMBULL. I have no objection to the preamble being stricken out, but I will not vote to strike out the preamble, if it is to leave an unmeaning resolution. If the Senator from Kansas prefers that the preamble be stricken out and will at the same time propose to alter the resolution so that it will read, "that the States of Virginia, North Carolina," &c., instead of the words "the States mentioned in the preamble," I shall have no objection to his motion; but I cannot consent to strike out the preamble and leave an unmeaning resolution. I presume he himself would not desire that.

Mr. LANE, of Kansas. "Sufficient unto the day is the evil thereof." I propose, if the preamble be stricken out, to offer then to amend the resolution to meet my own views on the subject.

Mr. TRUMBULL. I hope then it will not be stricken out.

Mr. SUMNER. I will simply observe that the motion of the Senator from Kansas, if it prevailed, would make nonsense of the resolution. I think, therefore, we had better vote against it.

Mr. LANE, of Kansas. Will not the resolution be in the hands of the Senate for amendment, if the preamble be stricken out? My object is to have the resolution amended to suit my own views.

The question being taken on the motion of Mr. Lane, of Kansas, by yeas and nays, resulted—yeas 12, nays 30; as follows:

YEAS—Messrs. Cowan, Doolittle, Hardan, Harris, Howe, Lane of Indiana, Lane of Kansas, Nesmith, Pomeroy, Ten Eyck, Van Winkle, and Willey—12.

NAYS—Messrs. Brown, Buckalew, Chandler, Clark, Conness, Davis, Dixon, Farwell, Foster, Grimes, Hale, Henderson, Hendricks, Howard, Johnson, Morgan, Morrill, Nye, Powell, Ramsey, Saulsbury, Sherman, Sprague, Stewart, Sumner, Trumbull, Wade, Wilkinson, Wilson, and Wright—30.

ABSENT—Messrs. Anthony, Carlile, Collamer, Foot, Harding, Hicks, McDougall, Richardson, and Riddle—9.

So the Senate refused to strike out the preamble.

Mr. COLLAMER. I now offer my amendment to strike out the preamble and the whole of the resolution except the resolving clause, and to insert:

"That the people of no State, the inhabitants whereof have been declared in a state of insurrection by virtue of the fifth section of the act entitled 'An act further to provide for the collection of duties on imports, and for other purposes,' approved July 13, 1861, shall be regarded as empowered to elect electors of President and Vice-President of the United States until said condition of insurrection shall cease, and be so declared by virtue of the law of the United States; nor shall any vote cast by any such electors elected by the votes of the inhabitants of any such State, or the Legislature thereof, be received or counted."

Mr. HARRIS. I propose to amend that amendment by substituting what I sent to the Chair.

Mr. COLLAMER. Before the amendment of the Senator from New York is read, I desire to modify my amendment, at the suggestion of the Senator from Ohio, [Mr. Sherman,] by inserting the words "or until they shall be represented in both Houses of Congress," after the clause relative to the condition of insurrection having ceased and been so declared by virtue of a law of the United States.

The VICE-PRESIDENT. The Senator's amendment will be so modified. The question now is on amending the amendment of the Senator from Vermont, by striking it all out and inserting the substitute proposed by the Senator from New York, which will be read.

The words proposed to be inserted by Mr. Harris were read, as follows:

"Whereas in pursuance of an act of Congress approved on the 13th day of July, 1861, the President did, on the 16th day of August, 1861, declare the inhabitants of certain

States, and among others the States of Tennessee and Louisiana, to be in a state of insurrection against the United States; and whereas, with a view to encourage the inhabitants of such States to resume their allegiance to the United States and to re-inaugurate loyal State governments, the President, on the 8th day of December, 1863, issued his proclamation, whereby it was declared, among other things, that in case a State government should be re-established in any of said States, in a manner therein specified, such government should be recognized as the true government of the State; and whereas the loyal inhabitants of the States of Tennessee and Louisiana, invited so to do by the said last-mentioned proclamation, have in good faith established State governments loyal to the United States, or attempted so to do; and whereas such loyal inhabitants at the recent presidential election have chosen electors of President and Vice-President, who have, in pursuance of the requirement of the Constitution, cast their votes for the President and Vice-President; and whereas doubts exist as to the validity of such election of presidential electors in the said States of Tennessee and Louisiana; and whereas it is well understood that the result of the presidential election could in no way be affected by the votes of the said States, whether the same be counted or not: Therefore,

“Be it resolved &c., That it is inexpedient to determine the question as to the validity of the election of electors in the said States of Tennessee and Louisiana, and that in counting the votes for President and Vice-President the result be declared as it would stand if the votes of the said States were counted, and also as it would stand if the votes of the said States were excluded, such result being the same in either case.”

MR. WILSON. There is a statement of fact in that proposition which I think is not a fact, and that is, that the State of Tennessee has established a loyal State government. There has been no State government established there, though I am told one will go into operation on the 4th of March.

MR. TRUMBULL. We all understand the question. Let her vote.

MR. HARRIS. I ask for the yeas and nays on my amendment to the amendment.

The yeas and nays were ordered; and being taken, resulted—yeas 12, nays 31; as follows:

YEAS—Messrs. Cowan, Doolittle, Farwell, Harris, Howe, Lane of Indiana, Lane of Kansas, Nesmith, Pomeroy, Ten Eyck, Van Winkle, and Willey—12.

NAYS—Messrs. Brown, Buckalew, Chandler, Clark, Collamer, Conness, Davis, Dixon, Foster, Grimes, Hale, Harlan, Henderson, Hendricks, Howard, Johnson, Morgan, Morrill, Nye, Powell, Ramsey, Sanbury, Sherman, Sprague, Stewart, Sumner, Trumbull, Wade, Wilkinson, Wilson, and Wright—31.

ABSENT—Messrs. Anthony, Carlile, Foot, Harding, Hicks, McDougall, Richardson, and Riddle—8.

So the amendment to the amendment was rejected.

MR. TRUMBULL. The practical effect of the amendment offered by the Senator from Vermont is the same as that of the resolution which has passed the House of Representatives. Under the operation of the amendment the electoral votes from the States named in the House resolution will be excluded, so that practically there is no difference between them as to the effect in canvassing the votes on Wednesday next. The Senator's amendment, however, goes a little further; it has the advantage of being a general proposition, as the Senator thinks; but when you come to scan it, it has no advantage in that respect, because you have to look to the proclamation to construe the Senator's amendment to find what States are declared in insurrection, and then the States are named; they are named in the proclamation just as they are named in the preamble of the House resolution, so that you come right around to the same place. The practical effect is precisely the same. There is this difference, however, between the propositions: the Senator's proposition is not limited to the case now in hand; if the rebellion should continue four years longer and until another presidential election is held, it would be in the power of the President of the United States, by a proclamation, to declare any State in the Union to be in a state of insurrection, and to prevent its voting at a presidential election. He could issue his proclamation and declare the State of New York, or any other State, to be in a state of insurrection; and under the amendment her vote could not be counted. I do not think it well to go further than the occasion requires. That is one suggestion that I make in reference to it.

Another is this: the House of Representatives have originated and passed this resolution; and unless something is to be gained by a change of its language it is not desirable to change it. The Committee on the Judiciary had this resolution before them, and although perhaps they would have preferred some change in it, they made none. The committee considered it carefully and recommended the Senate to adopt the resolution as it came from the House. They did propose a change in the preamble because they thought it would commit the Senate to a fact which some members of the committee desired not to be committed to. As it passed the House of Representatives, the preamble stated that these States, naming them, continued in a state of armed rebellion for three years, and were in such condition of rebellion on the 8th of November last. There was some dispute as to that among the members of the committee; and to avoid that, that por-

tion of the preamble was recommended to be stricken out, but the resolution itself was not interfered with.

Now, sir, inasmuch as the House has sent us the resolution in this form, inasmuch as the practical effect of the amendment offered by the Senator from Vermont will be precisely the same as that of the resolution the House have sent us, I think we had better adhere to the House resolution and the report of the Committee on the Judiciary. If the House had sent the proposition to us in this form, instead of the form in which they have sent it, I do not know but that I should have preferred to take that. As the question is now before us, and there is one objection that may properly lie against the substitute, I think we had best adhere to the report of the committee on the House resolution.

Mr. JOHNSON. I have an objection to the amendment proposed by the honorable member from Vermont, and I do not think I could vote for it if the proposition had come in that form from the House of Representatives. The act of July, 1861, does not state that there are any particular States in rebellion; it names no State at all. It only provides that when the President shall think that a state of insurrection exists he may proceed under the act of 1795 and declare that State to be in a state of rebellion.

Mr. COLLAMER. That is not it.

Mr. JOHNSON. I think that is it substantially. I do not think I can be mistaken about it; but if am mistaken as to that, I am certainly right in saying that that act does not name any particular State in rebellion. [Mr. Collamer nodded assent.] So far, the honorable member admits that I am correct in my recollection. Then they have been placed in the condition which the honorable member supposes would deprive them of the right of electing electors, by virtue of the President's proclamation issued under the authority of that act. We have left it to him, therefore, to say what States are to be considered as States in rebellion; and the proposition of the honorable member is that any States which he may have declared to be in a state of rebellion are to be considered, with reference to the power of electing electors, as remaining in rebellion until Congress by act shall declare otherwise or until the members elected from such States as Senators and Representatives shall have been admitted by both branches. That I understand.

Now, as I think—and I believe that is the opinion of the honorable member himself—these States have never been, in a constitutional sense, out of the Union; and they are to be considered, therefore, with reference to our power over them, as States in the Union. My idea is that if the President, by his proclamation issued in pursuance of the act of 1861, can deprive them of the right of electing electors, it is only because they are to be considered as in a state of rebellion; and if he can place them in a state of rebellion, why can he not say that that rebellion is terminated? Suppose the President had, by a proclamation issued before the 8th of November, announced to the country that the war, as against Tennessee, for example, was not to be carried on because the rebellion in Tennessee was put an end to; she was to be considered as in the Union. If my friend's amendment is the proper course to be pursued, she would not have been authorized to elect electors. According to that view, her authority to elect at any time afterward would depend upon the happening of one or two facts: either that Congress should have passed a law admitting Tennessee into the Union or declaring that the rebellion in Tennessee was terminated, or upon the fact that, in the absence of such act of Congress, Tennessee had elected Representatives and Senators, and each branch had received the members elected to that branch.

Now, Mr. President, suppose the President of the United States had declared that the rebellion in Tennessee was at an end, or, to put it stronger, suppose he had issued a proclamation before the 8th of November stating, and the fact was so, that the war had ceased in each one of those States which were declared by his proclamation, issued under the authority of the act of 1861, to be in a state of rebellion; suppose we all knew that; suppose every Senator here was satisfied that the President's proclamation was true in point of fact, that war had terminated, that the authority of the United States in these States was restored, and just as effectually as it existed before the rebellion was inaugurated, and Senators from those States had come here properly appointed by the Legislatures of the States; are we prepared to say that we would not receive them unless the other House should have received the members, or would the other House be willing to exclude members elected under such circumstances until the Senate should have declared that it would receive the Senators elected under the same circumstances? My idea is that all that is necessary in order to entitle those States to be represented, either in the electoral college or in Congress, is the fact that at the time the members are elected to one House or Senators are appointed to the other, the rebellion should have then terminated, and that peace should have been restored, the authority of the Constitution re-instated.

If I am not right as to that, it is because the opinion which I stated just now (and in which I believe the Senator from Vermont concurs, to a certain extent at any rate) is erroneous. Are the States out of the Union? I say they are not. If the States are

still in the Union, just as much a part of the United States as they ever were—a position demonstrated by the fact that we are carrying on the war in order to force them to yield upon the hypothesis that they are in the Union—if that proposition is right, that the States are in the Union, it must be true, as I think, that they have a right to elect Representatives and Senators the moment the contingency has happened that puts an end to the obstacle which, as long as it continued, deprived them of the authority to elect; that is to say, on the termination of the rebellion. If my friend is right Tennessee may have yielded, every man in it may have yielded long before the 8th of November; all the courts of the United States may have been again organized; the whole authority may have been re-instated; and yet she would not be entitled to appoint Senators or to elect Representatives until Congress should declare that the rebellion was ended as to her, or until both Houses should agree to receive Senators and Representatives. Now, I submit to my friend from Vermont that if he concurs with me in thinking that these States are now in the Union, a proposition like that is notoriously in conflict with that opinion; and I hope, therefore, with due deference to the better judgment of the honorable member who moves the amendment, that it may not be adopted, but that, on the contrary, we shall adopt the proposition as it came from the House of Representatives and as it stands amended by the report of the Judiciary Committee of the Senate.

MR. COLLAMER. Mr. President, I understand that this resolution, as passed by the House of Representatives, has already been amended in the Senate on the recommendation of the Committee on the Judiciary. Then it must go back to the House of Representatives for action. Having already been amended by the Senate, it will have to receive action again in the other House, and the amendment which I propose, if adopted, will not alter that condition. There is, therefore, no objection to my amendment on that ground.

In the act of 1861 Congress did not attempt to declare any particular State to be in a condition of war or insurrection. That act was drawn with care, and was intended to be so. It states a condition of things, and declares that when that condition of things arises in any State, in that contingency the President may issue his proclamation declaring the inhabitants of that State to be in a condition of insurrection, and thereupon the consequences are to ensue which are stated in the act, the consequences of a state of war. Congress alone under our Constitution has the power to declare war, and therefore Congress alone is to define what shall be a condition of war with any of our own States. In fact, there may be a war of our own States against the Government, as we have experienced sadly, and of course, therefore, there may be a war of the Government against them. I say Congress is to declare when that condition of circumstances exists; and Congress did it in the act of 1861.

I dislike the proposition contained in this House resolution, because by it Congress undertakes to exercise the power of declaring now, and in relation to a pending election, that the votes of particular States, by name, shall not be counted, because those States are in a condition of insurrection. I dislike to undertake to legislate for a State by name particularly, as I have before stated to the Senate. I want a general law on the subject. The act of 1861 was a general law by which all States were subjected to its operation in the same contingency. It seems to me that Congress, who defined in the act of 1861 what should be a condition of things which would put the inhabitants of a State in a state of insurrection against the Government, can alone define and decide upon that condition of things which shall restore a State to its allegiance. The decision must be by the same body, the same power. I know in relation to foreign nations that if we have a war with them declared by Congress, the President, with the concurrence of two-thirds of the Senate, may make a treaty of peace; but even in that case, there is the intervention and the exercise of power by one branch of Congress, the legislative department. But it seems that some gentlemen imagine that when we have made a law declaring the circumstances and contingencies which shall create a condition of insurrection and war on the part of States against the General Government, that condition may cease by the decision of the Executive, without any intervention of the power which created it. That does not seem to me to be so. A treaty of peace cannot be made with the insurrectionary States. The President cannot negotiate a treaty of peace with Mr. Davis or anybody in the South. No such treaty can ever come before the Senate. If you treat with them, you acknowledge their power as a nation; you acknowledge them as an independent power. No such treaty ever can be made. The declaration made by the act of 1861, which the Supreme Court of the United States has decided amounted to a declaration of war, was an act of the Legislature; and inasmuch as the treaty-making power cannot make a treaty of peace in this case, I think the legislative power should be exercised in declaring the restoration of the condition of peace, in declaring when, in the judgment of Congress, we have reached a cessation of the condition of insurrection. Congress has power to put an end to the old condition, or both Houses by receiving members from those States decide in effect that the condition of war has ceased; but, in the mean

time, until that does take place, I think the people in such a State should not be exercising the powers of the inhabitants of an independent State of the Union.

I propose to do this thing by the exercise of the same power which created the existing condition of affairs in the act of 1861. I wish by the law to state the condition, and to let Congress decide upon the condition of things which will restore the States to their former relations. That should be done by the two branches of Congress, either by the passage of a law or the admission of members. That seems to me to be untying the knot in the manner in which it was tied.

For these reasons, and because I want the law to be a general law like other laws for all States in the same contingencies, I prefer the amendment which I have presented. The suggestion of the honorable Senator from Illinois, that the President might declare a State to be in a condition of insurrection in order to prevent her voting for President, is to me too distant, too improbable, too extravagant a supposition for anybody to present it as an argument.

Mr. LANE, of Kansas. I desire to ask the Senator from Vermont a question, and before doing so I will make a statement. It is my purpose to recognize the State government of Tennessee, Louisiana, and Arkansas, and to vote for the reception of the Senators from those States whenever they present themselves. Suppose we adopt the amendment of the Senator from Vermont to-day, and Senators from those three States present themselves to-morrow for reception here, and the members of the other House present themselves to that House, is there anything in this amendment to preclude such action? Will the reception of those Senators and Representatives re-instate those States in the Union as they were before they rebelled?

Mr. COLLAMER. The gentleman has put this question very candidly and he is entitled to as much of an answer as I am prepared to make. The adoption of my amendment would in no way in my estimation embarrass the question which the gentleman puts, or any action which Congress might take upon it. To be sure it would do what it says, shut out the electoral votes which have been cast in any of these States heretofore in the *interim*; that is all.

I will say, further, that in deciding upon receiving Senators from any State which has been in a condition of insurrection, I do not think it is necessary that there should be a law like that which is ordinarily passed, called an "enabling act," to enable a Territory to form a State government. I do not think it needs any new law of Congress to enable the people of any one of the States which are in insurrection to lay down their arms, go home, and submit to the operations of the General Government, re-organize their State government, and present their Representatives for admission here. I say it requires no previous law of Congress to enable them to do that. Indeed we have decided repeatedly in Congress that it needs no enabling act to enable a Territory to form a State government. If they do meet in convention, and do form a State constitution, republican in its form, and actually elect their members and Senators under it, Congress has recognized such States and received those Senators and members elected before any act was passed on the subject by Congress. No doubt in my mind the same thing may be done here. If we are satisfied that the re-organization is substantial and abiding, that it has been fairly made, and that it will answer the ends of re-organization, undoubtedly we may admit, by our act here, the Senators, and the other House may admit the Representatives, without any previous action of Congress about it. I think the gentleman has my whole answer.

Mr. POWELL. Allow me to ask the Senator a question. If the Senate were to admit the Senators from those States, and the other House should admit their Representatives, then would the electoral votes be counted in elections held hereafter unless Congress should pass a law preventing it?

Mr. COLLAMER. Certainly. And I have put in my amendment the very words that they shall not cast electoral votes until either their condition of rebellion has been declared to cease by virtue of a law of Congress, or their members are admitted to seats in both branches of Congress.

Mr. POWELL. I was not aware that the latter provision was in the amendment.

Mr. COLLAMER. I have made that modification.

Mr. POWELL. Was it proposed to-day?

Mr. COLLAMER. Yes, sir.

Mr. POWELL. I was not aware of it.

Mr. COLLAMER. I am free to acknowledge that I prefer the proposition in this form so that this law, when passed, shall stand consistently with the laws we have heretofore enacted. And I wish it to stand in a shape requiring that the members shall have been admitted in both Houses. I do not want a quarrel and controversy got up by a possible supposition of the two Houses differing on the question.

Mr. POMEROY. I do not yet understand the Senator from Vermont to have answered the question whether he would receive members from States declared to be in insurrection, and admit them here, unless there was a previous act of Congress or proclamation of the President removing the restriction. Would he receive Senators while there was non-intercourse between the States they represented and the other States?

Mr. COLLAMER. I thought I had answered that, and I think if I had been listened to attentively it would be found that I had answered.

Mr. POMEROY. I listened attentively.

Mr. COLLAMER. I resembled the case, for it is the nearest parallel I can make, to the case of a Territory which organized a State government and sent representatives here.

Mr. POMEROY. There is no non-intercourse proclaimed with Territories.

Mr. COLLAMER. That makes no difference as to this point. Here we have prevented commercial intercourse because of the existence of a state of war. Though the people of a Territory had no right to elect a Senator when they did elect him in the case I have mentioned, and though they had no right at that time to elect members to Congress, yet if they did make a constitution and did make those elections, and Congress afterward by law ratify what they have done, it is all well enough. Just so here; though these States have not by any previous legislation of Congress been declared to be out of the condition of insurrection, yet if they are so in point of fact, and it turns out that they have regularly re-organized a loyal State government under the United States and made elections accordingly, and Congress on examination become satisfied of that, find that to be true, and that the government they have formed will answer all the purposes of a State government and can be perpetuated, and Congress then admits their representatives, that is the end of it. My amendment is that when their representatives are admitted by the two Houses their electoral votes shall be received.

Mr. COWAN. I should like to know, after we authorize the President by proclamation to cut off all commercial intercourse with the rebellious States, whether the President himself, without any further act of Congress, cannot restore that commercial intercourse; whether, as fast as the rebellion disappears before the advance of our armies, this intercourse is not restored in the same proportion? I think the honorable Senator's view of it involves a *non sequitur*. Because we have authorized the President to cut off intercourse with these States, it does not follow that it will require another law to restore it. It restores itself, of itself, the moment the rebellion has been put down. It comes back of itself; it is the natural condition which was disturbed and deranged by this abnormal state of affairs which the rebellion introduced; it is not necessary that there should be any further legislation in order to bring it back to the healthful and ordinary condition.

Mr. JOHNSON. When I was up before I had not the act of July, 1861, before me, to which my friend from Vermont has referred. I have it now, and I think it will be found entirely inconsistent with the proposition which his amendment includes. I understand his amendment to be that no votes, either cast now or cast hereafter for electors of President and Vice-President, are to be counted until either Congress shall by law declare that the States are to be considered as States in the Union, or until both branches of Congress shall have received the representatives who may have been elected by the inhabitants of such States. The proclamation to which my friend refers is the proclamation which the President was authorized to issue under the authority of the fifth section of the act of July 13, 1861.

A majority of the Supreme Court decided that war existed between the United States and the rebellious States just as efficiently before the act of July 13, 1861, was passed, as afterward. The only difference between the judges was whether it was to be considered as existing until the act of July 13 was passed; but the court decided that it would have been perfectly immaterial whether the act of July 13 had been passed at all; and the majority who held that opinion said that after the act of 13th of July was passed there could be no doubt of the question, because that act recognized a state of war. The minority of the court was of opinion that until the act of July 13 was passed, it was to be considered merely as an insurrection, not affecting at all the political relation existing between the States in rebellion and the rest of the States. The act of July 13, in the section which alone applies to the case, merely says:

"That whenever the President, in pursuance of the provisions of the second section of the act entitled 'An act to provide for calling forth the militia to execute the laws of the Union, suppress insurrections and repel invasions, and to repeal the act now in force for that purpose,' approved February 28, 1795, shall have called forth the militia to suppress combinations against the laws of the United States, and to cause the laws to be duly executed, and the insurgents shall have failed to disperse by the time directed by the President, and when said insurgents claim to act under the authority of any State or States, and such claim is not disclaimed or repudiated by the persons exercising the functions of government in such State or States, or in the part or parts thereof in which said combination exists, nor such insurrection suppressed by said State or States, then and in such case it may and shall be lawful for the President by proclamation to declare that the inhabitants of such State, or any section or part thereof, where such insurrection exists, are in a state of insurrection against the United States; and thereupon all commercial intercourse by and between the same and the citizens thereof and the citizens of the rest of the United States shall cease and be unlawful."

How long? Until Congress shall declare that the condition of hostility no longer exists, or until the President shall declare that it no longer exists? No, but—

"Shall cease and be unlawful so long as such condition of hostility shall continue."

So that, looking to the mere words of the act, and looking to the constitutional authority of Congress, and consequently the duty of Congress, the moment the insurrection ends, or, to use the language of the act, the moment the hostility ceases, then the commercial intercourse begins again, and that beginning, the State is back in the Union for all purposes. Now, therefore, the only question is, (as that act does not provide that the state of hostilities is to continue until Congress shall, by some act thereafter, declare that such hostilities have terminated,) whether the act itself, with reference to the provisions contained in the fifth section, does not expire upon the happening of the contingency of the cessation of hostilities. How would that be in a certain state of things that can well be imagined?

That act was passed on the 13th of July. The President, some time in August, issued a proclamation stating that these States were in a state of insurrection. Suppose soon after that, Congress having adjourned and not being in session, every man in each one of these States so declared to be in hostility to the United States had laid down his arms, ceased to carry on any hostile proceeding against the United States, would they not be entitled to the benefit of the Constitution of the United States until Congress should meet in the following month of December and by act of Congress declare hostilities to have terminated, or until the two branches should have received the members?

I submit—of course with due deference, because my friend from Vermont entertains a different opinion—that the moment that in point of fact hostilities have ended, the rebellion is at an end; and the moment the rebellion is at an end the States are back. My friend tells us, and tells us very properly, that in the case of an international war once properly commenced, it cannot be terminated by any treaty which does not receive the sanction of the Senate of the United States. This is all true enough, but the war may terminate long before any treaty is made.

Suppose that during the last war with England she had withdrawn all her armies, had pronounced her determination through her Parliament that as far as she was concerned she wished to be considered at peace with the United States, would not the war in point of fact have terminated, although there was no treaty of peace? The Constitution provides that Congress shall declare war. Suppose they do not declare war, may not war exist in the absence of a declaration? Certainly it may. That the courts have decided over and over again. And if war can commence by the happening of hostilities in point of fact, and be accepted by the President in defending the nation under his authority to see that the Constitution and laws are faithfully executed, why cannot the war be terminated in point of fact, even an international war? But in relation to a war of this description, as I stated just now, there can be no doubt on that point. Congress has no constitutional right to carry on a war against States. If my friend will look at the decision in the prize cases he will find that the majority and minority both admitted that there is not in Congress or in any department of the Government any power to declare war as against a State. It is not provided for in the Constitution. The whole authority that Congress have on the subject is under the power to suppress insurrection. Whether in suppressing insurrection the insurrection may culminate to such a point as to amount to war in the meaning of the prize law, is another question; but so far as the declaration of war is concerned, there is no authority at all in Congress, or in any other department of the Government, legislative or executive, to declare war against a State.

Then what is the authority, the sole authority? To call out the militia and the forces of the United States to put down insurrection. How long does that last? Only so long as that insurrection continues. That must be very clear. How was it with what is called the whisky insurrection? It did not go to the extent that the courts or the President would have been authorized to say that a state of war existed between Pennsylvania and the United States. Congress did not declare that the insurrection was at an end; nothing like it. The President declared it. It ended itself. The insurrectionists laid down their arms, expressed willingness to yield obedience to the authority of the United States, and that ended the insurrection and disbanded our forces, and that happening, the State of Pennsylvania, every part of it, stood exactly in the relation, for all purposes, in which the State and every part of it stood before the insurrection was commenced. There is in the Constitution no power to declare war against the State of Tennessee, (to take a single case,) and nobody, I suppose, will say that there is. The Constitution never contemplated such a contingency. It was proposed in the convention, but it was objected to upon the ground that a provision of that description would place the United States in their relation to the State against which war was declared as a foreign nation for all purposes, and carry the State out of the Union. The answer was that all that was necessary to have accomplished what could be accomplished by giving to Congress the authority to declare war against a State, was to make each citizen of the United States amenable to the Constitution and laws of the United States, and to empower the Government to put down insurrection.

That being my view, I maintain, I repeat it again, (with great respect for the oppo-

site opinion entertained by the honorable member from Vermont,) that if these men were to throw down their arms to-morrow they would be in the Union, and we have no authority to keep them out. The authority to keep them out now is because of the insurrection, and because of our authority by force of arms to put down that insurrection; but, the insurrection terminating, they stand as they stood before.

MR. CLARK. I suppose the Senator would not insist that this vote should be counted even if they did throw down their arms.

MR. JOHNSON. Not at all; by no manner of means.

Now, Mr. President, a singular state of things is existing at the very moment I am speaking. The President of the United States, under the authority of the act of 1861, has declared these States in a state of insurrection, and we have hundreds of thousands of men upon the field of battle. What is said to be the case? Officially or unofficially he sends or authorizes to go to Richmond a very respectable gentleman, as it is supposed to ascertain upon what terms this war can terminate, or, to state it in different words, on what terms or conditions this insurrection can terminate. He goes. He is said to have returned. While there he had an interview with these rebel authorities. He returns. He goes back again in a Government vessel. Did he, after his return, and before he went back to Richmond, have an interview with the President of the United States? If so, what was the result of that interview? We do not know, but we may have our speculations about it. Suppose that in that interview, acting under an express authority from the confederate authorities, he informed the President of the United States that they are willing to lay down their arms now, and come back into the Union at once; that they are willing to admit that slavery is either actually abolished by force of his proclamation, or that it has been abolished to the extent that your armies have gone and you have got actual physical possession of the negro; and that they are willing to leave the question of the effect of the proclamation over such portion of the slaves as have not come within the possession of the military authorities of the United States to be passed upon by the courts. The President, it is said, is willing to do that. He has said that more than once.

Suppose, further, that they are willing—I am dealing in speculation, but I believe to a certain extent it is right—suppose they are willing to say, “We assent to coming back to the Union to be governed by any constitutional amendment which may be now in progress, or which may be started hereafter, abolishing slavery throughout the United States;” and the President says, (for no treaty is necessary,) “I agree; I am warring against you exclusively under the authority of the act of the 13th of July, 1861. I agree to that; if you will throw down your arms and express a willingness to abide by the decision of the courts on all questions of doubt in relation to the continuance of slavery, if you will not claim the right to have restored to slavery those who have enjoyed even for a moment the blessings of freedom, and you are willing to stand by any constitutional amendment upon that subject which may be adopted by the required number of States, come back, come back, for I have no right to carry on the war further; the war ends of itself.” It would be, in my view, upon the part of the President murder if he authorized a single man to be shot upon the field of battle or otherwise after such a state of things as that should arise.

Suppose—and no doubt that will be a condition if we are to have peace, and I pray to God we may have it—these gentlemen should say further that there is one condition which must be understood between us. Suppose they should say (and I believe it is true of some of them) they have honestly believed that the right of secession exists. Gentlemen are not to forget that upon that question some of the best minds in the country, North and South, have held different opinions. Many of them have entertained that opinion. I think it is a terrible heresy, as the result has proved, a most pestilential heresy, a destructive heresy, but it was earnestly entertained. The President of the United States himself, when he was in Congress in 1845 or 1846, if he meant what his words stated, entertained it. Some of the leading presses of the country at the North have entertained it. I mention it not for the purpose of giving it any little support that it might possibly derive from any opinion of my own upon it, or weakening it by the expression of an adverse opinion, an opinion which I have sincerely entertained from the time I was capable of thinking; but I cannot be blind to the fact that some of the best men of the South, patriotic men, were of that opinion; and the inhabitants of the South to a great extent, and particularly the young and ardent who thought they were the salt of the earth, because of the existence of the institution of slavery, and that there could be no civilization without it, have been made to believe that the doctrine was a sound one. They have seen their error. God knows they ought to have seen it. They see it now in its recognition in their own constitution. They are threatened now with destruction, with dissolution, because they have incorporated that doctrine in their constitution. They see—and God be praised that they have been made to see it—that the resolution of the country is so perfect, and the devotion to the Union is so absolute, that, happen what will, we of the loyal States mean to prosecute the war to the end until the insurrection is put down, which has no other foundation in point of law than the assumed right of secession.

Now, suppose that these commissioners who are said to be with the President—Stephens, who denounced secession and predicted almost in words what the South has suffered; Hunter, who never was a party to it; Campbell of the Supreme Court, who I know, whatever his opinions may have been when he was at the bar of Alabama, after he came to be a member of the Supreme Court and it was his duty to study the decisions of that tribunal to make himself fit to discharge its eminent duties, and after he became eminently capable thought it was the vilest heresy that ever entered into the imagination of man, but was carried away by circumstances surrounding him—suppose they come and say to the President and say to us, “We know that the whole thing has been wrong; we see the horrors which have resulted from it. To say nothing of the consequences to the North, which are comparatively trifling, we cannot look upon our own fields, our own States, and our own homes without feeling that we have committed the error of our lives and sinned against the God of justice, whose judgment it has been to visit us with these horrors. We see it all; we know that we have been led astray by a few master-spirits; but we feel in honor bound to stand by them. We ask therefore a general amnesty; pardon all.” Suppose the President says—and he has a right to say it under the authority with which he is clothed, the pardoning power, these men being offenders against their duties as citizens and having committed treason, he has the power to pardon them—suppose he says, “I pardon all.” He issues the amnesty proclamation to-morrow, announces that the rebellion is ended, the insurrection terminated, and upon terms honorable to the United States. The plea upon which it rested for its justification constitutionally is withdrawn. They confess it has no foundation. They are back. Can you say that he has not the authority to do so? We have not the authority; it belongs to him, and it is for him to decide when he will exercise it. He turns to the act of 13th July, 1864, and he finds that the termination of his power to use the Navy and Army of the United States and the militia of the United States to put down the insurrection is the termination of the insurrection, and he comes back to the seat of Government and announces to the constituted authorities of Congress and the country that the war is over. What are we to say? It is not necessary to consult us; I mean in point of law. The manner of doing this is quite another thing. I have my own opinion about that. I do not choose to express it here.

But suppose he comes back and issues a proclamation such as I have indicated—and God grant that he may, provided the terms be honorable and fair—and communicates the facts to Congress, what are you going to do? Why, Senators, what happened the other day? It was shown that notwithstanding the arts of the traitor and the demagogue, no length of time will be sufficient to exclude from the bosom of Americans the affection which they hold toward each other and toward their country. These commissioners it was known had left Richmond on their way here upon some mission of peace. They first went through the lines of their troops. How did they go through? Amidst the huzzas and gladdened shouts of the thousands and thousands of men who are there in battle-array against the opposite foe. They passed their lines; and we are told by the Richmond press that the moment the news reached the Army of the United States, the soldiers cheered universally until each man grew hoarse. Cheered for what on either side? Cheered because they saw, as they thought, that the war which had made them enemies was about to terminate; that the ancient brotherhood was to be restored; that they should no more meet each other in battle-array, or in the grasp of death, to do all they could to murder each other; but that the time was approaching when they could embrace each other as brethren and as American citizens.

MR. CONNESS. Will the Senator permit me to ask a question?

MR. JOHNSON. Certainly.

MR. CONNESS. How does the Senator know but that the southern army, so called, cheered because they believed that those commissioners were going to arrange the terms for their independence, as they term it? And how does the Senator know but that our Army cheered because they believed the commissioners were going to acknowledge the power of the Union and the supremacy of our flag?

MR. JOHNSON. I do not know. I think I have already stated that I do not know anything about it. But how does the honorable member know that they did not? If both sides cheered, the probability is that they were cheering for the same purpose. But let me answer the honorable member. The southern soldiers, and particularly the officers, are not so besotted as to believe that this war is to terminate by the recognition of their independence, particularly at this time. The armies of the Union and the navies of the Union are triumphant everywhere. Victory perches upon our standard in every battle-field and upon every naval encounter, and these men know that. Jefferson Davis, or those in authority, never would have authorized commissioners except under an authority to yield their asserted independence and to recognize the continuing integrity of the Union.

MR. HOWARD. If the Senator will permit me—

MR. JOHNSON. I would rather not be interrupted now.

MR. HOWARD. Very well; I merely rose to ask the Senator a question for information.

Mr. JOHNSON. I have only a word or two more to say.

Mr. CONNESS. I ask the Senator's pardon for having interrupted him.

Mr. JOHNSON. Not at all. I am perfectly willing that either of the gentlemen should rise and put any question to me, and I only objected to the honorable member from Michigan because I was about to close. I will not postpone any question put to me for any length of time.

But suppose we do not know for what they were cheering. Have we any right to suppose that the fact is not as I have stated? Is it so improbable that no sane man could suppose they were cheering for such a thing?

Mr. COLLAMER. Perhaps they were cheering at the idea that they would be able to go home in peace.

Mr. JOHNSON. I have no doubt about that. I refer to this, Mr. President, simply for the purpose of showing that no matter what has happened in the past, no matter how bitterly we have felt toward the South, if we have felt bitterly toward the South, and no matter how bitterly they have felt toward us, as certainly they have, all the indications are that they have seen the error of their ways; and if, having come to that conclusion, they throw down their arms, and the President declares by his proclamation of amnesty that they are all pardoned, and announces to the country that the war is at an end, you may pass as many acts of Congress to raise troops to carry on the war as you please, and you will not get a man. The hearts of the people would rebel at carrying on an unnecessary conflict with those who have stood shoulder to shoulder with us in some of the most trying periods of our history, carrying with us the standard of the Union upon every battle-field, contributing to our glory, and sharing with us in that glory. They never will consent, and God forbid that they should, to carry on the war a moment after, in point of fact, obedience has been yielded by these men, criminal or mistaken, and the authority of the Union restored everywhere throughout the country, and the flag floating upon every place on which the flag could properly float.

I have been led into this discussion by my desire to meet the authority of the honorable member from Vermont, and nobody yields to it with more pleasure than I do, who seems to contend that this war must go on until the insurrection is declared to be terminated by Congress, or until Senators and Representatives have been received in the Senate and House of Representatives under the act of July 13, 1861, because, by my interpretation of that act, the President has no power to carry on the war an hour after he is satisfied that the hostility which authorized him to employ the Army and Navy has terminated. Once terminated, for all the consequences he is responsible to the country.

IN SENATE, *February 4, 1865.*

The Senate, as in Committee of the Whole, resumed the consideration of the joint resolution (H. R. No. 126) declaring certain States not entitled to representation in the electoral college.

The VICE-PRESIDENT. The pending question is on the amendment proposed by the Senator from Vermont, [Mr. Collamer,] and upon that question the Senator from Vermont is entitled to the floor.

Mr. LANE, of Kansas. Before the Senator from Vermont proceeds, I desire to ask for the yeas and nays upon his amendment.

The yeas and nays were ordered.

Mr. COLLAMER. Mr. President, I think any man must be exceedingly dull who would not have understood from the hints and remarks made this morning in relation to this topic that the Senate are very impatient for a vote. I do not blame them for being impatient. But, rising as I do to reply to the speech of the honorable Senator from Maryland, [Mr. Johnson,] delivered yesterday, I will not promise that I shall be able to gratify them with even my usual brevity. I will endeavor to be as brief as I can in justice to the subject.

In the first place, Mr. President, there perhaps is due from me to that honorable Senator some little notice that I am not entirely insensible to what he has on this and other occasions permitted himself to indulge in in his remarks with respect to my professional ability and discernment. I have never made any reply to them, but at the same time I wish it to be understood that I am not entirely ungrateful or insensible to such remarks. I will merely say that the opportunities I have had to inform myself in relation to the honorable Senator's high acquirements in his profession, in his legal acumen, and the perspicuity of his logic have given me a very high appreciation thereof. If I were to say merely that I reciprocate the sentiments he has expressed, and entertain a sincere respect for his professional superiority as high as he entertains of mine, he might consider it at least but a questionable compliment; but I will add to it that I have as high an estimation, and even higher, of him than he has thought proper to express in relation to me. I think that ought to be satisfactory.

But, sir, after all, I could not but observe that the honorable Senator, when speak-

ing in that manner, very courteously and very kindly, always accompanied it with an argument of great weight, coming from him, to show that the positions I took were wholly untenable. How much, therefore, the respect that is paid to my opinions is worth when accompanied by such sort of argument, he and other gentlemen can answer for themselves.

Mr. President, the amendment which I have proposed has in it one very important feature, to which the gentleman has addressed himself; and that is, that the States which have been declared in a state of insurrection are incapable of exercising their privileges or their duties within this Government as integral parts of this Union while they continue in that situation, and that their restoration shall be either by an act of Congress or by the reception of their representatives by the two Houses. That involves this point: whether Congress have anything to do in the matter in relation to the reorganization and re-establishment of these States. The Senator seems to think not; and he goes on to make some remarks which I will not attempt to repeat, but the substance of them is that they are States in the Union—I agree to that—and, being in the Union, if the hostilities cease there is an end of all action about it; they are remitted to all their rights, and may exercise all their functions as integral parts of this Government without the consent of this Government one way or the other. There I dissent.

The gentleman says that a war may exist without any declaration of war. I agree to that. He says that if Great Britain should wage a war upon us, and were in the exercise of that war, it would be a war though we had not declared it, nor they either. I grant it. He then says that if they should upon the whole surcease that war, withdraw their military force, and Parliament should declare that they were no longer in a state of hostility with the United States, that that would be an end of that war. There is exactly the point where we differ. That is exactly the point where we separate. I know that one party between two or more nations may make a war, but I say that both parties are required to make peace. If Great Britain were to actually levy war upon this country, besiege our cities, lay waste our coasts, capture our vessels, and then, when we had undertaken to defend ourselves with some success, they should withdraw from it, and declare to the world that there is peace between us, that would not be peace, nor would that war be ended. I insist that both parties must agree to the peace, and that the surcease of hostilities by one side does not end the war. Every nation undoubtedly has the right in a state of war, when negotiating for peace, to insist upon indemnity for the past and security for the future. If one party can make a war and make a peace when they please, without the consent of the other party, then neither of these rights of insisting upon indemnity for the past or security for the future can any longer exist. I say that if Great Britain had made such a war upon us, we would not be obliged to surcease our hostilities in defense of ourselves and the capture of their vessels because they ceased, until we had made a treaty which gives us indemnity for their having made that unjustifiable war upon us. There is the exact point where we separate; and it is in the application of that same point to this war and its analogies that we differ again.

But the Senator says you cannot make war upon a State; they are now States in the Union, and if they surcease hostilities you cannot prosecute the war. I am not insisting that if these people lay down their arms and return peaceably to their habitations, the President can carry the war into their houses. That is not what I am talking about. I am talking about when and how the political status of these States is to be restored, and with whose consent it is to be restored. Is it true the right to make war in this country consists in the right of the States to make war upon the General Government, but the United States cannot make war upon them? Is it their peculiar privilege and exclusive right to make war upon the General Government? Cannot we do anything about it? Cannot we prosecute war against them? Is it their privilege to make war on the United States as long as they have a mind to do so, and when they become satisfied they are not getting along very well, they have nothing to do but to stop and begin it again when they please, renew it when they have a mind to do so, and it is all an *ex parte* proceeding, and the Government of the United States has nothing to do with it? I cannot agree to any doctrine of that kind.

But I desire to make a few remarks on this subject of making war upon a State. I have heard a great deal about that first and last. I do not know but I was to blame, when I first heard that doctrine brought forward by Mr. Jefferson Davis in the Senate, for not correcting him. He quoted from the remarks of Mr. Sherman, Mr. Madison, and several other members of the convention that formed the Constitution who stated that. They did state it; and Mr. Davis used to quote from them. I understood how that was then. It is true I did not at that time explain it. I did not suppose that other people would be misled by it; nor did I suppose that my explanation would ever reach the community, and perhaps never reach the Senate. The remarks I am now making not only will never be read and understood by the community, but will never be read and understood by half the Senate. But still I feel it my duty at this time

as that doctrine is repeated and those quotations are again alluded to, to make some explanation on that point.

Mr. President, you will observe, and any gentleman who chooses to examine into it will find, that Mr. Buchanan put into his last message that same doctrine, and alluded to the very quotations made by Mr. Davis. If you will read that message it will be perfectly apparent that that portion of it which says you cannot make war upon the States was interpolated into the message after it was drawn up. I do not mean clandestinely; I mean interpolated by the President. It is obvious from its connection that it is so. I know that while that message must have been in a period of preparation Mr. Davis returned from his excursion to Maine, where he had spent that summer; and that was the very ground and those were the very quotations which Mr. Davis had used in the Senate; and after his return here, as I think, it was put into that message at his suggestion.

Now, sir, it will be recollected that the Articles of Confederation were never adopted by the people. They never were a constitution; they were a league; and it was declared in them that the States should retain and continue their sovereignty; that it was a league for the mutual defense of the States against foreign powers. The States were represented in the Congress under the Confederation by their Legislatures appointing the delegates, and withdrawing them when they pleased; and that body had no power of making laws except on the single subject relating to piracy on the high seas. They merely made requisitions on the States that they wanted so much money and so many men; and the States agreed to furnish them, or did not furnish them, as they saw fit. It will be observed that each State had but one vote in the Congress of the Confederation; each had the same weight. When they came to get together in a convention to form a new constitution, the small States were very desirous of preserving the Articles of Confederation; of having a mere league; a mere treaty. They were unwilling to give up the weight which they had under the Articles of Confederation; and they therefore proposed that they should be amended so as to oblige the States to furnish their quotas. The question whether they should mend up the old Articles of Confederation, or form a government with all the functions of government, executive, legislative, and judicial, was the first great question before that convention. Even the State of New York, then counted a small State, was very persistent in favor of having the Articles of Confederation amended merely, and when it was finally resolved to abandon that project and form a government, two out of three of those delegates from New York, Mr. Lansing and Mr. Yates, went home and never returned again.

It was when the convention were debating that question that these remarks by Mr. Sherman, Mr. Madison, and others, which have been so often quoted, were made about making war upon the States. They said, "You cannot coerce these States to furnish their quota. Why? Because it is war; you can only do it by force. These Articles of Confederation are a treaty, a league between these States. It is the settled law of nations that a war between the members of one treaty always puts an end to all the treaty stipulations existing; and, therefore, if you make war upon one of these States under the Articles of Confederation to coerce them, that moment you end your Confederation, because it is war, and the war ends it." It is perfectly palpable and plain to me that with articles merely of association in the nature of a treaty between the States, that was strictly and literally true; it could not be done. All the remarks then made by those gentlemen, which are now quoted, were made as applicable to the condition of a league; and yet they are now quoted upon us as being applicable to the condition of a nation as it is now formed, of a national Government.

If we follow out the doctrines of these southern gentlemen who have seceded, they are not inconsistent, because they hold that we are nothing but a league now, and therefore the making of a war would end that league. They therefore are not inconsistent in it; but no man who views this as a government, with all the functions of government attached to it, and not a league, can quote with propriety those expressions as applicable to our condition. So much for that.

Now, Mr. President, there commenced an insurrection in this country. It never arose, perhaps, to the dignity of a war until the act of 1861 was passed. I know a majority of the Supreme Court decided that in relation to laying a blockade and the making of prizes, &c., that a war existed before that act of 1861 was passed; but all agree that after the act of 1861 was passed it took the character of war. What shape was it that it took? It was this: Congress declared that where there was an insurrection existing in a State claiming to act under the authority of the State, and the authorities of the State did not disclaim it and did not suppress it, in that case the President might declare the inhabitants of that State in a state of insurrection, and all intercourse between the inhabitants of that State and the inhabitants of the rest of the United States should cease. Observe, sir, they did not declare that the war was to be against men who were insurgents. It included all the people of a State whose authorities sustained the insurgency, whether they were loyal or disloyal people. That is the condition of things in a state of war in every country. It may be the misfortune of

the minority, but that is their unavoidable condition in time of war. This was declared to be a war with the whole inhabitants of that State. Then it was that it took, in relation to our inhabitants, its true character and condition of a war, and a war between those States, made by them through their functionaries and the body of their people against the General Government.

Such being the state of war, the question presents itself, When and how is that war to cease, and when and how is the formal political status of the States which are engaged in it, or the inhabitants of those States, to be restored, and who is to declare it? The gentleman from Maryland has argued at much length to show that under the act of 1861, if the hostilities on the part of the enemy stop, the President is compelled to stop hostilities on his part. I do not wish to make controversy about that. What if he does? I know that the President can withdraw all our forces from the Southern States to-morrow, if he pleases; he can withdraw all our ships from off the coast and order them to the harbor of New York or Boston. I know that military operations may cease altogether by his act. I know he may pardon all crimes committed against the United States, including treason. That is his power. But, sir, does that alter the condition of the political status of those States in their relationships to this General Government? Suppose the hostilities entirely cease; suppose the rebels throw down their arms and go home to their several habitations; there are in those States the functionaries of their government, their governors, their legislatures, all organized in this revolutionary operation and carrying it on; and is it true that they then have the right to send members to the Senate and House of Representatives, and if they have a right to send them, to demand their admission here, and we have nothing to say about it? Is it true that they may make war upon the General Government, carry it along as far as they please, then stop it, and we are obliged to receive them, until they have had time to revive their powers or resolution and start again, and we cannot help ourselves?

Sir, are there not two sides and two parties to this war? It is the strangest war men ever heard of if it has but one side to it. I take it there are two parties to this war: the several States who have made it, on the one side, and the national Government against whom they have made it, on the other; and I suppose the two parties must participate in the restoration of peace and quietness, and their restoration to their former condition, or a condition where they can perform their functions within the Government as integral parts of the Union. It is for Congress to say when that state of things exists. Congress is not bound to receive their members, or to treat them as being regular, loyal, integral members of this Union because they have succeeded fighting and succeeded military operations, until we have seen a return to loyalty and an obedience to their allegiance and the performance of their fealty, a true restoration of themselves to their former condition of loyalty and obedience: and that must be for Congress to decide. That is the main and essential sentiment of the amendment I have presented.

Sir, when will, and when ought, Congress to admit these States as being in their normal condition? When they see that they furnish evidence of it. It is not enough that they stop their hostility and are repentant. They should present fruits meet for repentance. They should furnish to us by their actions some evidence that the condition of loyalty and obedience is their true condition again, and Congress must pass upon it; otherwise we have no securities. It is not enough that they lay down their arms. Our courts should be established, our taxes should be gathered, our duties should be collected in those States; and before they come here to perform their duties or privileges again as members of this Union, they should place themselves in an attitude showing to us that they have truly taken that position, and we should pass upon it; and I insist that the President, making peace with them, if you please, by succeeding military operations, does not alter their status until Congress passes upon it.

The great and essential thing now to insist upon, in my judgment, is that Congress shall do nothing which can in any way create a doubt about our power over the subject. Indeed it is right to assert at the proper time that we have that power; and how, and when, and in what manner we shall execute that power is in the discretion of Congress. I do not mean to occupy very much time with that; but one thing I have to say: I believe that when re-establishing the condition of peace with that people, Congress, representing the United States, has power, in ending this war as any other war, to get some security for the future. It would be a strange thing if it were not true that this nation, in ending a civil as well as a foreign war, could close it and make peace by securing, if not indemnity for the past, at least some security for future peace. I do not believe that Congress is stripped of that power in relation to this or any other war; and here I do not wish to be understood as undertaking to assert the existence of such a power without some warrant in the Constitution.

The Constitution has in it what is well known as the guarantee section, by which this Government guarantees to every State in the Union a republican form of government. Now, what is implied in that? Several things which are quite obvious. In the first place, that guarantee can only be kept and redeemed by preserving the States within the Union. We cannot carry out a guarantee to States on any other ground than by having and keeping them within the Union. That is necessarily implied.

In the next place that guarantee is to the States as States. It is a guarantee to the State of North Carolina, for instance, that North Carolina, as a State, shall have a republican form of government within this Union; not to be taken and split up and made into different States, but it is a guarantee to that State as a whole State.

Another thing is implied. That is a guarantee to the minority in a State. No man who will read Mr. Madison's remarks upon the subject can be mistaken in that. The very nature of the thing implies that. The majority in a State can shape their form of government as they please without any help from Congress; but the provision was inserted from a fear that the minority might be overborne, especially, said Mr. Madison, in a slaveholding State. The guarantee was therefore inserted for the security of the minority in a State, though there may be but one man there to redeem Sodom.

Again, it is a guarantee from which the States can never discharge the United States. You may say that when they make war on us they discharge us from our obligation in the matter; but that is impossible. That guarantee is not merely for the people of that State; it is a guarantee made for the security of all the States of the Union. I have a right as a representative from the State of Vermont to say that the State of Vermont insists that you shall keep North Carolina in the Union; we formed it with her in it; we had that guarantee, that she should be kept in with a republican form of government, and we have a right to insist on the redemption of that guarantee. Therefore I say no one State can discharge the United States from it.

Such being not only the clearly-expressed guarantee but the plighted national public faith which we are bound to keep, let me put a case. Suppose in all candor that Congress had by experience become convinced that they could not sustain a State within the Union with a republican form of government, holding slaves; suppose we had tried it over and over, and we had beaten them and made peace with them, allowing them to keep their slaves, and they had repeated their rebellion over and over until every man became convinced that it was utterly impracticable and impossible to have a republican form of government under such an aristocracy as that engendered and sustained; and suppose Congress in all candor and seriousness became convinced that we could not keep this guarantee in relation to those States that hold slaves, and they, being at war with us, choose to lay down their arms or we beat them, disperse their forces, and a question arises about fixing the status of those States again, their political condition in relation to this Government, that is, making peace; I say that Congress has a right, if so convinced in all candor, to say that in order to preserve our plighted public faith contained in that guarantee we will destroy and abolish that institution; for we cannot keep our guarantee without doing it. Cannot Congress under the general provision of the Constitution make all laws proper and necessary to carry into effect the powers granted in the Constitution? Clearly. If that is so then Congress may, in fixing the status of these States, if they are convinced of the proposition I have just stated, make it one of the conditions of their again exercising their franchise as integral members of this Union, that they shall be placed in a position which will enable the Union to continue and exist.

Such being my view, it remains for me to say a few words about what the Senator said yesterday in regard to the present probability of peace. I know nothing about that. I have no admissions to the White House and no knowledge of proceedings there; but I guess, after all, I have about as much as some members of the Cabinet, [laughter,] and you know a Yankee is allowed to "guess." I have but little expectation of any present cessation of hostilities, even. I have before remarked that I do not think the mere cessation of military operations is necessarily a peace, nor do I think the political status of these States is thereby re-established. I think it requires two parties to make a peace. I know not what the President may do. I grant that the President may, if he sees fit, pardon all treason. He has that power. Whether he can really dispense with the operations of what is called the confiscation act, I do not know. I had but very little to do with that act, but I believe it provides for making confiscations by proceeding *in rem*, and trying a man without notice to him. I do not understand much about such proceedings or exactly know how far they may go. But it seems to me that, before the President can re-establish these States in the Union, performing the functions of loyal States within this Government and integral parts of it, somehow or other the action of Congress will be needed. That is the very point we have now in discussion, the very point I am after.

I think it does need the action of Congress. How will he get rid of that confiscation law by any action of his own? I surely do not know. Then a law has been passed with his approval declaring that persons who have been engaged in this rebellion are ineligible to appointments to office in this Government. I do not know but that perhaps he may get them in without having that law repealed by Congress, but I cannot tell how. So in whatever aspect you look at the case it is evident that no re-establishment of the former condition of things can take place without the action of Congress. There are many other acts of similar character which stand directly in the way of doing what the Senator from Maryland thinks can be done by the President. Put an end to the hostilities, and there, he says, is the end: the States are in,

and we have nothing to do with it; and he cannot support a resolution which declares that we have to do with it! I say we have to do with it; we are the other party in the war, and I think we must participate in the re-establishment of peaceful relations.

The power existing in Congress in the re-establishment of peaceful relations to annex such conditions as are necessary to our preservation and life, another question arises, when and how and in what manner you will exercise the power. Will you ever exercise it at all? Will you ever annex any such conditions? We are told by the papers, which seem to be very hungry for peace, and to be crying "Peace, peace, when there is no peace," that there is no need of saying anything more about the condition to which I have adverted, because the Senate and House of Representatives have passed a constitutional amendment, and that will accomplish the purpose. If I were entirely convinced that we could not sustain a republican government in these States and keep them within this Union in any other way than by having the institution of slavery abolished, and I was inquired of whether I would insist upon that as a prerequisite and condition-precedent to their re-establishment, I would say this: if I was perfectly convinced, fully satisfied in my own mind, that the constitutional amendment referred to would be adopted by the constitutional number of States, that would remove the occasion for the exercise of any such power on the part of Congress; but I do not know how that will be. That is a matter which lies in the future. Neither I nor any other man can tell when and how and in what manner it will take place, or whether it will ever take place at all. While things remain suspended in this condition I reserve to myself the right of exercising this power which I think in the extreme Congress constitutionally possesses. In what manner I shall exercise it will depend upon the occasion as it shall present itself. It will depend upon their desire to restore their former condition, how far they have returned to loyalty and allegiance, how far they have so shaped their institutions as to furnish security for the future that the peace would be kept. All these matters would have to be examined into in each case as it presented itself.

MR. DAVIS. I move to amend the amendment by striking out all after the word "that," where it first occurs, and inserting:

"The States of Virginia, North Carolina, South Carolina, Georgia, Florida, Alabama, Mississippi, Louisiana, Texas, Arkansas, and Tennessee are not entitled to representation in the electoral college for the choice of President and Vice-President for the term of office commencing on the 4th day of March, 1865; and no electoral votes shall be received or counted from said States concerning the choice of President and Vice-President for the said term of office."

The simple effect of my amendment to the amendment is to strike out the preamble and to leave the resolution just as the Committee on the Judiciary reported it. It seems to me that three-fourths of the debate that has taken place upon the subject has originated out of the preamble. I think that there is a clear, indicated majority of the Senate in favor of the resolution, and that the Senate are ready to vote simply on the resolution. I do not intend to prolong the debate. I merely rise to announce what will be the effect of the amendment. As I believe that the preamble has given rise to the great body of the debate that has already occurred, I propose to cut off further discussion on the preamble by moving to strike it out, and bring the Senate to act directly and simply upon the resolution.

THE PRESIDING OFFICER. (Mr. Clark in the chair.) The Chair will inquire of the Senator from Kentucky whether his amendment is a substitute for the original resolution and preamble.

MR. DAVIS. My amendment is an amendment to the amendment of the Senator from Vermont.

MR. TRUMBULL. I hope the Senator from Kentucky will not persist in his motion. We had a distinct vote yesterday on striking out the preamble. He and I desire to accomplish the same object. I think the debate is pretty much over, and if we can get to a vote we shall soon settle this matter, and it seems to me we had better adhere to the resolution as the Committee on the Judiciary have reported it back. There seems to be a disposition in the Senate to pass a resolution of some character, and we shall soonest accomplish our object by just voting for the proposition as it is. Perhaps it is not in the very best form. As an original proposition I cared nothing about the preamble, nor do I now, but still I think we shall the soonest get through by not offering amendments. I believe the Senate is about ready to vote; and the object to be accomplished seems to be acquiesced in, and that is, to prevent the counting of the votes of certain States.

MR. DAVIS. If the Senate will come to a vote without any further debate I will not press the amendment to the amendment.

MR. TRUMBULL. Let us try.

MR. DAVIS. Well, sir, I withdraw it, in the hope that we may come to a vote.

MR. SAULSBURY. I hope the honorable Senator from Kentucky will not withdraw it, but will accept a modification by inserting after "1865" the words "for the reason

that there has been no valid election or appointment of electors of President and Vice-President in any of those States."

MR. TRUMBULL. The Senator from Delaware will allow me to suggest that that is the very preamble now. Those very words that he proposes to put in are in the amendment reported by the Judiciary Committee.

MR. SAULSBURY. If that is so, very well. I was not aware of it.

MR. TRUMBULL. If the Senator will have the preamble read as it was concurred in in Committee of the Whole, I think it will satisfy him.

MR. JOHNSON. I am not about to continue the debate, but only to refer to a sentence or two in two of the books I have on my table. My friend from Vermont seems to suppose that what was said in the convention that framed the Constitution in relation to the use of force against States had reference alone to the States as they existed under the Articles of Confederation. He will find that Mr. Madison—I read from his Debates—in that convention, in speaking to what was proposed as a clause to be inserted in the Constitution, authorizing an exertion of the force of the whole against a delinquent State, spoke in this way:

"He observed that the more he reflected on the use of force the more he doubted the practicability, the justice, and the efficacy of it when applied to people collectively and not individually. A union of the States containing such an ingredient seemed to provide for its own destruction. The use of force against a State would look more like a declaration of war than an infliction of punishment, and would probably be considered by the party attacked as a dissolution of all previous compacts to which it ought to be bound."

Then he is speaking in reference to a proposed power in the Constitution of the Union, as we have it, to authorize the use of force against a State as such.

MR. COLLAMER. That was a proposition to carry into effect the Confederation.

MR. JOHNSON. No; it was in the convention to adopt the Constitution. But I will not fatigue the Senate by going further into that subject. I stated yesterday that both the majority and the minority of the judges of the Supreme Court, by whom the prize cases were decided, expressly negatived the idea of any authority to carry on a war or declare a war against any State of the Union. That will be seen first in the opinion of the majority on page 668, 2 Black's Reports, in which, speaking for the court, Mr. Justice Grier, who delivered the opinion, says:

"By the Constitution Congress alone has the power to declare a national or foreign war. It cannot declare war against a State, or any number of States, by virtue of any clause in the Constitution. The Constitution confers on the President the whole executive power. He is bound to take care that the laws be faithfully executed. He is Commander-in-Chief of the Army and Navy of the United States and of the militia of the several States when called into the actual service of the United States. He has no power to initiate or declare war against a foreign nation or a domestic State. But by the acts of Congress of February 28, 1795, and 3d of March, 1807, he is authorized to call out the militia and use the military and naval forces of the United States in case of invasion by foreign nations, and to suppress insurrection against the government of a State or of the United States."

And at page 693, Mr. Justice Nelson, who gave the opinion of the minority, says:

"The acts of 1795 and 1807 did not, and could not, under the Constitution, confer on the President the power of declaring war against a State of this Union, or of deciding that war existed."

And Congress has not undertaken to do it by the two acts referred to by the court or by the act of July 13, 1861. Those acts all profess to act exclusively under the clause of the Constitution which authorizes the employment of force to suppress an insurrection.

The subject has been fully discussed in Congress; on the questions in issue between my friend from Vermont he has said all that can be said on his side, and I have endeavored to say what I could on the other. I shall not, therefore, detain the Senate by any further discussion.

THE PRESIDING OFFICER. The question is on the amendment of the Senator from Vermont, [Mr. Collamer.]

The amendment was read, as follows:

"Strike out the preamble and resolution and insert the following:

"*Resolved, &c.,* That the people of no State, the inhabitants whereof have been declared in a state of insurrection by virtue of the fifth section of the act entitled "An act further to provide for the collection of duties on imports, and for other purposes," approved July 13, 1861, shall be regarded as empowered to elect electors of President and Vice-President of the United States until said condition of insurrection shall cease, and be so declared by virtue of the law of the United States, or until they shall be represented in both houses of Congress; nor shall any vote cast by any such electors elected by the votes of the inhabitants of any such State, or the legislature thereof, be received or counted."

The question being taken by the yeas and nays, resulted—yeas 13, nays 27; as follows:

YEAS—Messrs. Anthony, Brown, Clark, Collamer, Dixon, Farwell, Foot, Harlan, Howard, Lane of Kansas, Ramsay, Sumner, and Wilson—13.

NAYS—Messrs. Buckalew, Chandler, Conness, Covert, Davis, Doolittle, Foster, Hale, Harris, Henderson, Hendricks, Howe, Johnson, Lane of Indiana, Morgan, Morrill, Nye, Pomeroy, Powell, Saulsbury, Sherman, Stewart, Ten Eyck, Trumbull, Van Winkle, Wiley, and Wright—27.

ABSENT—Messrs. Carlile, Grimes, Harding, Hicks, McDougall, Nesmith, Richardson, Riddle, Sprague, Wade, and Wilkinson—11.

So the amendment was rejected.

The joint resolution was reported to the Senate as amended.

THE PRESIDING OFFICER. The question is on concurring in the amendment made as in Committee of the Whole.

MR. HOWARD. I understand that is an amendment by which a part of the preamble was stricken out. I ask for the yeas and nays upon the amendment.

The yeas and nays were ordered.

MR. HOWARD. I hope the amendment will be read.

The Secretary read the amendment, which was to strike out from the preamble the words "and have continued in a state of armed rebellion for more than three years, and were in said state of armed rebellion on the 8th day of November, 1864;" and in lieu of them to insert, "and were in such state of rebellion on the 8th day of November, 1864, that no valid election for electors of President and Vice-President of the United States, according to the Constitution and laws thereof, was held therein on said day;" so as to make the preamble read as follows:

"Whereas the inhabitants and local authorities of the States of Virginia, North Carolina, South Carolina, Georgia, Florida, Alabama, Mississippi, Louisiana, Texas, Arkansas, and Tennessee rebelled against the Government of the United States, and were in such state of rebellion on the 8th day of November, 1864, that no valid election for electors of President and Vice-President of the United States, according to the Constitution and laws thereof, was held therein on said day."

MR. POMEROY. I suppose it is in order to perfect the preamble before the question is taken on striking out?

THE PRESIDING OFFICER. It is in order to amend the amendment. The question is not on striking out the whole preamble.

MR. POMEROY. I propose to offer an amendment to which I think the chairman of the committee will not object; and that is, instead of saying that these States continued up to the 8th day of last November in such a state of armed rebellion that a valid election could not be held, to say simply that they were in such a condition that a valid election could not be held. My amendment is to strike out the words "state of rebellion" and insert "condition." These States were not all in rebellion then; but I will admit that they were in such a condition that they could not vote.

MR. HOWARD. I had supposed that the amendment suggested by the Committee on the Judiciary, on which we are now again to vote, was simply to strike out a portion of the preamble, and not to substitute anything in its place. I perceive that in that respect I was mistaken, and that there is a substitution of other words which satisfy me. I shall therefore vote for the amendment of the committee.

MR. TRUMBULL. I have no right to accept the amendment of the Senator from Kansas, which is only to insert the word "condition" in place of the words "state of rebellion," so as to declare that these States were in such a condition that no valid election could be held. I had no objection to that individually, and as it seems to be more satisfactory to some members of the Senate, and does not alter the meaning of the resolution or preamble, I shall not object to it. The preamble, if thus amended, will then read that certain States rebelled against the Government and were in such a condition on the 8th of November last that no valid election could be held. I am satisfied with that as an individual.

MR. COLLAMER. I do not see the propriety of this change. It says they rebelled at such a time and were in a bad condition on the 8th of November. What the condition was it does not state. Was it a bad condition of health?

MR. HALE. I think the history of the Senate affords a precedent for the phraseology that is to be used here. It was once stated in a certain case on the floor of the Senate that certain members did not belong to a healthy political organization. [Laughter.]

MR. POMEROY. The object which I desire to accomplish is a simple one. I do not like to state in the preamble what is not true. That the local authorities of these States did rebel against the Government four years ago I have no doubt; but that all of them continued that rebellion up to the 8th day of November last is not true, and there is no use in saying that it is. For instance, in the State of Arkansas—and the same may be true of Louisiana—the local authorities that rebelled have not been inside of the State within a year. Then how could they have been in rebellion in that State on the 8th day of November last? The progress of our armies has been such that they

were not there; and for us to say in this preamble that they continued in a state of rebellion up to that time is not true. I am willing to say that the disorganized condition of these States, and the fact that they had not been recognized by the General Government, left them in such a condition that it was not expedient to hold an election. I am willing to say that, because I think that it is true. The other statement is not true, and that is the reason I do not wish to make it.

THE PRESIDING OFFICER. The question is on the amendment of the Senator from Kansas to the amendment made as in Committee of the Whole.

MR. JOHNSON. With due deference to the Senator from Kansas, I beg to say that it by no means follows because the authorities of the State of Arkansas were driven out of Arkansas, that they are not in a state of rebellion. You might have driven all the inhabitants of Arkansas and all the authorities out, and they still be waging war against the United States. In fact I suppose, as far as the authorities are concerned, that is true—I mean the authorities existing under the government of Arkansas at the time the rebellion commenced.

MR. POMEROY. They abandoned the State. The local authority is confined to the State.

MR. JOHNSON. They abandoned the State because they were driven out of it.

MR. POMEROY. They were not driven out as local authorities, but as individuals.

MR. JOHNSON. They could not have been driven out otherwise. Still, in point of fact, when they were driven out they were local authorities.

MR. POMEROY. Yes.

MR. JOHNSON. And in point of fact they were on the 8th of November in a state of rebellion; that is to say, they were warring against the United States, either collectively or individually. It is not strictly true to the letter that all the inhabitants and all the local authorities of any one of these States were in a state of rebellion on the 8th of November. There were a great many loyal citizens in each one of the States, and there may have been among the local authorities some loyal citizens who were driven by force to take part in the insurrection. But in point of law, as we have already said in the act of July 13, 1861, and as the President has said in his proclamation issued in pursuance of that act, so far as our power to put down insurrection by force of arms is concerned, they were in a state of insurrection; and then the question comes back whether a State whose inhabitants are collectively for the most part in a state of insurrection (that is to say, are opposing the laws of the United States, and who are supported in that opposition by the local authorities, such as they are) can elect electors.

MR. POMEROY. The local authorities to which I referred were the rebel authorities. They never had but one election in the State that I alluded to since the rebellion, and their governor has been killed and the whole thing destroyed. It is not true that these rebel local authorities were in a condition to make war even outside of the State on the 8th day of last November. The real local authorities were loyal Union men; and for us to say that the real local authorities of that State were in rebellion on the 8th day of last November will be saying what is not true. In the first place, the term of office of the old local authorities had expired by limitation; and in the second place, the chief men in that government were not alive to exert any influence if they were disposed to do so. To say that they made war on the Government on the 8th day of last November, or were in a condition to do so, is saying what cannot be true; and that our local authorities made war on the Government is equally untrue. I am willing to say that these parties, not having been recognized or countenanced by the Government, were in such a condition that they could not hold an election, and with that amendment I propose to sustain the resolution. I ask for the yeas and nays on my amendment to the amendment.

The yeas and nays were ordered.

MR. DOOLITTLE. I suggest to the Senator from Kansas, and to Senators around me, to avoid any trouble about the recitals in the preamble, that we strike out the preamble and just put the names of the States we intend to exclude from the electoral college into the enactment and let it go at that.

MR. TRUMBULL. We have had a direct vote on that, and now we are having a controversy about a matter which I am sure if the resolution was printed and laid before Senators there would be no controversy in regard to it. The question now pending is simply whether the word "condition" shall be used in place of the words "state of rebellion." The Senator from Vermont thinks it very objectionable because he supposes it may refer to the health of the States in some way. The word "condition" is to be understood in the connection in which it is used; and the previous language of the preamble explains it. It seems to me nobody can misunderstand it who does not want to misunderstand it, with the resolution before him. The preamble now recites that the States of Arkansas, Tennessee, and others rebelled against the Government of the United States, and were in such state of rebellion that no valid election was held in November last. The Senator from Kansas objects to that because he thinks all those States were not in a state of rebellion on the 8th of November; but he admits

that the condition of things was such that no valid election could be held, and he wants to change the words "state of rebellion" to the word "condition." Does that alter the effect of the resolution, or does it alter the effect of the preamble? If it would satisfy the Senator from Kansas, I was quite willing that it should be adopted. I can see no possible objection to adopting his amendment, and then we shall be done with the controversy.

The question being taken by yeas and nays resulted—yeas 26, nays 13; as follows:

YEAS—Messrs. Anthony, Brown, Buckalew, Chandler, Clark, Conness, Davis, Dixon, Doolittle, Farwell, Foot, Harlan, Harris, Henderson, Hendricks, Lane of Kansas, Morgan, Pomeroy, Powell, Ramsey, Saulsbury, Sherman, Trumbull, Van Winkle, Willey, and Wilson—26.

NAYS—Messrs. Collamer, Cowan, Foster, Grimes, Hale, Howard, Johnson, Morrill, Nye, Stewart, Ten Eyck, Wade, and Wright—13.

ABSENT—Messrs. Carlile, Harding, Hicks, Howe, Lane of Indiana, McDougall, Nesmith, Richardson, Riddle, Spragne, Sumner, and Wilkinson—12.

So the amendment to the amendment was agreed to.

MR. LANE, of Kansas. I desire to move to strike out the preamble, and insert after the word "States," in the resolution, the names of the States recited in the preamble.

THE PRESIDING OFFICER. The first question is on concurring in the amendment made as in Committee of the Whole as it has been amended.

MR. DOOLITTLE. It is true that yesterday the Senator from Kansas made a motion to strike out the names of those States from the preamble; but he did not move to substitute for the whole resolution and preamble the resolution as it would read with the names of the States in. Merely striking out the names from the preamble, as the Senator from Illinois remarked, left the resolution with no meaning, and therefore some Senators voted against it. But the present proposition of the Senator from Kansas is simply to indicate what is desired, that these States shall not be counted in the college, leaving out the preamble; for there seems to be some difficulty about the recitals in the preamble. This presents the question in a different point of view from that in which it was presented yesterday.

MR. TRUMBULL. I do not see what is to be gained by striking it out. It is proposed to take the names of the States out of the preamble and put them into the resolution. Will it be any better then? It is just taking up time. I hope the Senate will adhere to the resolution as it is, and vote down all amendments which are proposed.

MR. COLLAMER. Without this preamble I do not understand that the resolution states the condition of the country at all.

MR. JOHNSON. It does not.

MR. LANE, of Kansas. I am satisfied that a majority of the Senate, as well as of the other branch of Congress, will vote in a few days, and be compelled to vote, for the reception of Arkansas, Louisiana, and Tennessee, and that there is or will be a clear majority in this body in favor of that proposition. It is not true, as stated in this preamble, that the local authorities of the States of Arkansas and Louisiana were not in a situation to cast their votes for President and Vice-President either by being in rebellion or by being in "such condition," as my colleague says. They were prepared to vote, and, so far as Louisiana is concerned, did vote for President and Vice-President. I want to get rid of the preamble because I do not want to be compelled to take the back track on my own action. By inserting the names of the States in the resolution, as I have suggested, we reach the object desired by the Senator from Illinois, and relieve ourselves from the embarrassment that will be upon us in the contingency I have stated.

THE PRESIDING OFFICER. The first question is on concurring in the amendment made as in Committee of the Whole to the preamble as that amendment has been amended.

The question being taken by yeas and nays resulted—yeas 32, nays 6; as follows:

YEAS—Messrs. Anthony, Brown, Buckalew, Clark, Collamer, Conness, Davis, Dixon, Doolittle, Farwell, Foster, Grimes, Hale, Harlan, Harris, Henderson, Hendricks, Howard, Lane of Kansas, Morgan, Morrill, Nesmith, Nye, Pomeroy, Ramsey, Sherman, Stewart, Sumner, Trumbull, Wade, Wilson, and Wright—32.

NAYS—Messrs. Cowan, Foot, Johnson, Ten Eyck, Van Winkle, and Willey—6.

ABSENT—Messrs. Carlile, Chandler, Harding, Hicks, Howe, Lane of Indiana, McDougall, Powell, Richardson, Riddle, Saulsbury, Spragne, and Wilkinson—13.

So the amendment as amended was concurred in.

MR. LANE, of Kansas. I now move to strike out the preamble, and to strike out after the word "States," in the third line of the resolution, the words "mentioned in the preamble," and to insert in lieu of them "Virginia, North Carolina, South Carolina, Georgia, Florida, Alabama, Mississippi, Louisiana, Texas, Arkansas, and Tennessee," and on this amendment I ask for the yeas and nays.

The yeas and nays were ordered.

MR. JOHNSON. As far as the mere object is concerned, which is to exclude the votes of these States, whether the resolution pass in its present form or in the form now proposed makes no difference; but it seems to me singular legislation to resolve that

the votes of certain States shall not be counted, without assigning any reason why they shall not be counted. How is the President to know why they should not be counted? How is the House of Representatives to know why they should not be counted? How is the public to know why they are not counted? You have just as much right to say that the vote of any other State in the Union shall not be counted, looking to the face of the resolution alone, if it embraced any other State than those named. It appeared to me individually, and I think it appeared to the members of the committee, as evidently as it appeared to the other house, that when we are excluding certain States from voting we ought to state why we exclude them. For that reason I shall vote against this amendment.

Mr. COWAN. The objection of the honorable Senator from Maryland, I think, is fatal to this kind of legislation. This is not really a law, at any rate; it is simply a decision. Being a decision, it is insisted that the opinion of the judge shall contain the reasons on which the law is based. It strikes me this ought to be sufficient to show us the fallacy of this mode of legislation. That which we are now deciding ought to be decided next Wednesday in the joint convention. We have got now just to that point when it is evident that this, instead of being a law, is simply a decision legislative in its character.

Mr. LANE, of Kansas. We have spent several days here trying to satisfy ourselves that a rule should be adopted for the control of the joint convention that is to meet next Wednesday. Now, I should like to learn from the Senator from Maryland if it is usual to give a reason for a rule to govern legislative action, in this or any other legislative body. We desire to say that certain States shall not be entitled to have their electoral votes counted on next Wednesday, and we desire to say so now, in order to prevent confusion and disorder on that occasion. We have heard from several distinguished Senators that the object is to prevent the recurrence of a disorder that occurred eight years ago in joint convention. Now, sir, I want to save the loyal people of Arkansas, and Louisiana, and Tennessee from having their feelings further wounded. So far as one of those States is concerned, we drove their Senators from our doors last session. I am one of the men who believe that a State organization is indispensable to the protection of the Union men in those States. I am one of those who believe that the bringing back of any of the seceded States into the Union does more to demoralize our opponents and to close out this rebellion than any other act that we can accomplish. It is worth more than all the victories which can be gained in the field. I want these States brought back; I want to enrage the Union men in all the seceded States when they evince that there is any Union feeling within their borders.

Mr. JOHNSON. The honorable member is mistaken in supposing that this is a mere rule. A rule may be determined perhaps by the convention, or certainly by the concurrent action of the two bodies that constitute the convention. What we propose to do now is to pass a law, to which the President's assent is necessary before it becomes operative, declaring what electoral votes shall be counted legally. If we have the authority to pass such a law—and I do not propose to discuss that question now; I think very clearly we have the authority—when it is passed by both bodies and approved by the President, it is binding on the members of the convention when they meet together. It is, therefore, no rule; nor is it a decision, as the honorable member from Pennsylvania supposes. A decision of what? It is a declaration which is itself a law that those votes are not legitimate votes. Those who think it has no operation will vote against it in any form; but if it operates at all, it operates as a law. Then the only question with me is whether it is proper in Congress, having authority in certain cases, as I think, to exclude votes of electors, to declare that the votes of any particular State are to be excluded without stating why they are excluded.

Mr. LANE, of Kansas. I should like to ask the Senator from Maryland if a concurrent resolution, that does not require the signature of the President, would not be just as potent on this subject as a joint resolution?

Mr. JOHNSON. A concurrent resolution requires the approval of the President.

Mr. LANE, of Kansas. A resolution of each branch separately composing the joint convention would be as potent as this law for this purpose.

Mr. DOOLITTLE. This preamble contains a recital which meets the views of some gentlemen and is opposed to the views of others, and there are some gentlemen on this floor who have avowed their determination to vote in favor of the proposition to exclude Louisiana upon this other ground, that Louisiana has no representation in Congress, and not having any representation in Congress should not be represented in the electoral college. The learned Senator from Ohio [Mr. Sherman] based his argument entirely on that ground. It seems to me it would be better, without a recital that these States continue in rebellion, or that they continue in any condition, to declare simply, for reasons satisfactory to each one voting for the proposition, that the votes of these States shall not be counted in the electoral college; and then the preamble would have no embarrassing effect or entanglement connected with it upon the free action of any member of either house in relation to any other question that may arise, whether the members from Louisiana or Arkansas shall be admitted or not. It

seems to me that it is wise to strike out the preamble and leave the proposition itself, and then each one who votes for it can satisfy himself with his own reason.

Mr. TEN EYCK. I have persistently voted "nay" on all the various propositions submitted to-day for the amendment of the preamble, although some of them, I believe, are improvements upon the preamble as originally reported. Being opposed to the preamble and to the resolution itself, so far as it affects certain of the States mentioned, it might, perhaps, according to the ordinary method of parliamentary proceedings, have been esteemed excusable or proper in me to have voted "yea" on several of these propositions looking toward an amelioration of the charge made in the preamble as to the condition of all these States; but as I am persistently opposed to the whole measure, so far as it applies to at least one of these States, if not more, I think it more consistent to vote "nay" in relation to all these amendments.

Now, sir, if I were not prepared to say that the States of Louisiana or Tennessee were in such a state of rebellion on the 8th day of November last as that there could be no legal election held there, how could I be prepared to say that, in consequence of this rebellion, on the 8th day of November last they were in such a condition that they could not vote? I would much rather meet the question fairly and squarely and say that they were in a state of rebellion than simply to evade the question, and say that they were in some sort of condition that I do not undertake to decide in this high place. I would not strip a State of her rights in this Union without having the boldness to assign a cause.

That consideration regulates and controls my action in my vote on the amendment now proposed by the Senator from Kansas. I am not prepared to vote barely and squarely that these States shall not be counted in the electoral college, without assigning any reason under heaven for my action. I think it is due to the people there, if there be a corporal's guard of loyal men, that we should assign here the reason why we will not allow them to have an electoral vote cast, after they have endeavored to do all that they could do to resume their position in the Union. I am opposed to the whole proposition from beginning to end, and I have voted, and shall vote, consistently I think, "nay" throughout.

Mr. HOWE. Mr. President, I have not taken much part in this discussion, and I do not propose to take much; but I intended to say two or three words before the final vote should be taken on the passage of this resolution, and I believe I may as well say those few words now as at any time.

It strikes me as a most peculiar feature of this debate that we have spent four days, I think, in discussing, not whether we shall pass the resolution or not, but what reason we shall assign for passing it. Ordinarily, when you are agreed as to what law you will enact, you are in the habit of putting that in the bill, and looking there for the law and looking into the Congressional Globe for the reasons to be given for it. But to me this whole debate seems very significant that the Senate were conscious that they were about to do an extraordinary thing, and therefore they felt it incumbent on them to assign the reasons upon which they acted with a great deal of care and accuracy, and hence you have been debating for four days as to the question what reason you shall assign for enacting this law. I do not think you have occupied any more time than was absolutely necessary in order to assign a good reason for it.

Mr. President, here is the Constitution of the United States, so it is denominated, declaring that "each State shall appoint, in such manner as the legislature thereof may direct, a number of electors equal to the whole number of Senators and Representatives to which the State may be entitled in Congress." That the Constitution declares. When I came here you required me to step to your desk and take an oath to support it; and now you ask me to vote for a resolution which declares that eleven States shall not vote, shall not appoint electors of President and Vice-President. I do not want to do it. I have sworn that I will not do it; or if I have not sworn that exactly before, I swear it now.

Mr. President, that the people living in South Carolina, Georgia, and Tennessee, and those other States, had no right in fact, had no equitable right, to choose electors in November last, I believe; but I believe it because there were no American States there. But you ask me to vote for a resolution which says that they are States, and yet which says that they shall not vote for President. Wherever there is a State in fact, there is the right, and there is the evidence of it, to give a number of votes for President and Vice-President, equal to the number of Representatives in Congress in both houses to which that State is entitled. That is my judgment. During the last session of Congress I had occasion to call attention to this very subject, and to say then that it seemed to me the fitting time to fix the relations of these communities before the election was held, before we knew what would be the significance of their action. That was declined. Your law still said those are States; three of them actually did vote, we are told, did choose electors; and now you ask me to vote for a resolution which says that they are States, and yet which says that their votes shall not be counted.

And now, Mr. President, look one moment at the reasons which have been assigned. The committee assign for a reason that there was no valid choice of electors in those

States in November last. The committee say so; they ask me to say so; they ask the Senate to say so, that there was no valid choice of electors. Sir, is the law-making power of the United States made the judge of what is a valid election of presidential electors? "Each State shall appoint, in such manner as the legislature thereof may direct." The legislature is made the judge of the manner of choosing electors. It seems to me that the State itself is the final judge as to what is a valid election. There cannot be any other. The right is given in full to the State itself. Therefore, I cannot agree to say that there was no valid election in these States. I think it belongs to these States respectively to determine that question.

But if there was no valid election, there was some reason for it. What was the reason? The committee say because the people of those States were in a state of rebellion on that day. That may be, if true, a good reason why a valid election could not be held; but yet, right here in the Senate chamber, while you are debating this resolution, there is an issue of fact formed as to whether it is true or not. The Senator from Kansas, who has opportunities for knowing the fact as well as any one, and who is competent to testify, tells you that there was no such state of rebellion as prevented the people from making a valid election. That is his testimony upon the question of fact as to which we are at issue. Now, is it not dangerous legislation when you concede that the law you are about to pass depends for its validity on the reasons you assign for it, when in assigning reasons you differ not only upon the law as to what is a good reason, but differ upon the fact as to what reasons exist?

I wish now to call attention to one more remarkable debate we have had. The committee recite these facts as the ground upon which you shall proceed to disfranchise eleven States. They recite them as facts, present them as reasons why you should do it. The amendment which has created more debate than any other was the amendment moved by the Senator from Vermont, the effect of which was mainly to present as a reason for enacting this law, not anything that we affirmed to be a fact, but something that the President has affirmed to be a fact. The committee say, disfranchise those States because their people were in November in a state of rebellion; the amendment moved by the Senator from Vermont asked us to disfranchise the people of those States because the President said they were in rebellion; and that was really the breadth of that issue, as I understood it. If you have a right to disfranchise the people of a State, does it matter whether you and I agree upon the fact for which we do it, or whether we act upon something that the President or some other agent of the Government has said?

It all looks to me as if we were about to pass a most extraordinary law. I shall not vote for it myself, and I shall be extremely sorry to see the Senate pass it, for there it stands side by side with your Constitution, a law declaring in terms that the people of eleven States that you call States shall not vote. I think you might just as well declare that they should not marry. I think you can declare it just as well of the people of one State as another, if you insist upon it that they are States. I know you say that those people have rebelled. Some of them have; but when a man commits murder, can you pass an act of Congress to hang the man that you think has committed the murder? Would you not think that very extraordinary? But is it half so extraordinary as to pass an act of Congress disfranchising the people of a whole State because part of them have committed treason or engaged in rebellion?

But you do not rely upon that; the fact of rebellion you do not insist upon as a sufficient reason for passing this law, and therefore you put in another one. The rebellion is not a ground for disfranchising the people of a State, but the rebellion was the circumstance which prevented a valid election from being held. Why do you want to assign the reason why a valid election was not held? If you are made the judges of what is and what is not a valid election, why do you not say there was no valid election in those States, and let it stand there? It is because you are not made the judges of a valid election that you think it incumbent on you to bolster up your judgment by some very extraordinary reason. This is the way it looks to me. I distrust this whole method of legislating. If you will take hold of the question of the political relations of these communities, and if you will tell what is the truth, and has been the truth since 1861, that there are no State organizations there, no State governments, I am with you. When you establish that, you know what they may and what they may not do.

The question being taken by yeas and nays, resulted—yeas 7, nays 30; as follows:

YEAS—Messrs. Cowan, Doolittle, Harris, Lane of Kansas, Nesmith, Van Winkle, and Wiley—7.

NAYS—Messrs. Anthony, Brown, Buckalew, Chandler, Clark, Collamer, Conness, Davis, Dixon, Farwell, Foster, Grimes, Hale, Harlan, Henderson, Hendricks, Howard, Johnson, Morgan, Morrill, Nye, Powell, Ramsey, Saulsbury, Sherman, Sumner, Ten Eyck, Trumbull, Wade, and Wright—30.

ABSENT—Messrs. Carlile, Foot, Harding, Hicks, Howe, Lane of Indiana, McDougall, Pomeroy, Richardson, Riddle, Sprague, Stewart, Wilkinson, and Wilson—14.

So the amendment was rejected.

The amendment was ordered to be engrossed, and the joint resolution to be read a third time. It was read the third time.

Mr. WADE. I ask for the yeas and nays on the passage of the joint resolution.

The yeas and nays were ordered, and being taken, resulted—yeas 29, nays 10; as follows:

YEAS—Messrs. Anthony, Brown, Buckalew, Chandler, Clark, Collamer, Conness, Davis, Dixon, Farwell, Foster, Grimes, Hale, Harlan, Henderson, Hendricks, Howard, Johnson, Morgan, Morrill, Nye, Powell, Ramsey, Sherman, Stewart, Sumner, Trumbull, Wade, and Wright—29.

NAYS—Messrs. Cowan, Doolittle, Harris, Howe, Lane of Kansas, Nesmith, Saulsbury, Ten Eyck, Van Winkle, and Willey—10.

ABSENT—Messrs. Carlile, Foot, Harding, Hicks, Lane of Indiana, McDougall, Pomeroy, Richardson, Riddle, Sprague, Wilkinson, and Wilson—12.

So the joint resolution was passed.

IN THE HOUSE OF REPRESENTATIVES, February 4, 1865.

Mr. WILSON. I ask unanimous consent to take from the Speaker's table the joint resolution (H. R. No. 126) declaring certain States not entitled to representation in the electoral college, in order that the House may concur in the amendment made by the Senate.

There being no objection, the joint resolution was taken up, and the amendment was read, as follows:

"Strike out of the preamble the words 'and were in such condition of armed rebellion for more than three years;' and insert in lieu thereof, 'And were in such condition on the 8th day of November, 1864, that no valid election for electors of President and Vice-President, according to the Constitution and laws thereof, was held therein on said day: Therefore.'"

Mr. YEAMAN. I desire to offer a substitute for the joint resolution.

Mr. WILSON. I desired to demand the previous question on the amendment.

Mr. YEAMAN. I object if I am not allowed to offer a substitute.

Mr. STEVENS. Then I move to go to business on the Speaker's table.

Mr. YEAMAN. I withdraw my objection and offer the following substitute for the joint resolution:

"Be it resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That the votes of the presidential electors of any State shall be counted when presented and verified in the ordinary and legal method; and it is incompetent and immaterial for Congress to go behind such verification, and inquire whether a part of the citizens of such State may have been in rebellion; and all laws and parts of laws and joint resolutions incompatible with this are hereby repealed."

Mr. WASHBURN, of Illinois. I raise the question of order that the amendment is not germane to the Senate amendment.

THE SPEAKER. The only matter before the House is the Senate amendment; and any amendment, to be in order, must be germane to that. The amendment offered by the gentleman from Kentucky would be in order to the original bill, but is not in order to the Senate amendment.

Mr. YEAMAN. I offer it as a substitute for the matter before the House.

THE SPEAKER. The joint resolution has been passed upon by both houses, and is not susceptible of amendment, except so far as applies to the amendment of the Senate. The amendment offered by the gentleman from Kentucky is not in order.

Mr. WILSON. I demand the previous question.

The demand for the previous question was seconded.

Mr. Cox moved that the House do now adjourn.

The question was taken; and the motion to adjourn was not agreed to.

The question recurred upon ordering the main question; and being taken, the main question was ordered.

The question was then taken upon concurring in the amendment of the Senate, and it was agreed to.

Mr. Wilson moved to reconsider the vote by which the House concurred in the amendment of the Senate; and also moved that the motion to reconsider be laid on the table.

The latter motion was agreed to.

IN SENATE, February 6.

TWENTY-SECOND JOINT RULE.

Mr. TRUMBULL. With the consent of the Senate I will read the report, as the handwriting is more legible to me than to the Clerk.

The joint committee to whom was referred the subject of ascertaining and providing a mode for canvassing and counting the votes for President and Vice-President of the United States have instructed me to report the following joint rule in part in the discharge of their duty:

"Resolved by the Senate, (the House of Representatives concurring therein,) That the following be added to the joint rules of the two houses, namely :

"The two houses shall assemble in the hall of the House of Representatives at the hour of one o'clock p. m., on the second Wednesday in February next succeeding the meeting of the electors of President and Vice-President of the United States, and the President of the Senate shall be their Presiding Officer. One teller shall be appointed on the part of the Senate and two on the part of the House of Representatives, to whom shall be handed, as they are opened by the President of the Senate, the certificates of the electoral votes ; and said tellers having read the same in the presence and hearing of the two houses then assembled, shall make a list of the votes as they shall appear from the said certificates ; and the votes having been counted, the result of the same shall be delivered to the President of the Senate, who shall thereupon announce the state of the vote and the names of the persons, if any, elected, which announcement shall be deemed a sufficient declaration of the persons elected President and Vice-President of the United States, and, together with the list of the votes, be entered on the journals of the two houses."

That is the usual form, as far as I have read, of the resolutions heretofore adopted.

The committee have proceeded further to provide for a contingency :

"If, upon the reading of any such certificate by the tellers, any question shall arise in regard to counting the votes therein certified, the same having been stated by the Presiding Officer, the Senate shall thereupon withdraw, and said question shall be submitted to that body for its decision ; and the Speaker of the House of Representatives shall in like manner state the question to the House of Representatives for its decision ; and no question shall be decided affirmatively, and no vote objected to shall be counted, except by the concurring vote of the two houses, which being obtained, the two houses shall immediately re-assemble, and the Presiding Officer shall then announce the decision of the question submitted ; and upon any such question there shall be no debate in either house. And any other question pertinent to the object for which the two houses are assembled may be submitted and determined in like manner.

"At such joint meeting of the two houses seats shall be provided as follows : for the President of the Senate, the Speaker's chair ; for the Speaker, the chair on his left ; for Senators, the body of the hall on the right of the Presiding Officer ; for Representatives, the body of the hall not occupied by Senators ; for the tellers, Secretary of the Senate, and Clerk of the House of Representatives, at the Clerk's desk ; for other officers of the two houses, in front of the Clerk's desk and upon either side of the Speaker's platform.

"Such joint convention shall not be dissolved until the electoral votes are all counted and the result declared, and no recess shall be taken unless a question shall have arisen in regard to the counting of any such vote, in which case it shall be competent for either house, acting separately in the manner hereinbefore provided, to direct a recess not beyond the next day at the hour of one o'clock p. m."

MR. JOHNSON. I understood the Senator from Illinois to say that the latter part of the report is not to be found in the reports heretofore made by which these conventions have heretofore been governed, and if I recollect the reading aright it provides only for a single contingency ; that is to say, the contingency of votes being objected to. It appears to me it would be desirable to provide that in the event of any other question being made—

MR. TRUMBULL. It does so provide. It provides specifically for any other question pertinent to the matter for which the two houses are assembled.

MR. JOHNSON. I did not understand it so.

MR. TRUMBULL. It so reads.

MR. COWAN. There is one difficulty I would suggest to the honorable Senator from Illinois. It is provided that when questions shall arise in the joint convention, the houses shall separate and consider the matter separately. Now, suppose there is a question there whether the vote of Louisiana shall be counted. The Senate retires to its chamber and decides that it shall ; the House of Representatives organize and decides that it shall not ; how is the question then to be decided ?

MR. JOHNSON. It falls, of course, and would not be counted.

MR. COWAN. I think there is a fundamental mistake at the bottom of this provision. I think it belongs to the houses in joint convention to decide that question when it arises. It is evident that they are there with some power and authority over it. They cannot be supposed to be mere idle and indifferent spectators, because otherwise the votes might be counted separately in the separate chambers. Therefore I think that provision is objectionable. Any one of the houses, then, could disfranchise a State according to the construction that is to be put upon it.

MR. TRUMBULL. The question then has to be decided by the concurrent action of the two houses, and I suppose committees of conference may be resorted to to bring that about. It has to be decided somehow, and this provides a mode when the question arises by which it shall be settled. If the Senator from Pennsylvania chooses to suppose that you must take a vote *per capita*, the Constitution provides no means for any

such action. The only way the two houses of Congress can act is independently of each other. It was the unanimous opinion of the committee that it could not be done by voting *en masse*, as in a public meeting. That question was very elaborately discussed the other day. I hope no discussion is to spring up on this report, because it is important that we have action upon it at once.

Mr. COWAN. I ask the honorable Senator whether there is any other case in which the two houses go into joint convention except this one?

Mr. TRUMBULL. They do not go into joint convention here. They meet together simply to provide for the counting of the vote; but there is no provision for their taking action as a joint body. They go there to see the votes opened, and then Congress provides by law how they shall proceed. This is my view of it.

Mr. COWAN. That assumes the very point in dispute. The allegation of some of us is that they do go into joint convention; that the phrase which gives them power and authority to do so is a general phrase. The mode and manner in which it is to be exercised of course must be fixed by law, or must be fixed by rules to be adopted for the governance of this convention itself; and to show that it is a convention, and to show it conclusively, the resolution offered by the committee to-day provides for its organization, provides that it shall have a Presiding Officer, provides some rules at least for its governance, provides for the appointment of tellers.

Mr. TRUMBULL. Each house appoints the tellers, not the joint convention.

Mr. COWAN. Then I think the joint convention should appoint the tellers.

Mr. TRUMBULL. It never was done since the Government was formed. That part of the resolution is similar to the one we have always acted under since Washington was elected President.

Mr. COWAN. Then we encounter the mischief I suggested a moment ago. If there was a partisan majority in the Senate opposed to the counting of the votes of a particular State, all it had to do would be to stand firmly upon its resolve that they should not be counted, and that State would be disfranchised by the act of the Senate alone. The House would have the same privilege precisely. Was that ever contemplated?

Mr. TRUMBULL. If the Senator from Pennsylvania will allow me to put a question to him he will see that there is nothing in the question he asks.

Mr. COWAN. Certainly; I shall be very glad to see it.

Mr. TRUMBULL. Suppose either house obstinately refuses to go there at all. If you are to suppose that the Senate of the United States is determined to break up the Government, they will not meet at all. You might just as well suppose that as to suppose that it will obstinately refuse to perform any other duty.

Mr. COWAN. I have heard that argument repeatedly before, and it comes very badly from the mouth of one who provides for a proposition of the kind. I admit you have no right to presume it; but you have no right to provide that they may do it. You have no right to put the Senate in such a position as that it may do it. You have a right to foresee the mischief before it happens; but by the adoption of these rules it is a tacit admission that the Senate may do that thing. There is no presumption that the Senate will not go into joint convention, although I am very sorry to say that such a mode of procedure is too common now among the States, among men who think by that means they can gain an advantage from the country when they are overthrowing the very fundamental laws which underlie its institutions. I think this matter should be left with the joint convention; that in that convention all questions which arise as to the validity of votes there to be counted by that convention should be determined.

The VICE PRESIDENT. The question is on agreeing to the report of the committee.

The report was agreed to.

IN THE HOUSE OF REPRESENTATIVES, February 6, 1865.

Mr. STEVENS. I ask unanimous consent to take from the Speaker's table and put upon its passage a concurrent resolution sent to us from the Senate to-day in reference to counting the electoral votes.

No objection being made, the resolution was taken up, considered, and agreed to; as follows:

[The resolution is here given literally as already quoted in the Senate proceedings of the same date.]

Mr. Stevens moved that the vote by which the resolution was agreed to be reconsidered; and also moved that the motion to reconsider be laid on the table.

The latter motion was agreed to.

IN SENATE, February 7, 1865.

Mr. TRUMBULL. The joint rule which has been adopted by the two houses in regard to counting the votes for President and Vice-President to-morrow makes it the duty of the Senate to appoint one teller on its part and the House to appoint two. I move that the President of the Senate appoint the teller on the part of the Senate.

The motion was agreed to, and the Vice-President appointed Mr. Trumbull.

IN THE HOUSE OF REPRESENTATIVES, *February 7, 1865.*

The SPEAKER appointed Messrs. Wilson of Iowa, and Dawson of Pennsylvania, as tellers on the part of the House to count the electoral votes for President and Vice-President of the United States.

IN SENATE, *February 8, 1865.*

The VICE-PRESIDENT. The hour agreed upon by the concurrent vote of the two houses having arrived, the Senate will now repair to the hall of the House of Representatives for the purpose of opening, counting, and declaring the votes for President and Vice-President of the United States for the term commencing on the 4th of March, 1865.

The Senate accordingly proceeded to the hall of the House of Representatives, preceded by the Sergeant-at-Arms, and headed by the Vice-President and the Secretary.

The Senate returned to their chamber at two o'clock p. m.

IN THE PRESENCE OF THE SENATE AND HOUSE OF REPRESENTATIVES,
February 8, 1865.

At five minutes past 1 o'clock p. m., the Doorkeeper announced the Senate of the United States.

The Senate entered the hall, preceded by its Sergeant-at-Arms and headed by the Vice-President and Secretary of the Senate, the members and officers of the House rising to receive them. The Senators took the seats set apart for them in the eastern section of the hall.

The Vice-President took his seat as Presiding Officer of the joint convention of the two houses, the Speaker occupying a chair on the left of the Vice-President.

Senator Trumbull, the teller appointed on the part of the Senate, and Messrs. Wilson and Dawson, the two tellers appointed on the part of the House, took their seats at the Clerk's desk, at which the Secretary of the Senate and the Clerk of the House also occupied seats; two of the clerks of the Senate occupying seats at the reporters' desk.

The VICE-PRESIDENT. The Senate and House of Representatives having met under the provisions of the Constitution for the purpose of opening, determining, and declaring the votes for the offices of President and Vice-President of the United States for the term of four years commencing on the 4th of March next, and it being my duty, in the presence of both houses thus convened, to open the votes, I now proceed to discharge that duty.

The Vice-President then proceeded to open and hand to the tellers the votes of the several States for President and Vice-President of the United States, commencing with the State of Maine.

Senator TRUMBULL, one of the tellers, read in full the certificate of the vote of the State of Maine, giving seven votes for Abraham Lincoln, of Illinois, for President of the United States, and seven votes for Andrew Johnson, of Tennessee, for Vice-President of the United States.

Senator WADE. Mr. President, I move to dispense with the reading of everything in the certificate except the result of the vote.

Mr. COX. Mr. President, I believe that it is not competent for this joint convention to have any motion submitted, but I suggest, as General Cass suggested in 1857, that only the result of the votes shall be announced.

The VICE-PRESIDENT. That can be done, as suggested. The Chair does not think that it is within his power to receive the motion, unless the Senator from Ohio desire that the Senate shall separate in order to pass upon the question.

Senator WADE. I do not propose any such thing. I believe we may dispense with the reading of all but the results.

The VICE-PRESIDENT. The Chair will, therefore, if there be no objection, direct the results of the returns only to be read. The tellers will now read the results of the vote of the State of New Hampshire.

The tellers reported, through Senator Trumbull, that they had examined the vote of the State of New Hampshire, that they found it in due form, that all the votes given for President of the United States were five, all of which were for Abraham Lincoln, of the State of Illinois, and that all the votes given for Vice-President of the United States were five, all of which were for Andrew Johnson, of the State of Tennessee.

The same form was observed in announcing the votes of the other States.

The tellers having read, through Mr. Wilson, the certificate from the State of Nevada, showing that two votes had been given for Abraham Lincoln, of Illinois, for President, and two votes for Andrew Johnson, of Tennessee, for Vice-President,

The VICE-PRESIDENT said: The Chair will state to the convention that the messenger who bore the returns from the State of Nevada communicated the fact that the third elector did not appear when the vote was taken. The State having been but recently admitted into the Union, had no law by which the vacancy could be filled, and consequently but two votes were given for President and Vice-President.

The vote of the State of Nevada having been recorded,

Senator COWAN said: Mr. President, I inquire whether there are any further returns to be counted?

The VICE-PRESIDENT. There are not.

Senator COWAN. And if there be, I would inquire why they are not submitted to this body in joint convention, which is alone capable of determining whether they should be counted or not?

The VICE-PRESIDENT. The Chair has in his possession returns from the States of Louisiana and Tennessee, but in obedience to the law of the land the Chair holds it to be his duty not to present them to the convention.

Senator COWAN. I ask whether the joint resolution on that subject has become a law by having received the approval of the President of the United States?

The VICE-PRESIDENT. The Chair believes that the official communication of its approval by the President has not been received by either house. The Chair, however, has been apprised of the fact that the joint resolution has received the approval of the President.

Senator COWAN. Then, as a motion is not in order in this body, I suggest that the votes of Louisiana and Tennessee be counted, and that this convention determine the fact.

Mr. COX. I suggest the reading of the joint resolution by which our action is to be determined.

The VICE-PRESIDENT. The Secretary will read the joint resolution under which the House and Senate are now acting.

The Secretary of the Senate then read as follows:

[Here the joint rule quoted above was read.]

Mr. STEVENS. I do not think any question has arisen which requires the two houses to separate. That, according to the wording of the joint resolution, can only be upon the reading of the returns which have been opened by the President of the convention.

Senator COWAN. I merely wish to say that, believing as I do that it rests with this joint convention, in its joint capacity, to determine all questions which ought to arise here, I have done what I have thought to be my duty in bringing to the attention of the convention the question which I have raised. Having done so, I now beg leave to withdraw it.

The VICE-PRESIDENT. The Chair did not understand the Senator from Pennsylvania [Mr. Cowan] as making any distinct motion, but merely a simple suggestion.

Senator COWAN. I understood that no motion could be entertained in this convention.

The VICE-PRESIDENT. Motions can be entertained upon any matters pertinent to the purpose for which the convention has assembled. The decision of those motions must be determined by the two houses separately, after the Senate shall have withdrawn from the convention.

Mr. YEAMAN. Mr. President, if it requires a distinct motion to determine the question, I will move that all the returns before this joint convention be opened and presented for its consideration.

The VICE-PRESIDENT. The Chair is of the opinion that the motion of the member from Kentucky [Mr. Yeaman] is in order, being pertinent to the object for which the House and Senate have assembled in joint convention. The member will reduce his motion to writing, so that the precise question shall be in possession of the Senate when it shall retire for the determination of the question presented for the consideration of the convention.

Mr. PRUYN. I wish to inquire whether a second proposition, one in regard to the counting of the votes, can be entertained before the two houses shall separate. If so, I desire to move that the tellers be instructed not to count the vote of the so-called State of West Virginia.

The VICE-PRESIDENT. In the opinion of the Chair the motion of the member from New York [Mr. Pruyn] is made too late, the vote of the State of West Virginia having been already announced and declared.

Mr. PRUYN. With all respect to the Vice-President, I desire to say that I understand the rule to be this: the certificates of the votes of the respective States have been opened, read, and announced, and now the tellers, as the proper officers of this joint convention, are to pass upon those votes, and announce the result. My motion is that the tellers be instructed not to count the vote of the so-called State of West Virginia.

Mr. WHALEY. If it be in order, I would ask the gentleman from New York [Mr. Pruyn] to state his reasons for his motion.

The VICE-PRESIDENT. The language of the rule under which the two houses are now acting is as follows:

"If upon the reading of any such certificate by the tellers, any question shall arise as to the counting of the votes therein certified," &c.

The question must be raised when the vote is announced. In the opinion of the Chair the member from New York [Mr. Pruyn] should have made his motion, in order to come within the rule, at the time the tellers announced the vote of the State of West Virginia.

Mr. COX. If the rule is that which has just been enunciated by the Chair, how is it

that the gentleman from Kentucky [Mr. Yeaman] can submit his motion before the Vice-President shall have opened, and the tellers shall have announced, the votes of the States of Louisiana and Tennessee?

The VICE-PRESIDENT. In the opinion of the Chair the motion of the member from Kentucky [Mr. Yeaman] is in order. It does not apply to a return where objection is made, but it applies to a return which has not been submitted to the convention. It is a distinct motion that a return shall be submitted to the convention. It comes within the latter clause of the joint resolution, which relates to any other motion pertinent to the object for which the two houses have met in convention.

Senator FARWELL. I would suggest that the question raised by the member from Kentucky [Mr. Yeaman] has already been decided by the two houses of Congress in the passage of the joint resolution which has just been read. It is not in order, therefore, to again raise the question in this convention, the point of order having already been determined by the two houses of Congress.

The VICE-PRESIDENT. Does the Senator from Maine [Mr. Farwell] raise a question of order upon the ruling of the Chair?

Senator FARWELL. I raise the question of order that this question has already been decided by the two houses of Congress in passing the joint resolution under which this convention is acting, which joint resolution has been approved by the President.

The VICE-PRESIDENT. The fact of that approval of the President is within the knowledge of the Chair, and in consequence of that knowledge the Chair has seen fit to withhold the returns of the States in question. There has been no official promulgation of that approval of the President. Still, in the opinion of the Chair, if either branch of Congress shall be disposed to order the returns now upon the table to be read, it is within their power to do so. The reading of the returns would be one thing; then would arise another question, whether the vote in the return so read should be added to the count of the tellers. In the opinion of the Chair, the motion of the member from Kentucky [Mr. Yeaman] is in order.

Mr. YEAMAN. Before I submit my motion in writing, I would inquire whether the submission of that motion would require the temporary dissolution of this convention and the resolving of the two houses into their separate bodies in their respective chambers?

The VICE-PRESIDENT. The Chair has no doubt upon that point. Each house must determine the question in its own chamber; and each house has a negative upon the determination of the other.

Mr. YEAMAN. Then I desire to submit another suggestion.

Mr. WASHBURN, of Illinois. I object to any debate.

The VICE-PRESIDENT. All debate is out of order. The rule itself prescribes that no question shall be debated in the convention.

Mr. YEAMAN. Then I withdraw my motion, if it requires the separation of the convention into the two houses.

The motion was accordingly withdrawn.

Senator TRUMBULL, on the part of the tellers, announced the following as the result of the vote for President and Vice-President of the United States:

List of votes for President and Vice-President of the United States for the constitutional term to commence on the 4th day of March, 1865.

Number of electoral votes.	States.	President.		Vice-President.	
		Abraham Lincoln, of Illinois.	George B. McClellan, of New Jersey.	Andrew Johnson, of Tennessee.	George H. Pendleton, of Ohio.
7	Maine	7	.....	7	.....
5	New Hampshire	5	.....	5	.....
12	Massachusetts	12	.....	12	.....
4	Rhode Island and Providence Plantations	4	.....	4	.....
6	Connecticut	6	.....	6	.....
5	Vermont	5	.....	5	.....
33	New York	33	.....	33	.....
7	New Jersey .....	.....	7	.....	7
26	Pennsylvania	26	.....	26	.....
3	Delaware .....	.....	3	.....	3
7	Maryland	7	.....	7	.....
11	Kentucky .....	.....	11	.....	11
21	Ohio	21	.....	21	.....
13	Indiana	13	.....	13	.....
16	Illinois	16	.....	16	.....
11	Missouri	11	.....	11	.....
8	Michigan	8	.....	8	.....
8	Wisconsin	8	.....	8	.....
8	Iowa	8	.....	8	.....
5	California	5	.....	5	.....
4	Minnesota	4	.....	4	.....
3	Oregon	3	.....	3	.....
3	Kansas	3	.....	3	.....
5	West Virginia	5	.....	5	.....
2	Nevada	2	.....	2	.....
233	Total	212	21	212	21

The VICE-PRESIDENT. The tellers report that the whole number of votes cast for President and Vice-President of the United States is 233; necessary to a choice, 117. For President of the United States, the tellers report that Abraham Lincoln, of Illinois, has received 212 votes; George B. McClellan, of New Jersey, has received 21 votes. For Vice-President of the United States, the tellers announce that Andrew Johnson, of Tennessee, has received 212 votes, and George H. Pendleton, of Ohio, has received 21 votes:

Wherefore, I do declare that Abraham Lincoln, of the State of Illinois, having received a majority of the whole number of electoral votes, is duly elected President of the United States for four years, commencing on the 4th day of March, 1865; and that Andrew Johnson, of the State of Tennessee, having received a majority of the whole number of electoral votes for Vice-President of the United States, is duly elected Vice-President of the United States for four years, commencing on the 4th day of March, 1865.

[The announcement of the result of the vote was received with applause upon the floor and in the galleries.]

The VICE-PRESIDENT. The object for which the House and the Senate have assembled in joint convention having transpired, the Senate will retire to its chamber.

The Senate accordingly retired from the hall of the House of Representatives.

IN SENATE, February 10, 1875.

The PRESIDENT *pro tempore* also laid before the Senate the following message from the President of the United States:

"To the honorable the Senate and House of Representatives :

"The joint resolution entitled 'Joint resolution declaring certain States not entitled to representation in the electoral college' has been signed by the Executive in deference to the view of Congress implied in its passage and presentation to him. In his own view, however, the two houses of Congress, convened under the twelfth article of the Constitution, have complete power to exclude from counting all electoral votes

deemed by them to be illegal; and it is not competent for the Executive to defeat or obstruct that power by a veto, as would be the case if his action were at all essential in the matter. He disclaims all right of the Executive to interfere in any way in the matter of canvassing or counting electoral votes, and he also disclaims that, by signing said resolution, he has expressed any opinion on the recitals of the preamble or any judgment of his own upon the subject of the resolution.

“ABRAHAM LINCOLN.

“EXECUTIVE MANSION, *February 8, 1865.*”

MR. JOHNSON. That to me is a very extraordinary course for the President to pursue. I have no doubt his motives are perfectly correct and patriotic; but if his approval is necessary to give effect to the joint resolution, accompanying that approval with a disclaimer of any belief in the doctrines of the resolution is wholly inconsistent with his duty of approving or disapproving. I suppose nobody will contend for a moment that the resolution, if his approval is necessary, though approved in the way in which he has thought proper to approve it, is not just as effective as if he had approved it without saying a word on the subject.

It is, in my judgment, a reflection upon the Senate and upon Congress, although not so designed. If he is sincere (and of course I do not call in question his sincerity) in thinking that it was not a subject for the legislation of Congress, he ought to have disapproved the resolution; but in my judgment he is entirely wrong in point of law. It may be true, and perhaps to that extent is true, that in the absence of any legislation the two houses of Congress, either acting in convention or acting separately, might establish for themselves rules by which they would be governed in admitting or excluding votes. But it is equally true, in my judgment, (and I speak it with all the deference that I can feel for the opposite opinion announced by the President, that it is a subject over which Congress has a right to legislate in order to guard against the very mischiefs which would result from leaving the subject, without legislation to be disposed of by the convention.

This is not the first time in which it has been done. The bill for the reconstruction of the seceded States was passed by an overwhelming vote in both houses at the last session. The President, to be sure, did not return it with a qualified veto, or with any veto, or with any approval. There not being ten days between the passage of the bill and the adjournment of Congress, he had a right not to act upon it, and by not acting he put it out of the power of Congress to pass it; but immediately after Congress adjourned he issued a manifesto or a proclamation, in which he said that, according to his view, there were some good things in the bill passed by Congress, and some bad things; as far as they were good, he would act upon them; as far as he considered them bad, or not as good as what he proposed himself, he would be governed by his own judgment.

It seems to me to be his clear and manifest duty—and I speak it with no possible want of respect to him; I should say the same thing if any other man was in the presidential office—to approve or disapprove, and not to do it in part by way of approval and in part by way of disapproval. He reads us a lecture, virtually, in this paper. He says we have legislated on a subject with which we have nothing to do. It was for us to decide for ourselves whether it was within our jurisdiction, and we have decided. In the exercise of his constitutional power of acting upon all subjects submitted to him in the form of legislation, he has a clear right to disapprove, if he thinks that he ought to disapprove, but not to take the course which he has adopted in this case, or to take the course which he adopted in the other case to which I have adverted.

The message was laid on the table.

ELECTION FOR THE TWENTY-FIRST TERM—1869.

ULYSSES S. GRANT, President.

SCHUYLER COLFAX, Vice-President.

IN SENATE, *January 13, 1869.*

Mr. Conkling submitted the following resolution; which was considered and agreed to:

“*Resolved*, That the President of the Senate be authorized to appoint the teller on the part of the Senate, provided for in the twenty-second joint rule of the two Houses, to receive and count the votes for President and Vice-President.”

February 5, 1869.

The Vice-President appointed Mr. Conkling the teller on the part of the Senate to receive and count the votes for President and Vice-President, as provided for in the twenty-second joint rule.

IN THE HOUSE OF REPRESENTATIVES, *February 4, 1869.*

Mr. SCHENCK. I rise to offer a resolution in reference to the counting of electoral votes for President and Vice-President, which I ask the Clerk to read.

The Clerk read as follows:

"Resolved, That James F. Wilson, of Iowa, and John V. L. Pruyn, of New York, be appointed tellers on the part of the House of Representatives to count the electoral votes for President and Vice-President."

The resolution was agreed to.

IN SENATE, *February 8, 1869.*

ELECTORAL VOTE OF GEORGIA.

Mr. EDMUNDS. If there are no further bills or resolutions, I move that the Senate now proceed to the consideration of the resolution named by me.

The motion was agreed to; and the Senate proceeded to consider the following resolution, submitted by Mr. Edmunds on Saturday last:

"Whereas the question whether the State of Georgia has become and is entitled to representation in the two houses of Congress is now pending and undetermined; and whereas by the joint resolution of Congress, passed July 20, 1863, entitled 'A resolution excluding from the electoral college votes of States lately in rebellion which shall not have been re-organized,' it was provided that no electoral votes from any of the States lately in rebellion should be received or counted for President or Vice-President of the United States until, among other things, such State should have become entitled to representation in Congress pursuant to acts of Congress in that behalf: Therefore,

"Resolved by the Senate, (the House of Representatives concurring,) That on the assembling of the two houses on the second Wednesday of February, 1869, for the counting of the electoral votes for President and Vice-President, as provided by law and the joint rules, if the counting or omitting to count the electoral votes, if any, which may be presented as of the State of Georgia, shall not essentially change the result, in that case they shall be reported by the President of the Senate in the following manner: Were the votes presented as of the State of Georgia to be counted, the result would be, for ——— for President of the United States ——— votes; if not counted, for ——— for President of the United States ——— votes; but in either case ——— is elected President of the United States; and in the same manner for Vice-President."

Mr. EDMUNDS. I rise merely to say a few words on the subject, not to occupy the time of the Senate, because I hope the resolution will meet with unanimous approval. By the rules as they now stand, having been so created after the difficulty of 1857 about counting the vote of Wisconsin, if the vote of Georgia should be objected to in the joint convention, if I may so style it, next Wednesday, it will be necessary for the Senate to retire immediately, and to consider without debate the question whether Georgia had complied with the reconstruction acts of Congress and the resolution of the 20th of July, excluding her vote from being counted until she should have become entitled to representation. That, of course, involves the whole question as to the condition of Georgia, whether she has become entitled to admission into this chamber and into Congress, and has complied with the conditions of the laws on that subject. Of course that is a question of the gravest import. It is a question about which there is a difference of opinion, as is seen in the two reports from the Judiciary Committee upon that subject. It appeared to me, inasmuch as we know morally that the question whether Georgia be counted or not will make no difference with the result, that we ought not to decide so important a question instantly and without debate, but that we ought to leave the question where it stands now, for fair discussion and deliberate action. This resolution, therefore, provides that if the vote of Georgia shall make no difference in the result, the Presiding Officer shall announce it hypothetically, which obviates all difficulty; and I may say it is precisely the course that the two houses took in 1821, under a similar resolution, in the case of Missouri. That State claimed to have complied with the act admitting her into the Union, and voted for President in the fall of 1820, and her votes were forwarded here. It was claimed by one party in Congress that she had not complied with the act, and that her votes ought not to be counted; by another, that she had complied, and that her votes ought to be counted. It turned out that it would make no difference in the result of the election how that question was decided, although it came within three or four votes of making a difference, and the two houses, to obviate the difficulty, agreed upon a resolution, which is almost literally the one I have presented. I hope, therefore, that this resolution will meet with general approval.

Mr. TRUMBULL. Mr. President, I do not know that I shall seriously object to the passage of this resolution in the state of existing facts; but it really seems to me that, *prima facie*, at least, these votes should be counted; and I submit to the Senator from Vermont, who introduced this resolution and bases it upon the assumption that it is immaterial whether the vote of Georgia is counted or not, and states that we all know that it will make no difference in the result, if that be so, why should not the vote be counted as *prima facie* valid until Congress acts? It would seem to be very clear that

Georgia was entitled to vote for President. The resolution that was passed at the last session of Congress provided :

"That none of the States whose inhabitants were lately in rebellion shall be entitled to representation in the electoral college for the choice of President or Vice-President of the United States, nor shall any electoral votes be received or counted from any of such States, unless at the time prescribed by law for the choice of electors the people of such States, pursuant to the acts of Congress in that behalf, shall have, since the 4th day of March, 1867, adopted a constitution of State government, under which a State government shall have been organized and shall be in operation, nor unless such election of electors shall have been held under the authority of such constitution and government, and such State shall have also become entitled to representation in Congress pursuant to the acts of Congress in that behalf."

Now, sir, we all know that since the 4th of March, 1867, the State of Georgia has "adopted a constitution of State government, under which a State government has been organized and is in operation." So much of this resolution is complied with. "Nor unless such election of electors shall be held under the authority of such constitution and government." It is not denied that the election in Georgia was under the constitution and government organized since March, 1867. "And such State shall have also become entitled to representation in Congress ;" not that it shall be represented in Congress, but that it shall have become "entitled to representation in Congress pursuant to the acts of Congress in that behalf." Now, by turning to another act of Congress, passed on the 25th of June, 1868, we find that Georgia is declared to be entitled to representation in Congress. That act is in these words :

"That each of the States of North Carolina, South Carolina, Louisiana, Georgia, Alabama, and Florida shall be entitled and admitted to representation in Congress as a State of the Union, when the legislature of such State shall have duly ratified the amendment to the Constitution of the United States,"

known as article 14, and also in the case of Georgia having stricken out a provision of her relief clauses, so called. We have the evidence before us, in pursuance of this act, that Georgia has duly ratified the constitutional amendment, the same as the other States of South Carolina, North Carolina, Alabama, and Louisiana. The President has issued his proclamation in pursuance of this act of Congress, declaring the ratification of the fourteenth amendment by the legislature of Georgia in the same manner that it has been ratified by the other States. We have also the evidence that Georgia complied with the other condition required of her by striking out a certain provision in her constitution known as the relief clauses—clauses inserted for the purpose of preventing the collection of debts. *Prima facie* it would seem that Georgia was entitled to representation and entitled to vote for President. Congress has not yet set aside these proceedings. The question will arise hereafter whether Congress can set them aside, and upon that there will be some difference of opinion, I apprehend. It is known that there is a difference of opinion ; but at this time, *prima facie* she is entitled to have her vote counted. But, as has been said by the Senator from Vermont, it will make no difference in the result ; and he proposes to avoid any decision about it. I do not know that I shall seriously object to the passage of the resolution in that view. But, sir, it is a very dangerous proceeding that we are adopting ; and if the result depended on this vote of Georgia I do not know but that it might involve this country in civil war. It is a very delicate matter to undertake to determine here in advance the votes from what States shall be counted and what not, when those States have cast their votes in pursuance of the laws of the land ; and to do that before any act of Congress has been passed declaring in any way that they are not entitled to vote, and to do it by resolution in this way, seems to me a dangerous precedent.

My only object in rising was to call attention to the precise condition of Georgia at this time, and to make the statement that I have made in regard to this electoral vote, and to express the opinion that inasmuch as it would make no difference in the result, and as, *prima facie* at least, Georgia had a right to vote, it would be better to count the vote without raising the question at all.

Mr. EDMUNDS. I do not wish to occupy time, because my friend from Illinois does not really object to the passage of this resolution. I merely rise to say that I entirely disagree with my friend as to the *prima facie* state of the case. I believe it is capable of demonstration not only that Georgia is not *prima facie* entitled to have her vote counted or to be represented as a State in this Union, but that the evidence is conclusive the other way. But this is not the time to discuss that, because, as I said before, it is a grave question, that requires calm discussion and time for deliberation. I only propose this to avoid the difficulty that my friend sees will arise unless we agree to this resolution.

Mr. HENDRICKS. I wish to submit to the Senate whether the two houses ought, in advance of the count of the vote, to assume to know who is elected President.

Mr. EDMUNDS. We do not assume to know by the resolution.

Mr. HENDRICKS. The Senator from Vermont says they do not assume to know that.

Then I do not understand the resolution. The resolution is that the President of the Senate shall announce as follows:

"Were the votes presented as of the State of Georgia to be counted, the result would be, for — for President of the United States, — votes; if not counted, for — for President of the United States, — votes; but in either case — is elected President of the United States."

Mr. EDMUNDS. My friend has omitted to cast his eye on the four or five preceding lines, which state that, if in the counting, the result shall not be changed, he shall announce it in this way. If it turns out to be otherwise, we shall be obliged to meet the question, of course.

Mr. HENDRICKS. This is the announcement that the President is to make upon the presentation of all the votes.

Mr. EDMUNDS. If Georgia's vote makes no difference in the result.

Mr. HENDRICKS. When Georgia is reached in the call of States, what announcement is the President to make in regard to it?

Mr. EDMUNDS. Not any, until he gets them all.

Mr. HENDRICKS. Then it is not to be counted in its order?

Mr. EDMUNDS. Yes; it will be counted the same way.

Mr. HENDRICKS. I understand from the Senator from Vermont that when Georgia is reached in the call of States, the vote of Georgia is not to be announced as counted.

Mr. EDMUNDS. My friend from Indiana does not quite understand the purport of this resolution, I think. It merely directs the President of the Senate that in making his announcement, (and he announces the final result all at once of the whole vote, as the practice has always been,) if the vote of Georgia makes no difference he shall so announce it.

Mr. HENDRICKS. I want to know of the Senator from Vermont, when Georgia is called, is her vote to be counted by the tellers?

Mr. EDMUNDS. I suppose the tellers will count the votes and announce that the vote of the State of Georgia is so and so, but when the final footing up takes place, and it is found that that number of votes makes no difference in the result, the President will then announce it in this form. If it is found that it does make a difference in the result, then unquestionably the vote of Georgia will be objected to, if I happen to live at that time, and can get the floor; and then we shall be obliged to decide, as I have said before, under the joint rules, the dangerous question that my friend from Illinois alludes to, without debate and without consideration.

Mr. HENDRICKS. Then, for a while, Georgia is to be counted, and finally she is not to be counted, under this resolution. That is the proposition of the resolution. The tellers are to count the votes, and call the States as completed, and then the Chair is to announce substantially that Georgia is not counted. That is the substance of it, because he is simply to announce that if it were counted then the result would be thus; if Georgia were not counted, then it would be thus; so that if the announcement of the Chair is any part of the proceeding, and of its substance, Georgia is not to be counted. This resolution is to that effect.

Mr. EDMUNDS. Not at all.

Mr. HENDRICKS. Is such an announcement to be made upon the ground that the counting or not counting of that vote will make no difference in the result? Is the Senate prepared to say, in regard to a State, that she may not be counted and shall not be counted because it will make no change in the result? As I understand the case of Georgia, it stands thus: Congress by law has declared her entitled to representation and a State of the Union, upon two conditions: first, that she should ratify the fourteenth constitutional amendment. That she has done, and we have the evidence, which is regarded as conclusive on that subject I believe, of the proclamation of the Secretary of State; and the second condition was that her legislature should pass a law repealing certain provisions of the constitution of the State in regard to relief to debtors. She has done that, as is shown by her records. So that upon the conditions prescribed by Congress in the law there is no question of fact in the case of Georgia. I understand that the objections to the admission of Georgia to representation in this body are not based upon her non-compliance with either of these conditions. The objection rests upon other grounds—the conduct of her legislature, the conduct of her people; and in support of this proposition I refer the Senate to the report of the Committee on the Judiciary, made by the Senator from Nevada, [Mr. Stewart,] in which the grounds are stated, and I believe in that report it is not assumed that the legislature has failed to comply with either of the conditions. The legislature having complied with both conditions, and that being known to the Senate, upon what ground now is the Senate ready to say that Georgia shall not be counted?

It is not enough to say that the vote will not change the result; you cannot stand upon that position. My colleague and myself could not sit here to-day quietly and consent that the vote of Indiana should not be counted, although it would not change the result. We could not consent to a resolution like this, because, for the time being, it would be stripping her of one of her rights under the Constitution. If Georgia is a

State in the Union, then we cannot pass such a resolution as this. I cannot vote for it, whatever its effect may be upon the result.

Mr. WHYTE. I do not see with what propriety the Senate could adopt a resolution with such a recital in it as is contained in the resolution now under consideration in the Senate. It starts with an allegation which, in my humble judgment, is wholly incorrect, and one which could not receive my support:

"Whereas the question whether the State of Georgia has become and is entitled to representation in the two houses of Congress, is now pending and undetermined."

I do not understand that question to be pending and undetermined anywhere but in the Senate. So far from there being any question as to the representation of Georgia in the two houses, members from the State of Georgia are now acting in the House of Representatives, and voting upon the passage of bills which come from that house into the Senate Chamber.

Mr. CONKLING. Will the honorable Senator allow me to make a remark?

Mr. WHYTE. Yes, sir.

Mr. CONKLING. There is a delegation sitting from Georgia in the House of Representatives, but that delegation was elected long antecedent to the time at which the questions to which he adverts arose; and in the House a resolution had been passed instructing the committee having charge of that subject to inquire into the right of Georgia to be represented for the present or the future in that body. Therefore, I remind the Senator that the question has been made not only here, but in the other house.

Mr. WHYTE. May I ask the Senator from New York to tell me whether those Representatives from Georgia have not been admitted into the House of Representatives since the announcement of the acquiescence by Georgia in the requirements set down by Congress?

Mr. CONKLING. I am not able to speak of the date at which the actual admission took place; but the election occurred in April, which was months before the convening of the legislature, and therefore before all of the things which constitute the impediments, if in truth impediments exist, to the right of Georgia to representation.

Mr. WHYTE. Mr. President, the Senator from New York does not answer, or, as he states, cannot answer the question whether or not those members have not been admitted as Representatives from Georgia since the requirement by Congress of the adoption of the fourteenth constitutional amendment. I venture to affirm that they have been admitted since that period of time, and the Senators presented themselves here for representation in this branch of Congress, desiring to take their seats. But in the meanwhile, between the admission of the Representatives in the other house and the presentation of the credentials of the Senators, a resolution was passed by the Georgia legislature with regard to the eligibility of negroes to hold office in that body. But anterior to that time, and since the acquiescence by Georgia in the constitutional amendment, her right to representation in the other house was acquiesced in and settled. Whether the other house is pondering the question whether it shall take steps backward and now unseat the gentlemen, I do not know; but that she has been admitted to representation, recognized as entitled to representation, and consequently entitled to vote at the presidential election, there can be no doubt.

* * * * *

ELECTORAL VOTE OF GEORGIA.

Mr. EDMUNDS. I move that the Senate proceed to the consideration of the resolution I have indicated.

The motion was agreed to; and the Senate resumed the consideration of the following resolution:

"Whereas the question whether the State of Georgia has become and is entitled to representation in the two houses of Congress is now pending and undetermined; and whereas by the joint resolution of Congress passed July 20, 1863, entitled 'A resolution excluding from the electoral college votes of States lately in rebellion which shall not have been re-organized,' it was provided that no electoral votes from any of the States lately in rebellion should be received or counted for President or Vice-President of the United States until, among other things, such State should have become entitled to representation in Congress pursuant to acts of Congress in that behalf: Therefore,

"Resolved by the Senate, (the House of Representatives concurring,) That on the assembling of the two houses on the second Wednesday of February, 1869, for the counting of the electoral votes for President and Vice-President, as provided by law and the joint rules, if the counting or omitting to count the electoral votes, if any, which may be presented as of the State of Georgia shall not essentially change the result, in that case they shall be reported by the President of the Senate in the following manner: Were the votes presented as of the State of Georgia to be counted the result would be, for ——— for President of the United States, — votes; if not counted, for ——— for

President of the United States, — votes; but in either case — is elected President of the United States; and in the same manner for Vice-President."

The PRESIDENT *pro tempore*. The question is on the adoption of the concurrent resolution.

The question being put, there were, on a division, ayes, 33; noes, 8.

MR. HENDRICKS. I think this is an important vote, and therefore I call for the yeas and nays.

The yeas and nays were ordered; and the Chief Clerk commenced the call of the roll, Mr. Abbott answering to his name.

Several SENATORS. What is the question?

MR. HENDRICKS. I am told the question is on taking up the resolution of the Senator from Vermont. If so, I do not want the yeas and nays.

MR. EDMUNDS and others. No; it is on agreeing to the resolution.

The PRESIDENT *pro tempore*. The question is upon the adoption of the resolution, and the roll is being called.

The call of the roll having been concluded, the result was announced—yeas 34, nays 11; as follows:

YEAS—Messrs. Abbott, Anthony, Cameron, Cattell, Cole, Conkling, Corbett, Cragin, Drake, Edmunds, Frelinghuysen, Howard, McDonald, Morgan, Morrill of Maine, Morrill of Vermont, Morton, Nye, Pool, Ramsey, Rice, Robertson, Ross, Sherman, Stewart, Sumner, Thayer, Tipton, Warner, Welch, Willey, Williams, Wilson, and Yates—34.

NAYS—Messrs. Buckalew, Davis, Fowler, Hendricks, McCreery, Norton, Patterson of Tennessee, Saulsbury, Trumbull, Vickers, and Whyte—11.

ABSENT—Messrs. Bayard, Chandler, Conness, Dixon, Doolittle, Ferry, Fessenden, Grimes, Harlan, Harris, Henderson, Howe, Kellogg, Osborn, Patterson of New Hampshire, Pomeroy, Sawyer, Spencer, Sprague, Van Winkle, and Wade—21.

So the resolution was agreed to.

IN THE HOUSE OF REPRESENTATIVES, February 8, 1869.

ELECTORAL VOTE OF GEORGIA.

MR. WILSON, of Iowa. I now move that the rules be suspended in order that the concurrent resolution of the Senate, in relation to the electoral vote of Georgia, may be taken from the Speaker's table and agreed to.

MR. WOODWARD. I ask the yeas and nays on that motion.

MR. FARNSWORTH. Let the concurrent resolution be read.

The Clerk read as follows:

"Whereas the question whether the State of Georgia has become and is entitled to representation in the two houses of Congress, is now pending and undetermined; and whereas by the joint resolution of Congress passed July 20, 1863, entitled 'A resolution excluding from the electoral college votes of States lately in rebellion, which shall not have been re-organized,' it was provided that no electoral votes from any of the States lately in rebellion should be received or counted for President or Vice-President of the United States, until, among other things, such State should have become entitled to representation in Congress, pursuant to the acts of Congress in that behalf: Therefore,

"Resolved by the Senate, (the House of Representatives concurring,) That on the assembling of the two houses on the second Wednesday of February, 1869, for the counting of the electoral votes for President and Vice-President, as provided by law and the joint rules, if the counting or omitting to count the electoral votes, if any, which may be presented as of the State of Georgia shall not essentially change the result, in that case they shall be reported by the President of the Senate in the following manner: Were the votes presented as of the State of Georgia to be counted the result would be, for — for President of the United States, — votes; if not counted, for — for President of the United States, — votes; but in either case — is elected President of the United States; and in the same manner for Vice-President."

MR. WOODWARD. I ask unanimous consent that the yeas and nays be taken on the motion to suspend the rules.

There was no objection.

So the yeas and nays were ordered.

The question was taken, and it was decided in the affirmative—yeas 93, nays 17, not voting 107; as follows:

YEAS—Messrs. Allison, Ames, Banks, Beaman, Beatty, Benjamin, Benton, Blaine, Blair, Boles, Bowen, Boyden, Broomall, Buckland, Benjamin F. Butler, Roderick R. Butler, Churchill, Clift, Cobb, Coburn, Corley, Cullom, Dawes, Delano, Deweese, Dickey, Dixon, Dodge, Eckley, Ela, Ferriss, Ferry, Garfield, Halsey, Harding, Heaton, Higby, Hill, Hooper, Hopkins, Chester D. Hubbard, Hulburt, Jenckes, Julian, Kelley, Kellogg, Kelsey, Koontz, Laflin, William Lawrence, Loan, Logan, Loughbridge, Marvin, Maynard, McCarthy, McKee, Miller, Moore, Moorhead, Mullins, Norris, Paine, Per-

ham, Peters, Pierce, Pile, Plants, Price, Prince, Raum, Roots, Sawyer, Schenck, Scofield, Shanks, Shellabarger, Starkweather, Stevens, Stewart, Stokes, Stover, Sypher, Taylor, Thomas, Trowbridge, Twichell, Upson, Robert T. Van Horn, Vidal, Henry D. Washburn, Welker, Whittemore, William Williams, James F. Wilson, John T. Wilson, and Windom—98.

NAYS—Messrs. Baker, Boyer, Farnsworth, Getz, Holman, Hotchkiss, Johnson, Thomas L. Jones, Niblack, Phelps, Randall, Ross, Taber, Van Aiken, Van Trump, Woodward, and Young—17.

NOT VOTING—Messrs. Adams, Anderson, Archer, Arnell, Delos R. Ashley, James M. Ashley, Axtell, Bailey, Baldwin, Barnes, Barnum, Beck, Bingham, Blackburn, Bontwell, Bromwell, Brooks, Buckley, Burr, Cake, Callis, Cary, Chanler, Reader W. Clarke, Sidney Clarke, Cook, Cornell, Covode, Dockery, Donnelly, Driggs, Edwards, Eggleston, Eldridge, Thomas D. Eliot, James T. Elliott, Fields, Fox, French, Glossbrenner, Golladay, Goss, Gove, Gravely, Griswold, Grover, Haight, Hamilton, Hanghey, Hawkins, Asabel W. Hubbard, Richard D. Hubbard, Humphrey, Hunter, Ingersoll, Alexander H. Jones, Judd, Kerr, Ketcham, Kitchen, Knott, Lash, George V. Lawrence, Lincoln, Lynch, Mallory, Marshall, McCormick, McCullough, Merenr, Morrell, Morrissey, Munger, Myers, Newcomb, Newsham, Nicholson, Nunn, O'Neill, Orth, Pettis, Pike, Poland, Polsley, Pomeroy, Pruyn, Robertson, Robinson, Selye, Sitgreaves, Smith, Spalding, Stone, Taffe, Tift, John Trimble, Lawrence S. Trimble, Van Aernam, Burt Van Horn, Van Wyck, Ward, Cadwalader C. Washburn, Elihu B. Washburne, Thomas Williams, Stephen F. Wilson, Wood, and Woodbridge—107.

So the motion to suspend the rules was agreed to, and the concurrent resolution was adopted.

Mr. Wilson, of Iowa, moved to reconsider the vote just taken; and also moved that the motion to reconsider be laid on the table.

The latter motion was agreed to.

IN THE HOUSE OF REPRESENTATIVES, February 10, 1869.

Mr. Schenck introduced the following resolution; which was read, considered, and agreed to:

Resolved, That the Clerk inform the Senate that this House is now ready to receive that body for the purpose of proceeding to open and count the votes of the electors of the several States for President and Vice-President of the United States."

IN SENATE, February 10, 1869.

Mr. McPHERSON, the Clerk of the House of Representatives, appeared at the bar of the Senate, and delivered the following message:

Mr. President, I am directed to inform the Senate that the House of Representatives is now ready to receive the Senate for the purpose of proceeding to open and count the votes of the electors of the several States for President and Vice-President of the United States.

Mr. MORTON. I move that the Senate now proceed to the hall of the House of Representatives.

The motion was agreed to.

The PRESIDENT *pro tempore*. The Senate will now proceed to the hall of the House of Representatives for the purpose of counting the votes for President and Vice-President of the United States.

The Senate, preceded by the Sergeant-at-Arms and Secretary, proceeded to the hall of the House of Representatives.

IN THE PRESENCE OF THE SENATE AND HOUSE OF REPRESENTATIVES,

February 10, 1869.

COUNTING THE ELECTORAL VOTES.

At 1 o'clock p. m. the Doorkeeper announced the Senate of the United States.

The Senate entered the hall, preceded by its Sergeant-at-Arms and headed by the President *pro tempore* and the Secretary of the Senate, the members and officers of the House rising to receive them. The Senators took the seats set apart for them in the eastern section of the hall.

The President of the Senate took his seat as presiding officer of the joint convention of the two houses, the Speaker occupying a chair on the left of the President of the Senate.

Senator Conkling, the teller appointed on the part of the Senate, and Messrs. Wilson of Iowa, and Pruyn, the two tellers appointed on the part of the House, took their seats at the Clerk's desk, at which the Secretary of the Senate and the Clerk of the House also occupied seats.

The PRESIDENT *pro tempore* of the Senate. The Senate and House of Representatives having met under the provisions of the Constitution for the purpose of opening,

determining, and declaring the votes for the offices of President and Vice-President of the United States for the term of four years commencing on the 4th of March next, and it being my duty, in the presence of both houses thus convened, to open the votes, I now proceed to discharge that duty.

The President *pro tempore* then proceeded to open and hand to the tellers the votes of the several States for President and Vice-President of the United States, commencing with the State of New Hampshire.

Senator Conkling, one of the tellers, read in full the certificate of the vote of the State of New Hampshire, giving five votes for Ulysses S. Grant, of Illinois, for President of the United States, and five votes for Schuyler Colfax, of Indiana, for Vice-President of the United States.

The PRESIDENT. If there be no objection the certificates of the votes of the other States will not be read in full, but only the results stated, except when the reading of any certificate in full shall be called for by any member.

The tellers reported, through Senator Conkling, that they had examined the vote of the State of Massachusetts; that they found it in due form; that all the votes given for President of the United States were twelve, all of which were for Ulysses S. Grant, of the State of Illinois; and that all the votes given for Vice-President of the United States were twelve, all of which were for Schuyler Colfax, of the State of Indiana.

The same form was observed in announcing the votes of the other States until the State of Louisiana was announced, when

Mr. MULLINS said: Mr. President, I call for the reading in full of the certificate accompanying the return of the vote of Louisiana.

The certificate was read; after which

Mr. MULLINS said: I object to the counting of the vote from the State of Louisiana.

The PRESIDENT. The rule in this case will be read.

The rule was read, as follows:

"If, upon the reading of any such certificate by the tellers, any question shall arise in regard to counting the votes therein certified, the same having been stated by the Presiding Officer, the Senate shall thereupon withdraw, and said question shall be submitted to that body for its decision; and the Speaker of the House of Representatives shall in like manner submit said question to the House of Representatives for its decision; and no question shall be decided affirmatively, and no vote objected to shall be counted, except by the concurrent votes of the two houses, which being obtained, the two houses shall immediately re-assemble, and the Presiding Officer shall then announce the decision of the question submitted; and upon any such question there shall be no debate in either house. And any other question pertinent to the object for which the two houses are assembled may be submitted and determined in like manner."

The PRESIDENT. Objection has been made to counting the vote of the State of Louisiana.

Mr. ELDRIDGE. I rise to a question of order. I insist that the rule which has just been read is in direct contravention of the terms of the Constitution. I call attention to the following clause of the twelfth amendment to the Constitution, which is as follows:

"The President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates, and the votes shall then be counted."

The PRESIDENT. The rule which has been read is one that was adopted by both houses. The Chair declines to entertain the question of order, but will say that he believes the rule to be in accordance with the Constitution.

Mr. WOODWARD. I rise to a question of order, which I think will be entertained by the Chair. I submit that the objection made by the gentleman from Tennessee [Mr. Mullins] does not raise the question contemplated by the rule which has been read. To bring the case within the rule there must be specific objection, and until such specific objection shall be urged there is no occasion for the Senate to retire.

The PRESIDENT. It will be observed that the rule says:

"If, upon the reading of any such certificate by the tellers, any question shall arise in regard to counting the votes therein certified," &c.

The stating an objection without assigning any reason therefor, in the opinion of the Chair, is hardly "raising a question," within the meaning of the rule. The gentleman from Tennessee [Mr. Mullins] will therefore state in writing the reason for his objection.

Mr. WASHBURNE, of Illinois. I hope the gentleman from Tennessee [Mr. Mullins] will withdraw his objection and let this matter proceed.

Senator SUMNER. I would inquire whether we might not pass over the case of Louisiana informally and proceed with the rest of the count?

Mr. WOOD. I object to that, Mr. President. Let us go on regularly.

Senator SAULSBURY. I would like to know the objection that the Senate of the United States is to consider.

The PRESIDENT. No debate is in order till the reason of this objection shall be presented.

Senator SAULSBURY. I call for the reading of the objection.

The PRESIDENT. The reason for the objection will be read.

Mr. WILSON, of Iowa, (one of the tellers,) read the objection of Mr. Mullins, as reduced to writing, in the following words:

"I object to any count of the votes certified from the State of Louisiana, and raise the question in regard to them that no valid election of electors for President and Vice-President of the United States has been held in said State."

The PRESIDENT. Objection being made to the counting of the votes returned from the State of Louisiana, the Senate will, according to the rule, retire to their chamber to deliberate upon the objection.

The Senate accordingly retired from the hall.

IN SENATE, February 10, 1869.

VOTE OF LOUISIANA.

The Senate returned to its chamber at twenty-five minutes past one o'clock.

The PRESIDENT *pro tempore*. The Senate will come to order. The Clerk will read the point raised in the joint meeting.

The Chief Clerk read as follows:

"Objection was raised to any count of the votes certified from the State of Louisiana; and the question was raised in regard to them that no valid election of electors for President and Vice-President has been held in said State."

Mr. HENDRICKS. Mr. President, I move that it is the judgment of the Senate that the vote be counted.

The PRESIDENT *pro tempore*. It is moved and seconded that it is the judgment of the Senate that the vote be counted.

Mr. TRUMBULL. It had better be in the form of a resolution, I suppose.

Mr. HENDRICKS. I suppose the Secretary will put it in the form of a resolution.

Mr. TRUMBULL. I have prepared this resolution:

"Resolved, That in the opinion of the Senate the vote of Louisiana ought to be counted."

Mr. HENDRICKS. I withdraw my proposition.

Mr. CONKLING. "The vote of the electors of Louisiana," it should be.

Mr. TRUMBULL. I will so modify it, if that is the form of the Constitution.

Mr. CONNESS. I offer an amendment to the resolution, which I send to the Chair.

Mr. HOWARD. I beg to inquire whether the Senate proceeds to act upon this question of the validity of an election without any proof, discussion, or debate?

The PRESIDENT *pro tempore*. No debate is admissible.

Mr. CONNESS. I ask for the reading of my amendment.

Mr. HOWARD. I ask for the reading of the objection of the member of the convention which was read before.

The PRESIDENT *pro tempore*. Let it be read again.

The CHIEF CLERK. The objection was to any count of the votes certified from the State of Louisiana, and the question was raised in regard to them that no valid election of electors for President and Vice-President has been held in said State.

Mr. HOWARD. I inquire whether that is all the evidence before the Senate?

The PRESIDENT *pro tempore*. That is all there is here.

Mr. WARNER. I move to strike out the words "ought to" in the resolution and insert the word "shall."

Several Senators addressed the Chair.

The PRESIDENT *pro tempore*. No debate is in order.

Mr. SAULSBURY. I do not rise to debate it, but to submit a motion.

Mr. CONNESS. I have offered an amendment, which has not been read.

The PRESIDENT *pro tempore*. The amendment will be read.

The CHIEF CLERK. The resolution submitted by Mr. Trumbull is:

"Resolved, That in the opinion of the Senate the vote of Louisiana ought to be counted."

Mr. CONNESS moves to amend by striking out all after the word "resolved" and inserting:

"That in the opinion of the Senate the election for President and Vice-President in the State of Louisiana was valid, and that the vote shall be counted."

Mr. TRUMBULL. I think we need not decide anything more than is before us. It is simply whether the vote ought to be counted.

Mr. EDMUNDS. That is debate.

The PRESIDENT *pro tempore*. The question is on the amendment of the Senator from California.

The amendment was rejected.

The PRESIDENT *pro tempore*. The question now is on the resolution of the Senator from Illinois.

Mr. WILSON. I ask for the yeas and nays on that.

Mr. WARNER. I offer my amendment now.

The PRESIDENT *pro tempore*. The Senator from Alabama offers an amendment to strike out the words "ought to" and insert "shall."

Mr. EDMUNDS. Let it be read as it will stand if amended.

The CHIEF CLERK. If the resolution be amended as now proposed it will read:

"Resolved, That in the opinion of the Senate the vote of Louisiana shall be counted."

Mr. BUCKALEW. The Senate does not want it in that way.

Mr. WARNER. I will amend it so as to read "that it is the judgment of the Senate that the vote shall be counted."

The amendment was rejected.

The PRESIDENT *pro tempore*. The question is on the resolution of the Senator from Illinois.

Mr. WILSON. I ask for the yeas and nays on its adoption.

Mr. CONNESS. I call for the reading of the resolution again.

The CHIEF CLERK. It is as follows:

"Resolved, That in the opinion of the Senate the vote of Louisiana ought to be counted."

Mr. TRUMBULL. I think it ought to say "the vote of the electors of the State of Louisiana."

The PRESIDENT *pro tempore*. It will be so modified.

Mr. MORTON. Is it competent to offer an amendment to that now?

The PRESIDENT *pro tempore*. It is competent to offer an amendment, but debate is not in order.

Mr. MORTON. I offer the following amendment, which I will ask the Clerk to take down, to come in immediately after the word "resolved:":

"That while there is reason to believe from common report and information that the late presidential election in Louisiana was carried on by force and fraud, still there being no legal evidence before the Senate on that subject, therefore the electoral vote of Louisiana ought to be counted."

Mr. HENDRICKS. Mr. President, I submit that that recital is not in order. I submit as a question of order that under the joint rule we have to decide the question made by the objection, and that we are not to recite a state of facts, but to decide the question that comes up, and that question is simply and nakedly whether the vote be counted.

Mr. WILLIAMS. I object to debate.

The PRESIDENT *pro tempore*. The Chair is of opinion that nothing else is in order except the decision of the question made.

Mr. HARLAN. I inquire whether it would be in order to call for the reading of the official papers that accompany the vote?

Mr. WILSON and Mr. TRUMBULL. They were read.

Mr. HARLAN. They were read in the joint meeting, but they have not been read before the Senate.

Mr. TRUMBULL. There is no irregularity in the papers.

The PRESIDENT *pro tempore*. The papers are not in the possession of the Senate.

Mr. NYE. I do not suppose that the Chair intends to rule by any means that Senators are not to act on the testimony in regard to the question that they already possess.

The PRESIDENT *pro tempore*. The Chair rules nothing except that he believes it would be out of order to attempt to decide anything except the question that is made and presented.

Mr. EDMUNDS. I call for the reading of the resolution as it now stands, as modified.

The PRESIDENT *pro tempore*. It will be read.

The CHIEF CLERK. It is as follows:

"Resolved, That in the opinion of the Senate the vote of the electors of the State of Louisiana ought to be counted."

Mr. DAVIS. I move to amend by striking out the term "ought to" and inserting "should."

The amendment was rejected; there being, on a division—11 ayes and 30 noes.

Mr. SPRAGUE. I move to amend the resolution by striking out all after the word "resolved" and inserting:

"That the votes of the electors of the State of Louisiana for President and Vice-President be counted."

Mr. HENDRICKS. I think that is exactly right.

Mr. EDMUNDS. I object to debate.

The PRESIDENT *pro tempore*. No debate is in order.

Mr. SUMNER. I send to the Chair a substitute.

The PRESIDENT *pro tempore*. An amendment to the amendment?

Mr. SUMNER. An amendment to the amendment by way of substitute.

The PRESIDENT *pro tempore*. The proposition of the Senator from Massachusetts will be read.

The CHIEF CLERK. The Senator from Massachusetts proposes to strike out of the proposed amendment the words "votes of the electors of the State of Louisiana for President and Vice-President be counted," and in lieu thereof to insert:

"The electoral vote of Louisiana shall be reported in the following manner, to wit: 'Were the votes presented as of the State of Louisiana to be counted the result would be for ——— for President of the United States — votes; if not counted, for ——— for President of the United States — votes; but in either case ——— is elected President of the United States;' and in the same manner for Vice-President."

Mr. SUMNER. That is the rule adopted in the Georgia case.

Mr. EDMUNDS. That is not the question here.

Mr. SHERMAN. I rise to a question of order. The point of order is that that does not decide the point raised, nor is it in order in the present state of the question.

The PRESIDENT *pro tempore*. No debate is in order; and the Chair believes that the amendment proposed is not in order. It does not respond to the objection made.

Mr. SUMNER. Do I understand that the Chair rules the substitute which I offered to be out of order?

The PRESIDENT *pro tempore*. The Chair thinks it is out of order. It is the opinion of the Chair that nothing but a direct response to the objection made is in order.

Mr. SPRAGUE. I ask for the consideration of the amendment I have offered.

The PRESIDENT *pro tempore*. The question is on the amendment of the Senator from Rhode Island.

Mr. WILLIAMS. Let it be read again.

The CHIEF CLERK. The amendment is to strike out all after the word "resolved" and insert:

"That the votes of the electors of the State of Louisiana for President and Vice-President be counted."

Mr. WARNER. I suggest a modification like this, using the language of the Senator from Indiana:

"Resolved, That it is the judgment of the Senate of the United States that the electoral vote of Louisiana be counted."

Mr. SPRAGUE. We do not want any "judgment;" we express our opinion.

The PRESIDENT *pro tempore*. Does the Senator move that amendment to the amendment?

Mr. WARNER. Yes, sir.

The PRESIDENT *pro tempore*. The question is on the amendment to the amendment. The amendment to the amendment was rejected.

The PRESIDENT *pro tempore*. The question now is on the amendment of the Senator from Rhode Island, [Mr. Sprague.]

Mr. POOL. I move an amendment to the amendment, to strike out all after the word "that" and insert:

"The objection raised to the counting of the votes of the electors of the State of Louisiana for President and Vice-President of the United States is not sustained by the evidence before the Senate, and therefore said votes be counted."

The amendment to the amendment was rejected.

The PRESIDENT *pro tempore*. The question recurs on the amendment of the Senator from Rhode Island, [Mr. Sprague.]

Mr. CONKLING and Mr. CONNESS. Let that be read again.

The CHIEF CLERK. The amendment is to strike out all after the word "resolved" and insert:

"That the votes of the electors of the State of Louisiana for President and Vice-President be counted."

The amendment was agreed to—ayes 46, noes not counted.

The PRESIDENT *pro tempore*. The question is on the resolution as amended.

Mr. SUMNER and Mr. EDMUNDS called for the yeas and nays; and they were ordered.

The PRESIDENT *pro tempore*. The Chair will suggest to the Senate whether this ought not to be a concurrent resolution. The twenty-second joint rule, under which we are acting, provides:

"If, upon the reading of any such certificate by the tellers, any question shall arise in regard to counting the votes therein specified, the same having been stated by the Presiding Officer, the Senate shall thereupon withdraw, and said question shall be submitted to that body for its decision, and the Speaker of the House of Representatives shall in like manner submit said question to the House of Representatives for its decision; and no question shall be decided affirmatively, and no vote objected to shall be counted, except by the concurrent votes of the two houses; which being obtained, the

two houses shall immediately re-assemble, and the Presiding Officer shall then announce the decision of the question submitted, and upon any such question there shall be no debate in either house."

Mr. FRELINGHUYSEN. It says "concurrent vote."

Mr. EDMUNDS. That means the vote of each house the same way.

Mr. HENDRICKS. I submit that does not mean a concurrent resolution, but simply that the two houses shall unite.

Mr. SHERMAN. According to the rule, we send this resolution to the House of Representatives, they concur in it, and then we go back.

Mr. TRUMBULL. That is all. We pass our resolution expressing our judgment on the question raised.

Mr. DOOLITTLE. It should be "resolved, (the House of Representatives concurring.)"

The PRESIDENT *pro tempore*. The question is on the resolution as amended, upon which the yeas and nays are demanded.

The yeas and nays were ordered.

Mr. DOOLITTLE. I suggest that after the word "resolved" there should be inserted "the House of Representatives concurring."

Mr. HENDRICKS. I object to that.

Mr. FESSENDEN. Let us see how it stands.

The CHIEF CLERK. The resolution, as amended, is as follows:

"Resolved, That the votes of the electors of the State of Louisiana for President and Vice-President be counted."

Mr. EDMUNDS. I think it is better to say "the House of Representatives concurring," because we cannot re-assemble till there is concurrent action.

The PRESIDENT *pro tempore*. Would it not be better to say "in the opinion of the Senate" these votes ought to be counted?

Mr. TRUMBULL. Our resolution expresses our opinion. We ought to resolve that in the opinion of the Senate these votes ought to be counted; and then if the House agree to the resolution that is the end of it.

Mr. EDMUNDS. I ask unanimous consent to read that part of the rule:

"No question shall be decided affirmatively, and no vote objected to shall be counted, except by the concurrent votes of the two houses; which being obtained, the two Houses shall immediately re-assemble, and the Presiding Officer shall then announce the decision."

If I am permitted to say by unanimous consent—

Mr. GRIMES. I object.

Mr. EDMUNDS. Then I do not want to say anything. I move to insert the words "the House of Representatives concurring" after the word "resolved."

The PRESIDENT *pro tempore*. Is there any objection to that amendment?

Mr. SAULSBURY. I rise to make an objection. I have a right to make an objection, though I cannot argue it. I say that amendment cannot be entertained for the reason that the rule under which we are acting does not require a concurrent resolution, but only a concurrent vote of the respective houses.

Mr. MORTON. I offered an amendment to the original resolution, and I think I am entitled to have a vote upon it.

The PRESIDENT *pro tempore*. The Chair thought it was a preamble suggesting other reasons than those raised by the objection.

Mr. MORTON. I did not offer it as a preamble.

Mr. EDMUNDS. I ask to have the question put on the motion I made to amend by inserting after "resolved" the words "the House of Representatives concurring," to make it conform to the rule.

The amendment was agreed to—ayes 30, noes not counted.

Mr. MORTON. I move to amend the resolution so as to make it read:

"That while there is reason to believe from common report and information that the late presidential election in Louisiana was carried by force and fraud, still, there being no legal evidence before the Senate on that subject, therefore the electoral vote of Louisiana ought to be counted."

On that question I ask for the yeas and nays.

Mr. TRUMBULL. I object to it on the question of order.

The PRESIDENT *pro tempore*. The Chair was of opinion at first that it was out of order; but it is now offered as an amendment to the resolution, and perhaps it is in order. The Chair before thought it was offered as a preamble; but now, being offered as an amendment, the Chair cannot rule it to be out of order. The question is on the amendment offered by the Senator from Indiana, and on that question the yeas and nays are called for.

The yeas and nays were ordered.

Mr. WILLIAMS. I respectfully inquire if the amendment is not open to debate? Are we to decide such a question without discussion?

The PRESIDENT *pro tempore*. The rule is express. The question must be decided without debate.

Mr. WILLIAMS. I have not examined the subject.

The PRESIDENT *pro tempore*. The question is on the amendment of the Senator from Indiana, [Mr. Morton.]

The question being taken by yeas and nays, resulted—yeas 24, nays 35, as follows:

YEAS—Messrs. Cameron, Cattell, Chandler, Conkling, Harris, Howard, Kellogg, McDonald, Morgan, Morrill of Vermont, Morton, Nye, Osborn, Pool, Ramsey, Rice, Robertson, Spencer, Stewart, Sumner, Thayer, Tipton, Warner, and Wilson—24.

NAYS—Messrs. Abbott, Anthony, Buckalew, Cole, Conness, Corbett, Cragin, Davis, Dixon, Doolittle, Drake, Edmunds, Ferry, Fessenden, Fowler, Frelinghuysen, Grimes, Harlan, Hendricks, Howe, McCreery, Patterson of New Hampshire, Patterson of Tennessee, Ross, Sanlisbury, Sawyer, Sherman, Sprague, Trumbull, Van Winkle, Vickers, Whyte, Willey, Williams, and Yates—35.

ABSENT—Messrs. Bayard, Henderson, Morrill of Maine, Norton, Pomeroy, Wade, and Welch—7.

So the amendment was rejected.

Mr. McPherson, the Clerk of the House of Representatives, appeared at the bar and delivered the following message:

Mr. President, I am directed to inform the Senate that the House of Representatives, on the objection made in joint convention against counting the electoral vote of the State of Louisiana for President and Vice-President of the United States, have voted in favor of counting the said vote.

Mr. CONKLING. I move, as a substitute for the pending proposition, that the Senate send to the House of Representatives a resolution corresponding to that just sent to us from the House of Representatives, substituting the word "Senate" for "House" at the proper place, so that it will read that the Senate have determined in the same way.

Mr. ANTHONY. That will not be a concurrent resolution.

Mr. CONKLING. This is not a concurrent resolution.

Mr. ANTHONY. Yes; I believe the form is "the House concurring," which goes in as a matter of course.

Mr. CONKLING. I submit my motion as a substitute for the pending proposition, that it be resolved by the Senate that the House of Representatives be informed in the language of the resolution just received from the House.

The PRESIDENT *pro tempore*. Will the Senator put his motion in writing?

Mr. CONKLING. It is in writing now, in the hands of the Secretary, in the message just received from the House, and all that is necessary is to take that resolution and transpose the word "House" to "Senate."

Mr. DRAKE. I submit that that is not in order. We have not voted on the pending resolution yet.

The PRESIDENT *pro tempore*. A question being pending, the motion of the Senator from New York cannot be entertained except by unanimous consent.

Mr. DRAKE. I object until we vote on the pending resolution and decide the question.

The PRESIDENT *pro tempore*. The question is on the resolution, upon which the yeas and nays have been ordered. The Clerk will call the roll.

The Chief Clerk called the name of Mr. Abbott; and he responded.

Mr. WARNER. Is it in order to move to lay the pending proposition on the table?

Mr. ANTHONY. There has been an answer on the roll-call.

Mr. GRIMES. A Senator has answered to his name, and nothing is now in order but the calling of the roll.

Mr. ABBOTT. I had answered to my name.

The call of the roll being concluded, the result was—yeas 51, nays 7; as follows:

YEAS—Messrs. Abbott, Anthony, Buckalew, Cameron, Cattell, Cole, Conkling, Conness, Corbett, Cragin, Davis, Dixon, Doolittle, Drake, Edmunds, Ferry, Fessenden, Fowler, Frelinghuysen, Grimes, Harlan, Harris, Hendricks, Howe, Kellogg, McCreery, McDonald, Morgan, Morrill of Vermont, Osborn, Patterson of New Hampshire, Patterson of Tennessee, Pool, Ramsey, Rice, Ross, Sanlisbury, Sawyer, Sherman, Spencer, Sprague, Stewart, Tipton, Trumbull, Van Winkle, Vickers, Warner, White, Willey, Williams, and Yates—51.

NAYS—Messrs. Chandler, Howard, Nye, Robertson, Sumner, Thayer, and Wilson—7.

ABSENT—Messrs. Bayard, Henderson, Morrill of Maine, Morton, Norton, Pomeroy, Wade, and Welch—8.

Mr. FESSENDEN. I suggest that now, as we have received a message announcing the action of the House of Representatives, and the rule requires only a concurrent vote, the words, "House of Representatives concurring," be struck out of the resolution just adopted, by unanimous consent. Those words had better be stricken out; otherwise the House of Representatives may think it is necessary again to act on the subject.

Mr. EDMUNDS. I have no objection to that course to save time, so that we may send a mere message at once.

The PRESIDENT *pro tempore*. Those words will be stricken out, if there be no objection. The Chair hears no objection, and they will be stricken out.

Mr. BUCKALEW. I move an order that the Secretary communicate this resolution to the House of Representatives.

The PRESIDENT *pro tempore*. The House will be notified, of course.

Mr. SHERMAN. I presume it is not necessary for the Senate to wait until the message has been sent. Actual concurrence has now taken place.

Mr. GRIMES. We can follow right after the Clerk, and we need not enter the House hall until he has delivered his message. I move that the Senate proceed to the hall of the House of Representatives.

The motion was agreed to.

IN THE HOUSE OF REPRESENTATIVES, February 10, 1869.

VOTE OF LOUISIANA.

The House was again called to order.

The SPEAKER. Under the twenty-second joint rule the Chair submits to the House, to be decided upon without debate, the objection made by the gentleman from Tennessee [Mr. Mullins] in joint convention to the counting of the votes certified from the State of Louisiana. The Clerk will report the objection, and the House will decide upon it without debate.

The objection was again read.

Mr. WASHBURN, of Illinois. Will it be in order to move to lay that on the table?

The SPEAKER. It will not be. The question must be decided by the House.

Mr. NIBLACK. Is it in order, Mr. Speaker, to have the certificate of the governor of the State of Louisiana again read?

Several MEMBERS. Oh, no.

Mr. WOOD. I think the rule requires the Speaker to put the question directly to the House.

The SPEAKER. It does. The credentials are in possession of the joint convention. They were read in the presence of both houses as information for the members of both. The objection which has been made by a member of the House must be decided upon without debate.

Mr. JONES, of Kentucky. I call for the yeas and nays.

The yeas and nays were ordered.

The SPEAKER. The language of the twenty-second joint rule with respect to the proceedings of the joint convention is that—

“No vote objected to shall be counted, except by the concurrent votes of the two houses; which, being obtained, the two houses shall immediately re-assemble.”

The question is, Shall the votes certified from the State of Louisiana be counted? on which question the yeas and nays have been ordered.

The question was taken; and it was decided in the affirmative—yeas 137, nays 63, not voting 22; as follows:

YEAS—Messrs. Allison, Ames, Axtell, Baker, Barnes, Barnum, Beaman, Beatty, Beck, Benjamin, Bingham, Blaine, Blair, Boyden, Boyer, Bromwell, Brooks, Broomall, Buckland, Burr, Roderick R. Butler, Cary, Chanler, Churchill, Coburn, Cullom, Delano, De-weese, Dickey, Dixon, Dockery, Dodge, Eggleston, Eldridge, Farnsworth, Ferriss, Ferry, Garfield, Getz, Glossbrenner, Golladay, Gove, Gravely, Grover, Haight, Halsey, Hawkins, Heaton, Higby, Hill, Holman, Hooper, Hopkins, Hotchkiss, Asahel W. Hubbard, Humphrey, Ingersoll, Jenckes, Johnson, Alexander H. Jones, Thomas L. Jones, Judd, Kelley, Kellogg, Kerr, Ketchum, Kitchen, Knott, Koontz, Laffin, Lash, George V. Lawrence, William Lawrence, Lincoln, Logan, Longbridge, Mallory, Marshall, Marvin, McCarthy, McCormick, McCullough, Miller, Moore, Moorhead, Mungen, Newcomb, Niblack, Nicholson, Norris, Nunn, Peters, Phelps, Pike, Pile, Plants, Poland, Polsley, Price, Pruyn, Randall, Rann, Robertson, Ross, Sawyer, Schenck, Schofield, Selye, Shellabarger, Sitgreaves, Smith, Spalding, Starkweather, Stewart, Stokes, Stone, Taber, Taffe, Taylor, Thomas, Tift, John Trimble, Trowbridge, Twichell, Van Anken, Burt Van Horn, Van Trump, Elihu B. Washburne, William B. Washburn, Welker, James F. Wilson, John T. Wilson, Windom, Wood, Woodbridge, Woodward, and Young—137.

NAYS—Messrs. Delos R. Ashley, James M. Ashley, Banks, Benton, Blackburn, Boles, Bontwell, Bowen, Buckley, Benjamin F. Butler, Cake, Callis, Reader W. Clarke, Sidney Clarke, Clift, Cobb, Corley, Covode, Dawes, Donnelly, Driggs, Eckley, Edwards, Ela, Thomas D. Eliot, James T. Elliott, Fields, French, Hamilton, Harding, Haughey, Chester D. Hubbard, Hulburd, Hunter, Julian, Kelsey, Loan, Maynard, McKee, Morrell, Mullins, Newsham, O'Neill, Orth, Paine, Perham, Pettis, Pierce, Prince, Roots, Shanks, Stevens, Stover, Upson, Van Aernam, Robert T. Van Horn, Van Wyck, Vidal, Ward, Henry D. Washburn, Whittemore, Thomas Williams, and William Williams—63.

NOT VOTING—Messrs. Adams, Anderson, Archer, Arnell, Bailey, Baldwin, Cook, Cornell, Fox, Goss, Griswold, Richard D. Hubbard, Lynch, Mercur, Morrissey, Myers, Pomeroy, Robinson, Sypher, Lawrence S. Trimble, Cadwalader C. Washburn, and Stephen F. Wilson—22.

During the roll-call,

Mr. BARNES said: My colleague, Mr. Robinson, is detained from the House on account of important business; I think he was excused. Had he been here he would have voted "ay."

On the conclusion of the roll-call,

Mr. LAWRENCE, of Ohio, said: I desire to make objection to any announcement of the result of this vote.

The SPEAKER. The Chair declines to entertain it. The objection made by the gentleman from Tennessee [Mr. Mullins] in the joint meeting of the two houses to the vote of Louisiana being counted having been submitted by the Speaker of the House of Representatives, under the twenty-second joint rule, to the House for its decision upon the question "Shall the vote of that State be counted notwithstanding the objection of the gentleman from Tennessee?" the result is 137 yeas and 63 nays. The House therefore decides that it shall be counted; and a message to that effect will be communicated to the Senate of the United States.

Mr. JONES, of Kentucky. I move to reconsider the last vote; and to lay the motion to reconsider on the table. Is not that a proper motion?

The SPEAKER. The Chair thinks not under the joint rule.

Mr. JONES, of Kentucky. This is a vote in the House, and by the House alone. I therefore think it is in order.

The SPEAKER. The Chair thinks the motion is in order. When a motion has been carried in the affirmative or negative it is in order for any member who voted with the majority to move its reconsideration.

The latter motion of Mr. Jones, of Kentucky, to lay the motion to reconsider on the table, was agreed to.

Mr. SCHENCK. Mr. Speaker, having voted to admit the counting of the electoral vote of Louisiana, I ask unanimous consent to offer the following resolution:

"Resolved by the House of Representatives, That no proof being formally submitted to sustain the objection made to the counting of the vote of the electors of the State of Louisiana for President and Vice-President, this House, without affirming or denying anything in regard to the manner in which the election for said electors was conducted, decide that no reason appears why the vote of the said electors shall not be counted, and that in the opinion of the House the same should therefore be counted."

Mr. ELDRIDGE and Mr. WOOD objected.

Mr. SHANKS. I ask unanimous consent to offer the following resolution:

"Resolved, That in the opinion of this House the acceptance of the vote of Louisiana for President and Vice-President will encourage the criminal practice of enforcing elections in the States lately in rebellion, and involves the murder of thousands of loyal people."

Mr. GLOSSBRENNER and others objected.

Mr. LAWRENCE, of Ohio. I ask unanimous consent to have my point of order read.

Mr. GETZ and others objected.

Mr. RANDALL. I call for the regular order.

Mr. MULLINS. I ask leave to introduce a resolution.

Mr. WOOD. I object to any resolution.

The SPEAKER. There is no regular order but to wait for a message from the Senate announcing the action of that body on the subject.

Mr. MULLINS. I ask leave of the House for five minutes to give a personal explanation.

Mr. GETZ. I object.

A message from the Senate was communicated by Mr. Gorham, its Secretary, informing the House that that body had resolved that the votes of the electors of the State of Louisiana for President and Vice-President of the United States be counted.

Mr. SCHENCK. I move that a message be communicated to the Senate of the United States inviting their return to this chamber to complete the business of the joint meeting.

The motion was agreed to; and a message to that effect was accordingly communicated to the Senate.

At a quarter past two o'clock p. m. the Senate in a body re-entered the hall.

IN THE PRESENCE OF THE SENATE AND HOUSE OF REPRESENTATIVES,
February 10, 1869.

The PRESIDENT, having resumed the chair, said: By a concurrent resolution of the two houses the vote of Louisiana is ordered to be counted.

The tellers accordingly proceeded to announce the vote of the State of Louisiana, and of the remaining States until the State of Georgia was reached.

Mr. BUTLER, of Massachusetts. I ask for the reading of the certificate.

The PRESIDENT. Let the certificate be read.

Mr. PRUYN accordingly read the certificate, as follows :

“ STATE OF GEORGIA,
“ *Atlanta, Wednesday, December 9, 1868.*

“ The members of the electoral college of the State of Georgia convened this day at twelve o'clock m., at the capitol of said State, in the city of Atlanta.

“ A communication was received from his excellency Rufus B. Bullock, governor of said State, inclosing certificates in triplicate of the persons elected electors of said State to vote for a President and Vice President of the United States for a term of four years from the 4th day of March, 1869, of which certificates the following is a copy, and one of the originals of which is hereto annexed :

“ EXECUTIVE DEPARTMENT STATE OF GEORGIA.
“ *Atlanta, December 9, 1868.*

“ This may certify that it appears from the official returns received at this department of an election held in this State on Tuesday, the 3d day of November, 1868, for nine electors to vote for President and Vice-President of the United States :

“ That John B. Gordon, John T. Clarke, John C. Nicholls, Charles I. Goode, Raphael J. Moses, Augustus O. Bacon, J. P. Cumming, H. P. Bell, and James D. Waddell were elected.

“ Given under my hand and the seal of the executive department, at the capitol in the city of Atlanta, this the 9th day of December, 1868.

“ RUFUS B. BULLOCK,
“ *Governor.*

[Seal of executive department attached.]

“ By the governor :

“ B. B. DE GRAFFENREID,
“ *Secretary of Executive Department,*
“ *for the Governor.*

“ Whereby it appears that John B. Gordon, John T. Clarke, John C. Nicholls, Charles T. Goode, Raphael J. Moses, Augustus O. Bacon, J. P. Cumming, H. P. Bell, and James D. Waddell, were duly elected such electors at the election held in said State on Tuesday, the 3d day of November, 1868.

“ They, the said electors, being assembled as above mentioned, and all present, proceeded to vote by ballot for President of the United States for a term of four years from the 4th day of March, 1869. When all the ballots were cast and votes counted it appeared that Horatio Seymour, of the State of New York, had received nine votes, this being the whole number of votes given by the electoral college.

“ In testimony whereof the said electors do hereunto set their hands, at Atlanta, Ga., this 9th day of December, 1868.

“ JOHN B. GORDON.
“ JOHN T. CLARKE.
“ JOHN C. NICHOLLS.
“ CHARLES T. GOODE.
“ RAPHAEL J. MOSES.
“ AUGUSTUS O. BACON.
“ J. P. CUMMING.
“ H. P. BELL.
“ JAMES D. WADDELL.

“ The said electors then proceeded in like manner to vote by distinct ballots for a Vice-President of the United States for a term of four years from the 4th day of March, 1869. When all the ballots were cast and votes counted it appeared that Frank P. Blair, of the State of Missouri, had received nine votes, this being the whole number of votes given by the electoral college.

“ In testimony whereof the said electors do hereunto set their hands, at Atlanta, Ga., this 9th day of December, 1868.

“ JOHN B. GORDON.
“ JOHN T. CLARKE.
“ JOHN C. NICHOLLS.
“ CHARLES T. GOODE.
“ RAPHAEL J. MOSES.
“ AUGUSTUS O. BACON.
“ J. P. CUMMING.
“ H. P. BELL.
“ JAMES D. WADDELL.

"EXECUTIVE DEPARTMENT, STATE OF GEORGIA,
Atlanta, December 9, 1868.

"This may certify that it appears from the official returns received at this department of an election held in this State on Tuesday, the 3d day of November, 1868, for nine electors to vote for President and Vice-President of the United States :

"That John B. Gordon, John T. Clarke, John C. Nicholls, Charles T. Goode, Raphael J. Moses, Augustus O. Bacon, J. P. Cumming, H. P. Bell, and James D. Waddell, were elected.

"Given under my hand and the seal of the executive department, at the capitol in the city of Atlanta, this 9th day of December, 1868.

[L. S.]

"RUFUS B. BULLOCK,
Governor.

"By the governor :

"B. B. DE GRAFFENREID,
*Secretary Executive Department,
 "for the Governor."*

Mr. BUTLER, of Massachusetts. I object to the vote of the State of Georgia being counted, and send my objections in writing to the Chair.

Mr. PRUYN (one of the tellers) read the objections, as follows :

"I object, under the joint rule, that the vote of the State of Georgia for President and Vice-President ought not to be counted, and object to the counting thereof because, among other things, the vote of the electors in the electoral college was not given on the first Wednesday of December, as required by law, and no excuse or justification for the omission of such legal duty is set forth in the certificate of the action of the electors.

"Secondly. Because at the date of the election of said electors the State of Georgia had not been admitted to representation as a State in Congress since the rebellion of her people, or become entitled thereto.

"Thirdly. That at said date said State of Georgia had not fulfilled in due form all the requirements of the Constitution and laws of the United States, known as the reconstruction acts, so as to entitle said State of Georgia to be represented as a State in the Union in the electoral vote of the several States in the choice of President and Vice-President.

"Fourthly. That the election pretended to have been held in the State of Georgia on the first Tuesday of November last past was not a free, just, equal, and fair election ; but the people of the State were deprived of their just rights therein by force and fraud."

THE PRESIDENT. The concurrent resolution of the two houses will be read on the subject.

Senator DRAKE. As this objection requires the retirement of the Senate, I send up an objection to counting the vote of Nevada, to be considered at the same time.

THE PRESIDENT. The objection of the Senator is too late.

Senator DRAKE. The vote of Nevada has been reported, but has not yet been decided on. It has not been decided authoritatively to count the vote of Nevada.

THE PRESIDENT. It is too late. The objection should have been made at the time the vote was read.

Mr. PRUYN (one of the tellers) read the following as the reason for the objection of Senator Drake :

"I object to the counting of the votes of the electors of the State of Nevada, because it does not appear that they voted by ballot."

THE PRESIDENT. It comes too late. The concurrent resolution of the two houses in relation to the electoral vote of Georgia will now be read.

Mr. PRUYN (one of the tellers) read as follows :

"Whereas the question whether the State of Georgia has become and is entitled to representation in the two houses of Congress is now pending and undetermined ; and

"Whereas by the joint resolution of Congress passed July 20, 1868, entitled 'A resolution excluding from the electoral college votes of States lately in rebellion, which shall not have been re-organized,' it was provided that no electoral votes from any of the States lately in rebellion should be received or counted for President or Vice-President of the United States until, among other things, such State should have become entitled to representation in Congress pursuant to the acts of Congress in that behalf : Therefore,

"Resolved by the Senate, (the House of Representatives concurring,) That on the assembling of the two houses on the second Wednesday of February, 1869, for the counting of the electoral votes for President and Vice-President, as provided by law and the joint rules, if the counting or omitting to count the electoral votes, if any, which may be presented, as of the State of Georgia, shall not essentially change the result, in that case they shall be reported by the President of the Senate in the following manner : Were the votes presented, as of the State of Georgia, to be counted, the result would be, for ——— for President of the United States, ——— votes ; if not counted, for ——— for

President of the United States, — votes; but in either case — is elected President of the United States; and in the same manner for Vice-President.”

Senator EDMUNDS. I rise to a point of order. The objection of the gentleman from Massachusetts is not in order, the two houses having, by special rule for this case, made a substantial change in the standing joint rule.

Mr. BUTLER, of Massachusetts. I desire to call the attention of the President to the law that the votes must be counted or rejected by the convention of the two houses, and that the prior concurrent action of the Senate and the House cannot bind the convention, but the convention may act after they get together as they choose to do.

Mr. CHANLER, Mr. GARFIELD, and Mr. WOOD. Debate is not in order.

The PRESIDENT. Debate is not in order.

Mr. BUTLER, of Massachusetts. I have the right to state my question.

The PRESIDENT. The gentleman has stated his objection in writing.

Mr. BUTLER, of Massachusetts. And the gentleman from Vermont did not state his in writing. [Laughter.] Now I claim, as a point of order, that the objection of the gentleman from Vermont is not well taken, and I desire that to be decided by the two houses.

The PRESIDENT. The Chair is very much disposed to hold the Senate and House of Representatives to their own concurrent resolution. The purport of the resolution, as we understand it, is that if the votes of the State of Georgia do not change the result of the election, they may be counted, but if they did alter the result they should not be counted. [Laughter.]

Senator DRAKE. I submit a point of order that the ground stated in the concurrent resolution of the two houses, upon which the proposed disposition of the electoral votes of Georgia was to be made, does not dispose of the first objection of the gentleman from Massachusetts, namely: that the vote of Georgia was not cast on the day required by law, and therefore that point must be determined by the votes of the two houses.

The PRESIDENT. The resolution of the two houses declared that the vote of Georgia should be announced by the Vice-President *pro tempore* in a certain special way, and stated how that announcement should be made. The Chair is very much disposed to obey the directions of both branches of Congress in this matter.

Mr. BUTLER, of Massachusetts. With great respect for the decision of the Chair, as this is a matter of constitutional law, and in other times may make great trouble, I propose that it shall be considered on appeal to the House of Representatives.

Mr. FARNSWORTH. The gentleman cannot appeal from the President of the joint convention to the House of Representatives.

Mr. JONES, of Kentucky. I rise to a point of order. I object to the counting of the vote of Georgia in the manner indicated by the Senate and the House. I submit that I have the right to object in that form under the joint rule. It is there provided:

“If upon the reading of any such certificate by the tellers any question shall arise in regard to counting the votes therein certified, the same having been stated by the Presiding Officer, the Senate shall thereupon withdraw, and said question shall be submitted to that body for its decision.”

Under that rule I have the right now to object to any decision made by the House or Senate in regard to counting these votes, and especially made previous to this question. I will write out my objections and send them to the Chair.

The PRESIDENT. Objection being made, the Senate will retire to their chamber to deliberate, under the rules.

Mr. WASHBURNE, of Illinois. On what?

The PRESIDENT. On the objection that has been raised by the gentleman from Massachusetts.

Mr. JONES, of Kentucky. I thought that my objection was in order.

The PRESIDENT. The Senate will retire according to order. [Laughter.]

The Senate retired accordingly.

IN SENATE, February 10, 1869.

The Senate returned to its chamber at six minutes before three o'clock p. m., and the President *pro tempore* resumed the chair.

Mr. SHERMAN. Mr. President, is it in order to proceed?

The PRESIDENT *pro tempore*. The Senate will come to order.

Mr. SHERMAN. I submit a resolution.

Mr. VAN WINKLE. I ask the Chair to state for what question we are here.

The PRESIDENT *pro tempore*. The objections will be read first of all.

The CHIEF CLERK. This is the wording of the objection made in the convention by a member of the House of Representatives:

“I object, under the joint rule, that the vote of the State of Georgia for President and Vice-President ought not to be counted, and object to the counting thereof, because, among other things—

“1. The vote of the electors in the electoral college was not given on the first

Wednesday of December, as required by law, and no excuse or justification for the omission of such legal duty is set forth in the certificate of the action of the electors.

"2. Because at the date of the election of such electors the State of Georgia had not been admitted to representation as a State in Congress since the rebellion of her people, or become entitled thereto.

"3. That at said date said State of Georgia had not fulfilled in due form all the requirements of the Constitution and laws of the United States, known as the reconstruction acts, so as to entitle said State of Georgia to be represented as a State in the Union in the electoral vote of the several States in the choice of President and Vice-President.

"4. That the election pretended to have been held in the State of Georgia on the first Tuesday of November last past was not a free, just, equal, and fair election; but the people of the State were deprived of their just rights therein by force and fraud."

Mr. SHERMAN. I ask for the reading of the resolution I submitted.

The PRESIDENT *pro tempore*. The resolution of the Senator from Ohio will be read.

The resolution was read, as follows:

Resolved, That the vote of the electors of the State of Georgia be counted and announced in the mode prescribed in the concurrent resolution of the 8th of February instant.

Mr. EDMUNDS. I rise to ask a question, as of course debate is not in order, whether we have withdrawn to deliberate upon the propriety of counting the vote of Georgia, or to deliberate upon the point of order or appeal taken by the gentleman from Massachusetts to the decision of the Chair, that the special rule made by the two houses in the case of Georgia was to govern the proceedings in her case?

The PRESIDENT *pro tempore*. The Chair will state that the gentleman from Massachusetts took exception to the counting of the vote for a different reason from any covered by the concurrent resolution. It was because the vote was not cast upon the day required by law, which goes behind the concurrent resolution, as it seemed to the Chair, for which reason it was thought best to retire and deliberate upon that. It was a different question, not involved in the concurrent resolution, perhaps lying back of that, based on the ground that the vote was informal and not to be counted at all. The Chair cannot decide the effect of casting a vote on a different day from that required by law, which I believe was the objection made by the gentleman from Massachusetts.

Mr. FOWLER. I call for the reading of the concurrent resolution.

Mr. DOOLITTLE. I inquire, for information, whether the votes of the State of Wisconsin in 1856 for President and Vice-President were or were not counted by the joint convention?

The PRESIDENT *pro tempore*. My recollection is that they were counted after considerable debate.

Mr. TRUMBULL. It was not decided whether they should be counted or not. It did not affect the result.

Mr. SHERMAN. They were announced in some such way as this.

Mr. EDMUNDS. They were not announced at all.

Mr. TRUMBULL. If the Chair will pardon me, I will make a statement in regard to that case. A controversy arose in the joint convention as to what should be done and whether a question that arose there could be decided by the joint convention assembled together. A debate occurred when the two houses were assembled, and some Senators insisted that it was improper to take any vote when the two houses were together, as the Senate thereby lost its character, the House being more numerous, and although the Senate voted all one way they might be voted down by the House. Senators insisted that no action should be taken, and we withdrew here to this chamber and never did decide the question as to the vote of the State of Wisconsin; and that gave rise to this joint rule, which was adopted afterward to avoid those questions.

Mr. FERRY. What became of the votes of Wisconsin?

Mr. TRUMBULL. It was never decided whether they should be counted or not.

Mr. FERRY. What was done in point of fact?

Mr. TRUMBULL. The fact was announced that Mr. Buchanan was elected President.

Mr. DOOLITTLE. By unanimous consent, as I do not wish to violate the rule, I will ask the Senator from Illinois one further question. Is this joint rule the same that was adopted then in the case of Wisconsin?

Mr. TRUMBULL. This joint rule was adopted afterward to avoid such difficulties. I think this joint rule was adopted not more than four years ago.

Mr. DOOLITTLE. What was done with the vote of Wisconsin?

Mr. TRUMBULL. It never has been decided whether it should be counted or not.

Mr. FRELINGHUYSEN. I offer a resolution.

The PRESIDENT *pro tempore*. There is a resolution pending offered by the Senator from Ohio.

Mr. CONKLING. If it is in order—I do not wish to debate it—I wish to read what was done in the Wisconsin case. I have here the Globe, showing precisely the form of the

announcement in the instance referred to. I will read it or send it to the Secretary to be read, if it be the pleasure of the Senate.

Mr. DOOLITTLE. I hope by unanimous consent the Senator will be permitted to read it.

Mr. CONKLING. I read from page 652 of the Congressional Globe, Thirty-fourth Congress, third session:

"Mr. Jones, of Tennessee, one of the tellers, reported. He said: Mr. President, the tellers appointed on the part of the two houses to count and report the votes given for President and Vice-President of the United States, report that they have examined all the returns, and find that they were all regular, and that the votes were cast on the day required by law, except in the case of the votes cast by the electors of the State of Wisconsin. Their returns show that they cast their electoral vote in that State on the 4th of December instead of on the first Wednesday of December (which was the 3d) as required by law. All the returns show that James Buchanan, of the State of Pennsylvania, received 174 votes for President of the United States; that John C. Frémont, of the State of California, received—including the votes of Wisconsin—114 votes for President of the United States; that Millard Fillmore, of the State of New York, received 8 votes for President of the United States; that John C. Breckinridge, of the State of Kentucky, received 174 electoral votes for Vice-President of the United States; that William L. Dayton, of the State of New Jersey, received—including the five votes of Wisconsin—114 electoral votes for Vice-President of the United States; and that Andrew Jackson Donelson, of the State of Tennessee, received 8 electoral votes for the Vice-Presidency of the United States."

Then follows a full recapitulation of the votes in tabular form, in which Wisconsin appears:

"Mr. LETCHER. Is it in order now to move to exclude the vote of Wisconsin from that count?"

"The PRESIDING OFFICER. No debate is in order, in the opinion of the Presiding Officer."

"Senator CRITTENDEN. Do I understand the Chair to decide that Congress in no form has power to decide upon the validity or invalidity of a vote?"

"The Presiding Officer proceeded to recapitulate the vote as announced to the joint convention by Mr. Jones, of Tennessee, one of the tellers upon the part of the House, and then said: Thus it is reported by the tellers that the whole number of electors appointed to vote for President and Vice-President of the United States is 296, of which 149 make a majority. The state of the vote for President of the United States, as delivered by the tellers, is—for James Buchanan, of Pennsylvania, 174 votes; for John C. Frémont, of California, 114 votes; for Millard Fillmore, of New York, 8 votes; and the state of the vote for Vice-President of the United States, as delivered by the tellers, is—for John C. Breckinridge, of Kentucky, 174 votes; for William L. Dayton, of New Jersey, 114 votes; and for Andrew J. Donelson, of Tennessee, 8 votes."

Mr. GRIMES. Does that include Wisconsin?

Mr. CONKLING. Yes, sir.

"In further execution of the concurrent order of the two houses, the Presiding Officer therefore declares that James Buchanan, of the State of Pennsylvania, having the greatest number of votes for President, that number being a majority of the whole number of electors, has been duly elected President of the United States for the term prescribed by the Constitution, to commence on the 4th of March, 1857. I also declare that John C. Breckinridge, of the State of Kentucky, having the greatest number of votes for Vice-President, and that number being a majority of the whole number of electors, has been duly elected Vice-President of the United States for the term prescribed by the Constitution, to commence on the 4th day of March, 1857."

And then what followed?

"Mr. H. MARSHALL. Mr. President, I think that it is a matter of public importance, not for this occasion, but for some occasion which may arise hereafter, that the ruling of the Chair upon this occasion should be publicly excepted to. I understand the Chair to have ruled that it is within the competency and function of the President of the Senate, in the presence of the Senate and House of Representatives, to open the certificates and to count the votes, thereby giving to the President of the Senate the function of counting. Now, in the case which has arisen—the case of Wisconsin—the President of the Senate, through the tellers, announces the vote of Wisconsin, and the vote of Wisconsin is therefore counted upon your decision. Whether that is a vote or not must depend upon the determination of this convention; and, if you will regard the verbiage of the Constitution, you will find that your function goes no further than to open the certificates. The language of the Constitution is that 'the President of the Senate, in the presence of the House of Representatives, shall open all the certificates;' and then the phraseology changes and proceeds: 'and the votes shall be counted,' not by you, but by us; and whenever a vote is challenged, this is the time, and this is the only place, where a determination can be formed whether it is a vote. I merely want to

raise the point, as we all know it makes no difference in the result in this case, but a case might arise in which it might make a difference."

Here follows a long debate, which I traversed the other day, and it resulted, as the honorable Senator from Illinois mentions, in the two houses separating after a somewhat animated discussion, to say the least, between the Chair and various members of the convention, but still the vote stood according to this record, as declared and counted.

Mr. TRUMBULL. I have the Senate Journal before me, by which it will appear what officially took place as recorded upon the journals of the two houses:

"Mr. Bigler, on the part of the tellers of the two houses, submitted the following report, which was read:

"The tellers on the part of the two houses report that they have counted the votes of all the States cast for President and Vice-President of the United States of America, for the constitutional term of four years from the 4th day of March, 1857, and find that on the first Wednesday in December, 1856, the electors of all the States assembled in their respective States, being the day prescribed by law for the assembling of the electors, except the electors for the State of Wisconsin; that of those who assembled and cast their votes on the said first Wednesday of December, 1856, James Buchanan, of the State of Pennsylvania, received 174 votes for President of the United States; John C. Frémont, of California, received 109 votes; and Millard Fillmore received 8 votes for the same office; that for Vice-President of the United States, John C. Breckinridge, of Kentucky, received 174 votes; William L. Dayton, of New Jersey, received 109 votes, and Andrew J. Donelson, of Tennessee, received 8 votes; that from the report of the electors of the State of Wisconsin it appears that the electors for that State assembled in Madison, the capital of that State, on the 4th of December, 1856, the day after the day prescribed for the meeting of the electors for President and Vice-President of the United States, and so assembled on that day did cast the electoral votes for that State, 5 for John C. Frémont, of California, for President, and 5 for William L. Dayton, of New Jersey, for Vice-President of the United States.

"WILLIAM BIGLER,

"Teller on the part of the Senate.

"GEORGE W. JONES, of Tennessee,

"WILLIAM A. HOWARD, of Michigan,

"Tellers on the part of the House of Representatives."

From which it appears that they did not include the vote of Wisconsin, but reported the fact, and on that report the President of the Senate announced that Mr. Buchanan was elected President.

Mr. CONKLING. How many votes did he announce that Mr. Buchanan received

Mr. TRUMBULL. He announced that Mr. Buchanan had, of those assembled on the proper day, 174 electoral votes for President and John C. Frémont 109 votes, and then went on to state what the State of Wisconsin did. That was the official report of the tellers, and it never was decided. I was present, and this is in accordance with my recollection. This report is in the Senate Journal, required to be there.

Mr. CONKLING. Was it a report made to the Senate?

Mr. TRUMBULL. It was the report made by the tellers to the joint meeting of the two houses of Congress, signed by them, and recorded here.

Mr. CONKLING. I, of course, know nothing about this except what appears in the Globe. Here is the report of the tellers taken down at the time, and here is the table, and the vote of Wisconsin does appear, not only in the table, but in the footing and in the declaration of the votes as well as in the count.

Mr. TRUMBULL. This is the official report signed by the tellers.

Mr. FRELINGHUYSEN. The substance of the resolution which I wish to offer, I see, has been anticipated by the Senator from Ohio, and I simply desire to say that that resolution, when reported, will show that it proposes to count the vote of Georgia and that it be announced under the concurrent resolution, which I think there can be no question is the proper way.

Mr. CONNESS. I call for the reading of the resolution.

Mr. FRELINGHUYSEN. Let me make one remark and I shall be through. As to the objection that the vote was not cast on the proper day, I think if that question was before us for determination, we would all agree that that was a mere directory provision of the law, and that we would not change the Government of the country or deprive the State of its vote because it had not complied with so insubstantial a provision. Therefore, if we were just considering that question we should admit the vote of the State of Georgia. I hope the resolution of the Senator from Ohio will be adopted.

Mr. EDMUNDS. I do not agree to that doctrine.

Mr. DRAKE. I offer a substitute for the resolution of the Senator from Ohio.

Mr. CONNESS. Let the resolution be read.

The PRESIDENT *pro tempore*. The resolution of the Senator from Ohio will first be read.

The CHIEF CLERK. The resolution of the Senator from Ohio is:

"Resolved, That the vote of electors of the State of Georgia be counted and announced in the mode provided by the concurrent resolution of the 8th of February instant."

Mr. DRAKE. Now I ask for the reading of my amendment.

The CHIEF CLERK. It is proposed to strike out all after the word "resolved" and to insert:

"That upon the first ground of objection stated to the counting of the electoral vote of the State of Georgia it is the judgment of the Senate that the said vote should not be counted."

Mr. DRAKE. Upon that I ask for the yeas and nays.

Mr. CONKLING. What is the first ground—that they voted on the wrong day?

Mr. DRAKE. Yes, sir.

Mr. McPHERSON, Clerk of the House of Representatives, appeared at the bar of the Senate, and delivered the following message:

"Mr. President, I am directed to inform the Senate that the House of Representatives, upon the question, 'Shall the electoral vote of the State of Georgia be counted notwithstanding the objections thereto?' have voted in the negative."

Mr. HOWE. Is the resolution pending subject to amendment?

The PRESIDENT *pro tempore*. An amendment to the amendment may be offered.

Mr. HOWE. My amendment is to strike out the words "upon the first ground of objection" from the amendment of the Senator from Missouri.

Mr. DRAKE. I think it is better to state the exact grounds of objection.

Mr. HOWE. There might be differences of opinion.

Mr. CONNESS. I object to debate. Let us vote.

The PRESIDENT *pro tempore*. The resolution as it would stand if the pending amendment should be adopted will be read.

The CHIEF CLERK. The Senator from Wisconsin [Mr. Howe] proposes to amend the amendment of the Senator from Missouri [Mr. Drake] so as to make it read, "that the electoral vote of the State of Georgia, in the judgment of the Senate, should not be counted."

Mr. HENDRICKS. I wish to submit a question of order, whether the Senate now, by a separate resolution, can modify the concurrent resolution adopted the other day? There is but one of the objections raised, as I understand, that does not fall within the concurrent resolution that was adopted. Now can the Senate, by a separate resolution, agree to reject that vote upon any ground included within the concurrent resolution? Can the Senate, in other words, amend or abrogate a rule that has been adopted by the concurrence of the two houses? So far as this resolution proposes to modify that, I submit, as a question of order, that it is not allowable.

The PRESIDENT *pro tempore*. The Chair supposes that that concurrent resolution has no higher authority than any other resolution, and is subject to modification by both branches, as every other law or resolution is. It is not a rule, but a resolution of the two houses.

Mr. EDMUNDS. It is a special order.

The PRESIDENT *pro tempore*. It is a special order in the nature of a resolution. It has no higher authority than any other resolution.

Mr. HENDRICKS. It is a resolution adopted by both branches, they concurring. It is a law that governs their action if it has any force.

The PRESIDENT *pro tempore*. It is the opinion of the Chair that it cannot be modified by either branch alone, but it may be modified by a concurrent resolution of both houses.

Mr. HENDRICKS. Of course. Now the question I wish to submit to the Senate without any debate is, that as the resolution taken together would now stand, if adopted, it would seem to be the judgment of the Senate that the vote of a State ought to be rejected because the electors may cast their votes on the wrong day. That is a very grave question.

Mr. EDMUNDS rose.

Mr. CAMERON. I rise to a question of order. With great deference to the Senator from Indiana, and the Senator from Vermont now up, I believe we can have no debate.

Mr. EDMUNDS. I have not said anything about it.

Mr. CAMERON. No; but you are getting ready.

Mr. EDMUNDS. You do not know that.

Mr. CAMERON. I say I object to any debate.

Mr. EDMUNDS. Mr. President, I suppose it is in order to ask what is the pending question. [Laughter.]

The PRESIDENT *pro tempore*. The pending question is the amendment moved by the Senator from Wisconsin [Mr. Howe] to the amendment offered by the Senator from Wisconsin, [Mr. Drake.]

Mr. WILLIAMS. I move to lay the resolution and all the proposed amendments upon the table, and that the action of the Senate be communicated to the House of Representatives. That will make some result.

Mr. DRAKE. That is no result at all.

Mr. WILLIAMS. I make that motion.

The PRESIDENT *pro tempore*. It is moved that the resolution with the amendments be laid on the table.

The motion was not agreed to.

Mr. FOWLER. I submit this point of order, whether the concurrent resolution does not cover the whole case?

The PRESIDENT *pro tempore*. The Chair believes it covers the whole case except the objection made by the member from Massachusetts in the joint convention, going back of it, as was suggested before, and making a new objection that did not arise; and that was about casting the votes on an improper day.

Mr. GRIMES. I thought we came out to determine the question of order whether the Representative from Massachusetts could raise that point while there was in existence the concurrent resolution of the Senate and House of Representatives on this subject as to how the vote of Georgia should be counted. That is what I came here to consider, and I understood the Presiding Officer to state as he left the chair of the joint meeting that the Senate would proceed to its chamber for the purpose of determining that question of order. That is the only thing we could determine. I simply desire to say that if we adopt this resolution which is now pending, proposed by the Senator from Missouri, [Mr. Drake,] it cannot override the concurrent resolution of the two houses passed on the 8th of this month, which we cannot repeal except by one day's notice served upon the Senate.

Mr. HOWARD. If it be in order, I will move that the Senate concur in the resolution which has been sent us by the House of Representatives.

Mr. EDMUNDS. It is not in order now, for we have another question up.

The PRESIDENT *pro tempore*. That cannot be done now except by common consent.

Mr. EDMUNDS. Let us hear the pending amendment read and know what it is.

The PRESIDENT *pro tempore*. It will be read.

The CHIEF CLERK. It is proposed to amend the amendment so that, if amended, the amendment to the resolution will read—

Mr. DRAKE. Let what is stricken out be read.

Mr. TRUMBULL. Read the whole resolution.

The CHIEF CLERK. The amendment first proposed reads as follows:

Strike out all after the word "resolved" in the original resolution and insert:

"That, upon the first ground of objection stated to the counting of the electoral vote of the State of Georgia, it is the judgment of the Senate that the said vote should not be counted."

It is proposed to amend that amendment so that, if amended, it will read:

"Resolved, That the electoral vote of the State of Georgia, in the judgment of the Senate, should not be counted."

The PRESIDENT *pro tempore*. The question is on the amendment to the amendment.

Mr. TRUMBULL. I think we had better have the yeas and nays on that. It is a very important matter, in my judgment, and I call for the yeas and nays. This decides the whole question.

The yeas and nays were ordered.

Mr. MORTON. I am satisfied the question is not understood. I call for the reading of the amendment of the Senator from Missouri and of the amendment of the Senator from Wisconsin to it.

Mr. CONKLING. This is simply striking out three words, I understand.

Mr. WILLIAMS. Let the question be stated.

Mr. FERRY. Let the amendment be read.

Mr. DRAKE. I ask that the Clerk not only read the resolution as offered and then as it would be if amended, but that he state what the words are that the Senator from Wisconsin moves to strike out.

The PRESIDENT *pro tempore*. The Clerk is endeavoring to do that very thing.

Mr. DRAKE. He has not done it yet.

The CHIEF CLERK. Mr. Sherman submitted the following resolution:

"Resolved, That the vote of the electors of the State of Georgia be counted and announced in the mode provided by the concurrent resolution of the 8th of February instant."

Mr. Drake proposed to amend that resolution by striking out all after the word "resolved" and inserting:

"That, upon the first ground of objection stated to the counting of the electoral vote of the State of Georgia, it is the judgment of the Senate that the said vote should not be counted."

Mr. Howe moves to amend that amendment by striking out the words "upon the first ground of objection stated to the counting of," and striking out the words "it is," and inserting "in;" and striking out also after the word "Senate" the words "that the said vote;" so that, if so amended, the amendment will read: "that the electoral vote of the State of Georgia, in the judgment of the Senate, should not be counted."

Mr. HENDRICKS. I make the point of order that the amendment proposed by the

Senator from Wisconsin is inconsistent with the concurrent rule adopted by both houses for this business, which is binding upon the Senate; and that the amendment, therefore, is out of order, it covering a ground that the two houses, by joint action, have already decided. I ask the ruling of the Chair on that question of order. I submit to the Chair that this is a resolution of the Senate. This now is not proposed as a concurrent resolution or a modification, by the action of both houses, of their former order, but a separate resolution of the Senate. It cannot be done.

Mr. FOWLER. I submit again that this is out of order. The concurrent resolution covers the whole case. If the Chair will examine it he will find it is. I will read the concurrent resolution, with permission, or send it to the Secretary to be read.

The PRESIDENT *pro tempore*. The Clerk has that resolution.

Mr. HENDRICKS. Let the concurrent resolution be read.

Mr. WILLIAMS. I call for a decision on the question of order.

Mr. HENDRICKS. I want the concurrent resolution read.

The PRESIDENT *pro tempore*. The Chair supposed the resolution pending was a concurrent resolution. The other was a concurrent resolution that was sent to the House. If this is a concurrent resolution, the Senate has the power to modify the former concurrent resolution with the concurrence of the House, as they passed the original resolution.

Mr. WILLIAMS. Mr. President—

Mr. FERRY. The decision is not announced yet. We have not had the decision.

Mr. WILLIAMS. No.

Mr. FERRY. The Chair has stated his opinion; he has not made a decision.

Mr. CORBETT. I call for the reading of the former concurrent resolution, the one we passed on the 8th of February, for the information of the Senate.

The PRESIDENT *pro tempore*. The Chair is perfectly aware that the concurrent resolution adopted the other day by both branches of Congress covers the whole ground, except it be the first objection raised by the member from Massachusetts; and he supposed that the reason why the Senate retired was because that was a ground independent of the concurrent resolution; back of it.

Mr. WILLIAMS. I ask the Chair if he will decide the question whether the amendment is in order.

The PRESIDENT *pro tempore*. The Chair will state, further, that he so ruled in the joint convention, and would have stood by that ruling in the joint convention had it not been for some doubt whether the first objection made by the member from Massachusetts was not an independent objection going back of the concurrent resolution and demanding a decision.

Mr. FOWLER. Do I understand the Chair has decided that that is an independent objection going back of the concurrent resolution?

Mr. WILLIAMS. What is the decision of the Chair upon the question?

The PRESIDENT *pro tempore*. Now, the point of order is raised that this is an attempt by the Senate alone to modify the concurrent resolution of the two houses. That cannot be done, in our judgment. The only question in the mind of the Chair is whether the proposition now pending is a concurrent resolution or a resolution of the Senate. If it is a concurrent resolution, the Senate has the same power that it had when it passed the original measure, and can modify, change, or repeal that concurrent resolution. It is not a rule, but simply a resolution.

Mr. HENDRICKS. Upon that question just now suggested by the Chair I wish to say that the two houses are engaged under a rule, and I believe under a law, in a joint business, and that that is the only business that can be considered by the Senate.

The PRESIDENT *pro tempore*. Yes.

Mr. HENDRICKS. And the Senate cannot modify rules, or take up any business except the exact business that is before the two bodies.

Mr. WILLIAMS. I ask for a decision.

Mr. HENDRICKS. I wish to finish my remarks.

Mr. CONNESS. I object to debate.

Mr. DRAKE. I object to further debate on the question.

Mr. HENDRICKS. I am not debating.

The PRESIDENT *pro tempore*. The Senator from Indiana is stating his question of order.

Mr. HENDRICKS. Yes, sir; I intend it to be understood. My point is that the concurrent resolution adopted on the 8th of February cannot be modified pending this business of the count of the vote for President and Vice-President.

Mr. DOOLITTLE. Mr. President—

The PRESIDENT *pro tempore*. As a decision on that question is demanded—

Mr. DOOLITTLE. Mr. President, I rise to a point of order. As I understand, the Chair has decided—

Mr. CONNESS. I object, Mr. President—

The PRESIDENT *pro tempore*. The objection is not well taken.

Mr. DOOLITTLE. I am stating my point of order.

The PRESIDENT *pro tempore*. The Senator from Wisconsin will state his point of order.

Mr. DOOLITTLE. The Chair has stated himself that he acted from a doubt in his own mind whether he should execute the concurrent resolution or not; that that was the occasion of his directing the Senate to withdraw, the doubt in his own mind on that subject.

The PRESIDENT *pro tempore*. Not precisely, the Chair would state.

Mr. DOOLITTLE. I so understood the Chair.

The PRESIDENT *pro tempore*. If a question was raised involving the concurrent resolution, the Chair would have had no doubt about it; but an objection was made going back of that and resting on different grounds, not covered by that resolution. The Chair had no doubt in joint convention that the concurrent resolution must be adhered to at all events until it should be repealed, and he would count the vote according to the terms of that resolution; but there is an objection written out formally here to counting the vote at all, because it is said that it was not cast upon the day required by law; and that was the question that the Chair supposed was to be disposed of here.

Mr. DOOLITTLE. The point of order which I desire to state is this: that the concurrent resolution does cover every objection to the vote of Georgia, and the Chair ought to have executed the order. That is the point of order which I make.

Mr. CONNESS. Mr. President, there is a question of order before the Senate, raised by the Senator from Indiana, [Mr. Hendricks.] I ask a decision of the Chair on that question first, before any other question is received.

The PRESIDENT *pro tempore*. The Chair rules, then, that it is not in order for the Senate to modify the resolution of both branches. ["That is right."]

Mr. DRAKE. Then the question is on my amendment.

Mr. HOWE. I do not complain of the ruling of the Chair, and am inclined to think it is right; but the Senator from Indiana makes the point of order on a motion to amend the resolution, and if his point of order is good, it is good against the resolution, and not against the amendment proposed by me. If we can entertain the resolution, we can amend it. That I wish to call the attention of the Chair to.

Mr. HENDRICKS. I beg the Senator's pardon. My point of order rests on the point made by the Chair.

Mr. CONNESS. I object to this.

Mr. HENDRICKS. The Chair's point was that the first objection made by the member from Massachusetts is not within the concurrent resolution, and that is the only question the Senate can now consider in separate session. We have got to decide that one question, and nothing else.

Mr. CONNESS. I ask for the question before the Senate, or for the Chair to execute its order. If we debate, we shall never arrive at a decision of anything.

Mr. FERRY. Is there any question?

The PRESIDENT *pro tempore*. The Chair has no doubt about executing the order; but he wishes instructions upon the point raised by the Representative from Massachusetts. Does that go back of the concurrent resolution? Is it outside of that resolution and not covered by it?

Mr. EDMUNDS. On that point I have a resolution to offer, though I do not know that it is in order at this time.

Mr. TRUMBULL. Let us see if the others are not ruled out first.

Mr. EDMUNDS. You cannot tell whether it is in order or not till I offer it. I offer this resolution:

"Resolved, That under the special order of the two houses respecting the electoral vote from the State of Georgia, the objections made to the counting of the vote of the electors for the State of Georgia are not in order."

I offer that upon the ground that the concurrent resolution, saying nothing about its preamble, directs absolutely what treatment shall be given to those votes, reasons or no reasons.

Several SENATORS. That is right.

Mr. TRUMBULL. I like the resolution of the Senator from Ohio better. It comes to the same result.

Mr. CONNESS. If it comes to the same result, take either.

Mr. DRAKE. I ask for information whether the decision of the Chair rules out my amendment and the original resolution of the Senator from Ohio?

Mr. GRIMES. Of course it does.

The PRESIDENT *pro tempore*. The Chair is of opinion, since the point has been made, that nothing would be in order except that the Chair should receive a new direction to stand by the concurrent resolution; but that is unnecessary, as the Chair will stand by that anyhow, unless it is modified. The only difficulty is as to the point whether it covers the objection raised by the member from Massachusetts.

Mr. GRIMES. I wish to inquire whether, if we adopt the proposition of the Senator

from Vermont or of the Senator from Ohio, the other house having decided as it has, the result is that the vote of Georgia cannot be counted anyhow?

MR. CONNESS. We do not know that. We cannot tell.

MR. GRIMES. According to our rule it cannot be counted.

MR. WILLIAMS. It cannot be counted. All we have to do is to get out of this scrape.

MR. GRIMES. All we have to do is to preserve our own consistency and vindicate it on the record. The vote of Georgia is thrown aside anyhow.

MR. CONNESS. Then let us get to a vote.

MR. GRIMES. That is what I want.

The PRESIDENT *pro tempore*. The Chair has ruled these resolutions out of order; and if there is no appeal the Chair will entertain no modification of the concurrent resolution of the two houses.

MR. EDMUNDS. Then I offer the resolution which I read.

MR. FERRY. That will cover the whole thing.

The PRESIDENT *pro tempore*. That will be read.

The Chief Clerk read Mr. Edmunds's resolution, as follows:

"Resolved, That under the special order of the two houses respecting the electoral vote from the State of Georgia, the objections made to the counting of the vote of the electors for the State of Georgia are not in order."

MR. CORBETT. Now I call for the reading of the concurrent resolution adopted on the 8th instant, so that we can judge.

The PRESIDENT *pro tempore*. It will be read if there be no objection.

The Secretary read the following concurrent resolution of the two houses:

"Whereas the question whether the State of Georgia has become and is entitled to representation in the two houses of Congress is now pending and undetermined; and whereas by the joint resolution of Congress passed July 20, 1868, entitled 'A resolution excluding from the electoral college votes of States lately in rebellion which shall not have been re-organized,' it was provided that no electoral votes from any of the States lately in rebellion should be received or counted for President or Vice-President of the United States until, among other things, such State should have become entitled to representation in Congress pursuant to acts of Congress in that behalf: Therefore,

"Resolved, That on the assembling of the two houses on the second Wednesday of February, 1869, for the counting of the electoral votes for President and Vice-President, as provided by law and the joint rules, if the counting or omitting to count the electoral votes, if any, which may be presented as of the State of Georgia shall not essentially change the result, in that case they shall be reported by the President of the Senate in the following manner: Were the votes presented as of the State of Georgia to be counted, the result would be, for ——— for President of the United States ——— votes; if not counted, for ——— for President of the United States ——— votes; but in either case ——— is elected President of the United States; and in the same manner for Vice-President."

MR. NYE. I want to ask a question. Is it at all material, after the resolution we have received from the House of Representatives, what the action of this body is?

MR. GRIMES. Not at all.

MR. NYE. The vote of Georgia cannot be counted. That is settled.

MR. EDMUNDS. Let us have the question.

MR. TRUMBULL. I ask the Senate to permit me to make a statement. I have no other interest except to preserve the propriety of our action and prevent getting into a wrangle that will be disreputable to the Congress of the United States in both of its branches. It would relieve us of any difficulty if we adopted the same course that was adopted when Mr. Buchanan was elected. The President *pro tempore* of the Senate then announced that "James Buchanan, of the State of Pennsylvania, having received the greatest number of votes for President, and that number being a majority of the whole number of electors, has been duly elected." It is not necessary to say how many votes he received.

MR. EDMUNDS. That is changing the rule.

MR. TRUMBULL. No; it is not changing the rule. The rule provides what is to be done with Georgia—that her vote shall be neither rejected nor received. The Senator from Nevada asks if the vote of Georgia can be counted when the other house has decided against it. Certainly. The Senate will never admit that the House of Representatives can settle by itself the votes which shall be counted.

MR. EDMUNDS. You have admitted it in the twenty-second joint rule. It says in express terms, "and no vote objected to shall be counted except by the concurrent vote of the two houses."

MR. TRUMBULL. We must concur with the House of Representatives.

MR. NYE. Not at all. If the other house says it shall not be counted, it cannot be.

MR. TRUMBULL. Can the Senate or the House by itself throw out any votes?

MR. EDMUNDS. I object to any further debate. Let us terminate this.

The PRESIDENT *pro tempore*. The question is on the resolution offered by the Senator from Vermont.

Mr. NYE. I call for the yeas and nays.

The yeas and nays were ordered.

Mr. SHERMAN. I understood the Chair has ruled the resolution I offered out of order.

The PRESIDENT *pro tempore*. The Chair did rule that to be out of order, as it was an attempt to overthrow the concurrent resolution. Perhaps it was not altogether so.

Mr. SHERMAN. I will vote for the resolution of the honorable Senator from Vermont, or for the resolution I offered. I look upon them as tantamount, but that I do not see how the resolution I offered was displaced. I do not care about that, however; I am ready to vote for whichever is first presented.

Mr. RICE. I wish to ask a question. If it turns out that the vote of Georgia ought to be counted would the concurrent resolution adopted yesterday be sufficient to prevent its being counted to-day? If it was a clear proposition that that vote should be counted now, would the concurrent resolution prevent it?

Mr. EDMUNDS. It directs just what shall be done in literal terms.

Several SENATORS. "Question!" "Question!"

The PRESIDENT *pro tempore*. The Clerk will call the roll on the resolution of the Senator from Vermont.

Mr. Abbott's name was called; and he responded.

Mr. DAVIS. I should like to hear the resolution read.

Several SENATORS. It is too late. The call of the roll has commenced.

The PRESIDENT *pro tempore*. If the Senator from Kentucky wishes to hear the resolution read, the Chair will direct it to be read.

The Chief Clerk read the resolution, as follows:

Resolved, That under the special order of the two houses respecting the electoral vote from the State of Georgia, the objections made to the counting of the vote of the electors for the State of Georgia are not in order.

The question having been taken by yeas and nays, resulted—yeas 32, nays 27; as follows:

YEAS—Messrs. Abbott, Anthony, Buckalew, Cattell, Conness, Corbett, Cragin, Davis, Dixon, Doolittle, Edmunds, Fowler, Frelinghuysen, Grimes, Hendricks, Kellogg, McCreery, Morrill of Maine, Morrill of Vermont, Morton, Patterson of New Hampshire, Patterson of Tennessee, Ross, Saulsbury, Sawyer, Sherman, Sprague, Stewart, Tipton, Vickers, Whyte, and Williams—32.

NAYS—Messrs. Cameron, Chandler, Cole, Conkling, Drake, Ferry, Fessenden, Harlan, Harris, Howe, McDonald, Morgan, Nye, Pool, Ramsey, Rice, Robertson, Spencer, Sumner, Thayer, Trumbull, Van Winkle, Wade, Warner, Willey, Wilson, and Yates—27.

ABSENT—Messrs. Bayard, Henderson, Howard, Norton, Osborn, Pomeroy, and Welch—7.

So the resolution was agreed to.

The PRESIDENT *pro tempore*. The Chair would like to inquire now, as the two branches do not agree, what announcement is to be made to the joint convention.

Mr. EDMUNDS. The Chair ought to announce the decision of the Senate and then proceed under the joint rule. In point of fact the vote of Georgia is rejected by the action of the House of Representatives under the joint rule.

Mr. TRUMBULL. But does not this special rule repeal so much of the joint rule as is inconsistent with it?

Mr. EDMUNDS. Certainly. The special rule made a decision of that case. All I can say is that I now move that a message be sent to the House of Representatives, informing that body of the action of the Senate.

Mr. SHERMAN. I think the question made and presented is the gravest one I have ever known in the Senate, because if the rule now laid down is to be observed, no President of the United States could ever be elected with the Senate one way and the House the other. It seems to me it is a very dangerous and a very hazardous proposition that the House of Representatives, or the Senate either, can defeat an election.

Mr. EDMUNDS. We cannot debate that now.

The PRESIDENT *pro tempore*. Will the Senate direct the Secretary to carry the resolution just passed to the House of Representatives?

Mr. HENDRICKS. I move to add to the resolution just adopted the resolution proposed by the Senator from Ohio; not that I was in favor of the original proposition, but it became the law of the body.

Mr. NYE. I want to make an inquiry.

Mr. EDMUNDS. I wish the Chair would put the question on my motion.

Mr. NYE. If I understand the effect of our vote, we declare that the vote of Georgia shall be counted.

Mr. EDMUNDS. We do not declare anything about it.

Mr. NYE. If this indorses the resolution of the 8th, we do. The House of Representatives have declared that the vote shall not be counted. Where does that leave

ns? After one house has declared that it shall not be counted I claim that it is quite immaterial what course the other house take; the vote cannot be counted.

Mr. CONNESS. It leaves us, I answer, under the operation of the rule adopted on the 8th, which was a concurrent rule of both bodies which the House cannot repeal separately nor the Senate separately.

Mr. EDMUNDS. That is true.

Mr. WARNER. I rise to a point of order. My point of order is this: that all the points of order that have been made are out of order, and that the two houses cannot one month or one week or one day beforehand decide what votes shall be counted in joint convention.

The PRESIDENT *pro tempore*. There is nothing before the Senate, except —

Mr. HENDRICKS. My motion.

Mr. EDMUNDS. My motion that the Secretary inform the House of Representatives of the action of the Senate.

The PRESIDENT *pro tempore*. The latter motion is agreed to, the Chair understands.

Mr. TRUMBULL. As a relief from the difficulty I suggest that the proper course for us to pursue practically is this: when we return to the other House, the vote of Georgia having been already read, let the tellers read over the vote and the Presiding Officer of the Senate then announce, just as was done twelve years ago, that such a person has received a majority of all the votes cast for President and is thereupon declared to be elected President; and so for Vice-President; and the joint convention will dissolve, and we shall leave this matter without any other decision of it than that. It will not affect the result, and I hope in a calmer time we shall take some measure to avoid the difficulty we are now in.

The PRESIDENT *pro tempore*. The Chair would ask what would become of the concurrent resolution then?

Mr. EDMUNDS. I hope the Chair will obey the joint order of the two houses, and announce that if the vote of Georgia were counted the result would be so and so; if it were not counted it would be so and so; and that in either event so and so is elected. That is what we have directed you to do.

Mr. CONNESS and others. That is it exactly.

Mr. CONKLING. I should like to make a suggestion to the Senator from Vermont, if I can have consent to do it. I call his attention to these words in the Constitution:

"The President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates, and the votes shall then be counted."

This is the language of the Constitution. My difficulty is to see how the Chair, of his own motion, or authorized by a concurrent resolution, is to announce that that thing which the Constitution says shall be done is not to be done at all; but that if it was done one way a certain result would happen, and if done the other way a certain other result would happen, and that we do not do it either way. That is my trouble.

Mr. HOWARD. Mr. President, I offer the following resolution.

The PRESIDENT *pro tempore*. It will be read.

Mr. HENDRICKS. I moved to add the resolution offered by the Senator from Ohio to the one just adopted.

The PRESIDENT *pro tempore*. The resolution of the Senator from Michigan will be read.

Mr. HENDRICKS. Some time since I moved to add the resolution of the Senator from Ohio to the one already adopted.

The PRESIDENT *pro tempore*. That was to a resolution before adopted.

Mr. HENDRICKS. Of course it was. It was calling up the resolution of the Senator from Ohio for action.

The PRESIDENT *pro tempore*. This will be read.

The Chief Clerk. The Senator from Michigan [Mr. Howard] offers the following resolution:

"Resolved, That the electoral vote of Georgia ought not to be counted."

Mr. WILLIAMS. I make a point of order on that resolution. It is out of order according to the ruling of the Chair.

Mr. EDMUNDS. And according to the vote of the Senate.

Mr. HOWARD. Does the Chair rule it to be out of order?

The PRESIDENT *pro tempore*. It is not out of order for the Senate to pass any resolution they see fit to pass.

Mr. EDMUNDS. I move that the Senate return to the House of Representatives.

Mr. FERRY. There is a question before the Senate. Let us vote on it.

The PRESIDENT *pro tempore*. It will be satisfactory to the Chair to know what is to be done when we get back.

Mr. HOWARD. I did not understand the Chair to say that my resolution was out of order.

The PRESIDENT *pro tempore*. The Chair did not say that it was out of order. The question is on the resolution of the Senator from Michigan.

Mr. WILLIAMS. I made a point of order on that resolution, that it was out of order according to the recent ruling of the Chair.

Mr. FERRY. The Chair has decided it to be in order. The Senator can take an appeal if he wishes.

The PRESIDENT *pro tempore*. The Chair does not understand that this question has been acted upon at all.

Mr. WILLIAMS. I will ask the Chair to decide whether the resolution of the Senator from Michigan is or is not in order?

The PRESIDENT *pro tempore*. The Chair thinks it is in order, and has so stated.

Mr. WILLIAMS. Then I respectfully appeal from the decision of the Chair.

The PRESIDENT *pro tempore*. The Senator appeals from the decision of the Chair. The question is, "Shall the ruling of the Chair stand as the judgment of the Senate?"

Mr. MORTON. I ask that the resolution of the Senator from Michigan be read.

The resolution of Mr. Howard was read.

Mr. MORTON. I make a point of order on that resolution that it is in direct conflict with the resolution just adopted, which was offered by the Senator from Vermont.

The PRESIDENT *pro tempore*. That is a question which the Chair cannot decide. It is for the Senate to decide. There is now an appeal pending from the decision of the Chair.

Mr. CONKLING. What is the decision of the Chair?

The PRESIDENT *pro tempore*. The decision of the Chair was that the resolution of the Senator from Michigan was in order, from which decision an appeal is taken, and the question now is, "Shall the decision of the Chair stand as the judgment of the Senate?"

Mr. HENDRICKS. Mr. President—

Mr. WILLIAMS. I object to debate.

The PRESIDENT *pro tempore*. It is not debatable.

Mr. HENDRICKS. I wish to submit that the resolution of the Senator from Michigan is debatable.

Mr. EDMUNDS. No, sir; it is not. Anyhow, the point of order is not debatable.

The PRESIDENT *pro tempore*. The question is, "Shall the decision of the Chair stand as the judgment of the Senate?"

Mr. CONNESS. Upon that I call for the yeas and nays.

The yeas and nays were ordered; and being taken, resulted—yeas 28, nays 25; as follows:

YEAS—Messrs. Abbott, Cameron, Chandler, Cole, Conkling, Drake, Ferry, Grimes, Harlan, Harris, Howard, Howe, McDonald, Nye, Osborn, Patterson of New Hampshire, Ramsey, Rice, Robertson, Sawyer, Sherman, Spencer, Stewart, Sumner, Thayer, Van Winkle, Warner, and Yates—28.

NAYS—Messrs. Buckalew, Conness, Corbett, Cragin, Davis, Dixon, Doolittle, Edmunds, Fessenden, Fowler, Hendricks, McCreery, Morgan, Morrill of Maine, Morrill of Vermont, Patterson of Tennessee, Pool, Ross, Sprague, Tipton, Vickers, Whyte, Willey, Williams, and Wilson—25.

ABSENT—Messrs. Anthony, Bayard, Cattell, Frelinghuysen, Henderson, Kellogg, Morton, Norton, Pomeroy, Saulsbury, Trumbull, Wade, and Welch—13.

The PRESIDENT *pro tempore*. The decision of the Chair is sustained. The resolution of the Senator from Michigan [Mr. Howard] is in order, and the question is on agreeing to that resolution.

Mr. HENDRICKS. Mr. President, I claim that this resolution is debatable. ["No!" "No!"] I will state my point.

Mr. CHANDLER. I object. I call the Senator to order.

The PRESIDENT *pro tempore*. The Senator from Indiana may state his point of order; but of course he cannot debate the question.

Mr. DRAKE. I do not understand that he is stating a point of order.

Mr. HENDRICKS. My point is this: that this resolution is not based in the Senate upon any objection made in the joint convention, but that it is an independent resolution of the Senate, and is therefore not controlled by the joint rule which prohibits debate upon a question made in joint convention. The Senate has decided, in support of the ruling of the Chair, that the objection made in the House is not in order, and the Senate has informed the House of that fact. Therefore this resolution does not rest upon that objection.

The PRESIDENT *pro tempore*. Debate is not in order.

Mr. HENDRICKS. Upon the ground I have just stated I claim the right to debate the resolution.

The PRESIDENT *pro tempore*. It is the opinion of the Chair that it is not debatable.

Mr. HENDRICKS. Then I appeal from the decision of the Chair.

Mr. MORTON. I desire to suggest a point of order.

The PRESIDENT *pro tempore*. The question is on the appeal.

Mr. FERRY. One thing at a time.

The PRESIDENT *pro tempore*. The Senator from Indiana [Mr. Hendricks] appeals

from the decision of the Chair, and the question is, "Shall the decision of the Chair stand as the judgment of the Senate?"

Mr. HENDRICKS. I do not care enough about it; I am not going to press an appeal on a question of this sort.

The PRESIDENT *pro tempore*. The appeal is withdrawn.

Mr. MORTON. I desire to ask a question. I hold in my hand the resolution just passed, offered by the Senator from Vermont, which declares that the objections made to counting the vote in joint convention a little while ago were out of order, and could not be entertained; and now if we pass the resolution offered by the Senator from Michigan, that the electoral vote of Georgia shall not be received, which one shall be reported to the joint convention?

The PRESIDENT *pro tempore*. The question is on the resolution of the Senator from Michigan.

Mr. CONNESS. I call for the yeas and nays.

The yeas and nays were ordered.

Mr. EDMUNDS. Let it be read.

The chief clerk read the resolution of Mr. Howard.

Mr. WILLIAMS. I call for the reading of the other resolution that has just been adopted.

The chief clerk read as follows:

"Resolved, That under the special order of the two houses respecting the electoral vote from the State of Georgia, the objections made to the counting of the vote of the electors for the State of Georgia are not in order."

The question being taken by yeas and nays, resulted—yeas 25, nays 34; as follows:

YEAS—Messrs. Abbott, Cameron, Chandler, Cole, Conkling, Drake, Harlan, Harris, Howard, Howe, Kellogg, McDonald, Nye, Osborn, Ramsey, Rice, Robertson, Sawyer, Spencer, Stewart, Sumner, Thayer, Wade, Wilson, and Yates—25.

NAYS—Messrs. Buckalew, Conness, Corbett, Cragin, Davis, Dixon, Doolittle, Edmunds, Ferry, Fessenden, Fowler, Frelinghuysen, Grimes, Hendricks, McCreery, Morgan, Morrill of Maine, Morrill of Vermont, Morton, Patterson of New Hampshire, Patterson of Tennessee, Pool, Ross, Saulsbury, Sherman, Sprague, Tipton, Trumbull, Van Winkle, Vickers, Warner, Whyte, Willey, and Williams—34.

Absent—Messrs. Anthony, Bayard, Cattell, Henderson, Norton, Pomeroy, and Welch—7.

So the resolution of Mr. Howard was rejected.

Mr. EDMUNDS. Mr. President—

The PRESIDENT *pro tempore*. One moment; shall the Secretary send the vote already taken to the House of Representatives? ["Certainly."]

Mr. EDMUNDS. I made that motion long ago, and the President declared it carried, I understood.

The PRESIDENT *pro tempore*. There were other resolutions, and we directed the Clerk not to go over yet, not knowing what would become of it.

Mr. EDMUNDS. I move that the President direct the Clerk to go now.

The motion was agreed to.

Mr. EDMUNDS. I move that the Senate return to the House of Representatives.

The motion was agreed to; and the Senate, preceded by the Sergeant-at-Arms and the Secretary, proceeded to the hall of the House of Representatives.

The Senate returned to the Senate chamber at four o'clock and forty-five minutes p. m.

NOTIFICATION OF ELECTION.

Mr. MORTON. I offer the following resolution:

"Resolved, That a committee of one member of the Senate be appointed by this body to join a committee of two members of the House of Representatives, to be appointed by that House, to wait on Ulysses S. Grant, of Illinois, and to notify him that he has been duly elected President of the United States for four years, commencing on the 4th day of March, 1869; and also to notify Schuyler Colfax, of Indiana, that he has been duly elected Vice-President of the United States for four years, commencing on the 4th day of March, 1869."

The resolution was considered, by unanimous consent, and agreed to.

The PRESIDENT *pro tempore*. The Chair will appoint Mr. Morton as the committee on the part of the Senate under this resolution.

IN THE HOUSE OF REPRESENTATIVES, February 10, 1869.

The SPEAKER having resumed the chair and called the House to order, said: In the joint meeting of the two houses when the certificate of the electoral vote of Georgia was read the gentleman from Massachusetts [Mr. Butler] objected to counting that vote, for reasons which will be read by the Clerk.

The Clerk read as follows:

"I object, under the joint rule, that the vote of the State of Georgia for President and Vice-President ought not to be counted, and object to the counting thereof, because, among other things, the vote of the electors in the electoral college was not given on the first Wednesday in December, as required by law, and no excuse or justification for the omission of such legal duty is set forth in the certificate of the action of the electors.

"Secondly. Because at the date of the election of said electors the State of Georgia had not been admitted to representation as a State in Congress since the rebellion of her people or become entitled thereto.

"Thirdly. That at said date said State of Georgia had not fulfilled in due form all the requirements of the Constitution and laws of the United States, known as the reconstruction acts, so as to entitle said State of Georgia to be represented as a State in the Union in the electoral vote of the several States in the choice of President and Vice-President.

"Fourthly. That the election pretended to have been held in the State of Georgia on the first Tuesday of November last past was not a free, just, equal, and fair election; but the people of the State were deprived of their just rights therein by force and fraud."

The SPEAKER. The question is, "Shall the vote of Georgia be counted, notwithstanding the objection of the gentleman from Massachusetts?"

Mr. ELDRIDGE. I rise to a question of order. The Presiding Officer of the joint convention of the two houses twice decided not to entertain the objection, but to hold the convention to the order which the House and the Senate in their separate bodies had made. The two bodies separated on the point of order raised by the gentleman from Kentucky, [Mr. Jones.]

The SPEAKER. The Chair overrules the point of order. Questions in regard to the decision of the President of the convention of the two houses must be submitted to that officer when occupying the chair in that capacity. The point upon which the two houses separated was the objection of the gentleman from Massachusetts.

Mr. KERR. I demand the yeas and nays upon the question in reference to the objection of the gentleman from Massachusetts.

Mr. MUNGEN. I rise to a point of order. My point of order is that the second and third objections of the gentleman from Massachusetts [Mr. Butler] are not well taken. [Laughter.] I want to give my reasons. [Cries of "Order!"]

The SPEAKER. The gentleman cannot give his reasons. That would be debate. The Chair cannot hear reasons.

Mr. MUNGEN. Let me state my point of order in another way. [Cries of "Order!"]

The SPEAKER. The Chair would be glad to hear the gentleman from Ohio if it was in order, but it is not in order.

Mr. MUNGEN. I want to state my point of order in another form. [Cries of "Order!" "Order!"]

The SPEAKER. That would be in the nature of debate. The Chair could not hear the gentleman from Massachusetts [Mr. Butler] explain his reasons, nor can he hear any other gentleman give reasons. The question is to be decided by a vote of the House without debate.

Mr. MUNGEN. I do not wish to debate. I merely want to state my point of order.

The SPEAKER. The Chair cannot entertain the point of order.

Mr. FARNSWORTH. I desire to make a parliamentary inquiry of the Chair. I desire to know whether the House is to vote upon the question whether the vote of Georgia shall be counted, or whether it shall or shall not be counted in the manner indicated by the concurrent resolution of the two houses.

The SPEAKER. The Chair submits the question to the House, as the rule requires him to submit it. The concurrent resolution to which the gentleman refers devolves certain duties upon the President of the Senate, and he will perform them, the Chair supposes, under that concurrent resolution. The question before the House as a house is, "Shall the vote of Georgia be counted, notwithstanding the objections of the gentleman from Massachusetts?" [Mr. Butler,] and upon the question the gentleman from Indiana [Mr. Kerr] demands the yeas and nays.

Mr. FARNSWORTH. I make the point of order that the joint resolution of the two houses is of higher authority and is a later rule than the one which orders that question to be put to the House.

The SPEAKER. The Chair overrules the point of order on the ground that the concurrent resolution devolves no duty on the Speaker of the House at all. It devolves a duty on the President of the Senate in presiding over the joint meeting of the two houses. If the gentleman will read the text of the concurrent resolution he will see that it devolves no duty on the Speaker or upon the House of Representatives in its capacity as the House.

Mr. KERR. I desire to make an inquiry of the Chair. Are the propositions submitted by the gentleman from Massachusetts [Mr. Butler] susceptible of division and separate votes?

The SPEAKER. They are not. The only question is, "Shall the vote of the State of Georgia be counted?" And as the objection was made by the gentleman from Massachusetts, the Chair added, "notwithstanding the objection of the gentleman from Massachusetts."

MR. SHELLABARGER. Before the vote is taken, I ask that the certificate of the State of Georgia be again read.

The SPEAKER. It is not in the possession of either house officially, but is in the possession of the convention of both houses.

The question was upon ordering the yeas and nays; and being taken, they were ordered.

The question was then taken upon counting the electoral vote of the State of Georgia; and it was decided in the negative—yeas 41, nays 150, not voting 31; as follows:

YEAS—Messrs. Axtell, Baker, Barnes, Barnum, Beck, Boyer, Brooks, Burr, Cary, Chauler, Eldridge, Farnsworth, Getz, Glossbrenner, Golladay, Grover, Haight, Hawkins, Holman, Hotchkiss, Humphrey, Johnson, Thomas L. Jones, Kerr, Knott, Marshall, McCormick, Mungen, Nicholson, Phelps, Pryn, Randall, Ross, Sitgreaves, Taber, Tift, Van Auken, Van Trump, Wood, Woodward, and Young—41.

NAYS—Messrs. Allison, Delos R. Ashley, James M. Ashley, Baldwin, Banks, Beaman, Beatty, Benjamin, Benton, Bingham, Blaine, Blair, Boles, Bontwell, Bowen, Boyden, Bromwell, Broomall, Buckland, Buckley, Benjamin F. Butler, Roderick R. Butler, Cake, Callis, Churchill, Reader W. Clarke, Sidney Clarke, Cliff, Cobb, Coburn, Corley, Covode, Cullum, Dawes, Deweese, Dickey, Dixon, Dodge, Donnelly, Driggs, Eckley, Edwards, Eggleston, Ela, Thomas D. Eliot, James T. Elliott, Ferriss, Ferry, Fields, French, Garfield, Goss, Gove, Gravelly, Halsey, Hamilton, Harding, Haughey, Heaton, Higby, Hill, Hooper, Hopkins, Chester D. Hubbard, Hulburd, Hunter, Ingersoll, Jenckes, Alexander H. Jones, Judd, Julian, Kelley, Kellogg, Kelsey, Ketcham, Kitchen, Koontz, Lallin, Lash, George V. Lawrence, William Lawrence, Lincoln, Loan, Logan, Loughridge, Mallory, Marvin, Maynard, McCarthy, McKee, Miller, Moore, Moorhead, Morrell, Mullins, Newcomb, Newsham, Norris, O'Neill, Orth, Paine, Perham, Peters, Pertis, Pierce, Pike, Pile, Plants, Poland, Polesley, Price, Prince, Raum, Robertson, Roots, Sawyer, Schenck, Scofield, Selye, Shanks, Shellabarger, Starkweather, Stevens, Stewart, Stokes, Stover, Sypher, Taffe, Taylor, Thomas, John Trimble, Trowbridge, Twichell, Upson, Van Aernam, Burt Van Horn, Robert T. Van Horn, Van Wyck, Vidal, Ward, Elihu B. Washburne, Henry D. Washburn, William B. Washburn, Welker, Whittmore, Thomas Williams, James F. Wilson, John T. Wilson, Stephen F. Wilson, and Windom—150.

NOT VOTING—Messrs. Adams, Ames, Anderson, Archer, Arnell, Bailey, Blackburn, Cook, Cornell, Delano, Dockery, Fox, Griswold, Asahel W. Hubbard, Richard D. Hubbard, Lynch, McCullough, Mercur, Morrissey, Myers, Niblack, Nunn, Pomeroy, Robinson, Smith, Spalding, Stone, Lawrence S. Trimble, Cadwalader C. Washburn, William Williams, and Woodbridge—31.

The SPEAKER. On the question, "Shall the vote of Georgia be counted, notwithstanding the objection of the gentleman from Massachusetts?" the yeas are 41, nays 150. The nays have it; and the House of Representatives have decided that the vote of Georgia shall not be counted. A message will be sent to the Senate informing that body of this action of the House.

MR. BUTLER, of Massachusetts. I move to reconsider the vote just taken; and I also move that the motion to reconsider be laid on the table.

MR. ELDRIDGE. On that motion I call for the yeas and nays.

MR. BUTLER, of Massachusetts. Rather than lose the time necessary to take the yeas and nays I will withdraw my motion.

MR. WOOD. I desire to inquire whether any message has been sent to the Senate that we have determined this question with regard to counting the vote of Georgia, and are waiting for the re-assembling of the joint convention?

The SPEAKER. A message has been sent to the Senate, communicating the action of the House upon the objection of the gentleman from Massachusetts, [Mr. Butler.] The Chair has learned informally, not from any official communication from the Senate, that that body has adopted a resolution that the objection was not in order under the joint rule. That action will be communicated to the House for its consideration.

MR. ELDRIDGE. I would like to inquire of the Speaker whether he is now ready to announce what position the House will be in when that fact is officially announced?

The SPEAKER. The Chair is not prepared at present to answer the inquiry.

MR. FARNSWORTH. I desire, in view of the statement of the Chair in regard to the action of the Senate, to make one or two inquiries of the Chair, that the House may understand this matter.

The SPEAKER. The Chair cannot answer any such inquiries until the action of the Senate has been officially communicated. The Chair merely stated his informal information.

MR. FARNSWORTH. I desire to inquire whether—

The SPEAKER. The Chair will decline to answer all inquiries with regard to the action of the Senate until that action has been officially communicated.

Mr. FARNSWORTH. The point upon which I desire to get the opinion of the Chair is whether it is competent for the House of Representatives, acting separately from the Senate, to rescind or annul the action of the two houses in the adoption of the concurrent resolution on this subject.

The SPEAKER. The Chair declines to answer that question at present.

Mr. PILE. I desire to inquire whether it would be in order to send a messenger to see what has become of the Senate?

The SPEAKER. It would scarcely be deemed respectful toward that body. The Senate will communicate its action to the House in its own time.

Mr. THOMAS. Mr. Speaker, as other gentlemen seem reluctant as to how they will extract the House from a very unnecessary entanglement, although unaccustomed to take much part in its proceedings, I have determined to submit a proposition. I move to reconsider the vote given by the House touching the question mooted by the gentleman from Massachusetts.

The SPEAKER. Did the gentleman vote with the majority?

Mr. THOMAS. I did.

The SPEAKER. The motion is in order.

Mr. THOMAS. If the House will allow me I will for a moment assign a few reasons.

The SPEAKER. The question is not debatable under the concurrent resolution of the two houses.

Several MEMBERS. Can we not grant unanimous consent?

The SPEAKER. No unanimous consent can waive the action of the two houses.

Mr. BINGHAM. I desire to make a parliamentary inquiry.

Mr. THOMAS. I was about to ask the Chair a similar question. The inclination of my own mind is in that way very strong, that it is not competent for the House of Representatives by a vote of this character to supersede the resolution adopted by the Senate and House concurrently. That resolution fixed the mode of action and prescribed the rule of conduct for the Senate and House in joint meeting. I have no reference to the separate action of this body.

The SPEAKER. A reply to that question would involve a discussion of questions properly transpiring in joint convention of the two houses, over which the Speaker of this House has no power.

Mr. THOMAS. I submit the motion to reconsider, and each member can act upon his own responsibility.

Mr. DICKEY. I move that the motion to reconsider be laid upon the table.

Mr. BENJAMIN. The gentleman from Massachusetts made the motion to reconsider, and it was laid upon the table.

The SPEAKER. The gentleman from Wisconsin [Mr. Eldridge] having demanded the yeas and nays, the motion was withdrawn.

Mr. SCHENCK. Has any message been received from the Senate?

The SPEAKER. None as yet.

Mr. BUTLER, of Massachusetts. I demand the yeas and nays.

The yeas and nays were ordered.

The question was taken; and it was decided in the affirmative—yeas 117, nays 57, not voting 48; as follows:

YEAS—Messrs. Allison, Delos R. Ashley, Baldwin, Banks, Benjamin, Benton, Blaine, Blair, Boles, Boutwell, Brownell, Broomall, Buckley, Benjamin F. Butler, Roderick R. Butler, Cake, Callis, Churchill, Reader W. Clarke, Sidney Clarke, Clift, Cobb, Coburn, Corley, Covode, Cullom, Dawes, Deweese, Dickey, Dixon, Dodge, Donnelly, Driggs, Eckley, Eggleston, Ela, Thomas D. Eliot, James T. Elliott, Ferris, Ferry, French, Goss, Gove, Gravely, Halsey, Hamilton, Harding, Haughey, Higby, Hill, Hooper, Hopkins, Hulburd, Hunter, Ingersoll, Alexander H. Jones, Judd, Julian, Kelsey, Kitchen, Lash, Lincoln, Loan, Logan, Longbridge, Mallory, Maynard, McCarthy, McKee, Miller, Moore, Morrell, Mullins, Newcomb, Newsham, Norris, O'Neill, Orth, Paine, Perham, Pettis, Pierce, Pike, Poland, Polsley, Prince, Raum, Robertson, Roots, Sawyer, Schenck, Scofield, Selye, Shanks, Starkweather, Stevens, Stewart, Stokes, Stover, Sypher, Taffe, Taylor, Trowbridge, Twichell, Upson, Van Aernum, Burt Van Horn, Robert T. Van Horn, Van Wyck, Ward, Henry D. Washburn, William B. Washburn, Welker, Whittemore, Thomas Williams, Stephen F. Wilson, and Woodbridge—117.

NAYS—Messrs. Axtell, Baker, Barnes, Barnum, Beaman, Beatty, Beck, Bingham, Boyden, Boyer, Brooks, Burr, Cary, Chanler, Eldridge, Farnsworth, Getz, Glossbrenner, Golladay, Grover, Haight, Hawkins, Holman, Hotchkiss, Chester D. Hubbard, Humphrey, Jenckes, Johnson, Thomas L. Jones, Ketchum, Knott, Koontz, Laffin, George V. Lawrence, Marshall, Moorhead, Mungen, Niblack, Nicholson, Phelps, Pile, Pruyn, Randall, Ross, Sitgreaves, Smith, Stone, Taber, Tift, John Trimble, Van Anken, Van Trump, James F. Wilson, Windom, Wood, Woodward, and Young—57.

NOT VOTING—Messrs. Adams, Ames, Andersen, Archer, Arnell, James M. Ashley, Bailey, Blackburn, Bowen, Buckland, Cook, Cornell, Delano, Dockery, Edwards, Fields,

Fox, Garfield, Griswold, Heaton, Asahel W. Hubbard, Richard D. Hubbard, Kelley, Kellogg, Kerr, William Lawrence, Lynch, Marvin, McCormick, McCullough, Mercur, Morrissey, Myers, Nunn, Peters, Plants, Pomeroy, Price, Robinson, Shellabarger, Spalding, Thomas, Lawrence S. Trimble, Vidal, Cadwalader C. Washburn, Elihu B. Washburne, William Williams, and John T. Wilson—48.

So the motion to reconsider was laid on the table.

During the roll-call a message from the Senate was communicated by Mr. Gorham, its Secretary, informing the House that that body had resolved that, under the special order of the two houses respecting the electoral vote of the State of Georgia, the objections made to the counting of the electoral votes of that State are not in order.

Mr. WOOD moved that the roll-call be suspended for the purpose of admitting the body of the Senate.

The SPEAKER. The House has ordered the roll to be called. Upon the entrance of the Senate the Speaker would be obliged to vacate the chair, but even that cannot interrupt the roll-call; nothing can interrupt it but the close of a session of Congress.

The roll-call having been completed, and the result announced as above,

At half past four o'clock the Senate in a body re-entered the hall.

IN THE PRESENCE OF THE SENATE AND HOUSE OF REPRESENTATIVES,

February 10, 1869.

The PRESIDENT having resumed the chair, said: The objections of the gentleman from Massachusetts are overruled by the Senate, and the result of the vote will be stated as it would stand were the vote of the State of Georgia counted, and as it would stand if the vote of that State were not counted, under the concurrent resolution of the two houses.

Mr. BUTLER, of Massachusetts. I desire to state that the House sustained the objection of "the gentleman from Massachusetts." [Laughter.] I now submit the following resolution. I do not understand that we are to be overruled by the Senate in that way. [Laughter.]

Mr. WOOD. I rise to a question of order.

The PRESIDENT. The Chair declines to receive the resolution. The tellers will make out the statement of the vote as directed.

Mr. BUTLER, of Massachusetts. I appeal from the decision of the Chair to the convention.

Mr. WOOD. Order!

Mr. BUTLER, of Massachusetts. Let us see whether we have any rights in the House or not.

The PRESIDENT. The tellers will make out the statement under the concurrent resolution as directed.

Mr. BUTLER, of Massachusetts. Does the Chair entertain my resolution?

The PRESIDENT. I do not.

Mr. BUTLER, of Massachusetts. Does the Chair entertain the appeal?

The PRESIDENT. No, sir; he does not entertain the appeal. [Laughter.]

Mr. BUTLER, of Massachusetts. Does the Chair hold, as a matter of order, that the Senate can overrule this House?

Many MEMBERS. "Order!" "Order!"

Mr. BUTLER, of Massachusetts. I do not understand that the representatives of the people who have elected a President can be overruled.

Many MEMBERS. "Order!" "Order!"

Mr. BUTLER, of Massachusetts. The question is whether the Senate can overrule an order or a resolution of this House. I know I speak the sentiment of the House. Do I not?

Many MEMBERS. "Yes!" "Yes!"

Mr. BUTLER, of Massachusetts. Now, then, shall we have this unseemly scene—

Calls to order.

The PRESIDENT. No debate is admissible.

Mr. BUTLER, of Massachusetts. I am not debating; and neither calls to order nor arbitrary proceedings can override the privileges of this House.

The PRESIDENT. If the gentleman is not debating he will resume his seat. [Laughter.]

Mr. BUTLER, of Massachusetts. I appeal from the decision of the Chair.

The PRESIDENT. The Chair will not entertain the appeal.

Mr. BUTLER, of Massachusetts. I appeal from that decision.

The PRESIDENT. Nothing is in order but the statement of the vote.

Mr. WOOD. Have we a Sergeant-at-Arms attached to this body?

Mr. SHANKS. Will it be in order to ask for the reading of the rule governing this body?

The PRESIDENT. It would not be in order.

Mr. INGERSOLL. I object to any further proceeding on the part of this body until that appeal is entertained and action is had upon it by this body. [Loud shouts of "Order!" "Order!" and great confusion.]

Mr. CALLIS. Mr. President, I rise to a point of order. I cannot believe that members on this floor are in earnest when they indulge in such undignified——

Cries of "Order!" "Order!"

Mr. CALLIS. If it be in order, I move that this convention now adjourn.

The PRESIDENT. That motion is not in order.

Mr. FARNSWORTH. I rise to a point of order.

Mr. INGERSOLL. I call my colleague to order.

Mr. FARNSWORTH. I make the point of order that an appeal cannot be taken from the decision of the President of this body. [Renewed shouts of "Order!"]

The PRESIDENT. There is no appeal entertained. The gentleman from Massachusetts [Mr. Butler] will resume his seat.

Mr. BUTLER, of Massachusetts, [amid great uproar.] I am in order. I desire the reading of the joint rule upon the subject of counting the votes, which expressly states that a vote cannot be counted unless both houses concur. I do not know of any power which the President has to override the rules. [Loud cries of "Order!"]

The PRESIDENT. The tellers will perform their duty under the concurrent resolution as directed.

Mr. INGERSOLL. I object.

The PRESIDENT. The Chair understands that. [Laughter.]

Mr. INGERSOLL. Now the Senate can retire and consider that objection. [Laughter and cries of "Order!"]

The PRESIDENT. Order! order!

Mr. ELDRIDGE. Would it be in order to have peace? [Great laughter.]

Mr. VAN HORN, of Missouri. I rise to a point of order.

Mr. BUTLER, of Massachusetts. I again insist on my appeal from the order of the Chair.

The PRESIDENT. The Chair has decided that an appeal cannot be entertained in the joint convention.

Mr. BUTLER, of Massachusetts. From that decision I have the honor to appeal.

The PRESIDENT. We decide that in the same way. [Laughter.]

Mr. VAN HORN, of Missouri. I rise to a point of order, and I wish to state it. The point of order that I make is this, that since the retiring of the Senate upon the objection of the gentleman from Massachusetts [Mr. Butler] there has been no report made of the action of both houses upon that subject, and we cannot proceed until a full report is made.

The PRESIDENT. The votes have all been counted, and the statement of the result will be made under the concurrent resolution of both houses. [Loud cries of "No!" "No!" and other cries of "Announce the vote!"]

Mr. DRIGGS. I move that the joint convention adjourn.

Mr. BUTLER, of Massachusetts. Let us have the House to ourselves. [Laughter and shouts of "Order!"] I respectfully move that the Senate have leave to retire. [Renewed laughter and applause in the galleries.]

Senator DOOLITTLE. I rise to a point of order. It is that everything except the execution of the joint order of both houses is out of order, and I demand that that order shall now be executed. [Loud shouts of "Order!" "Order!" "Announce the vote!"]

Mr. VAN HORN, of Missouri. I demand a decision on the point of order I have made before any other point can be entertained.

Mr. DICKEY. I desire to make an inquiry of the Chair, whether it is competent for the Senate to decide points of order for this joint convention.

Mr. INGERSOLL, (amid cries of "Order!" and the greatest confusion.) There must be some misunderstanding with regard to the position of the question at this time. It is not understood by the House generally.

Senator DOOLITTLE. I rise to a point of order.

Mr. BENTON. I object.

Mr. INGERSOLL. It is not understood.

The PRESIDENT. The gentleman is out of order.

Senator DOOLITTLE. I ask the Chair to call on the tellers to proceed. [Loud cries of "Order!" and "The vote!"] I demand that the tellers shall proceed. [Renewed cries of "Order!" "Order!" and "Announce the vote!"]

Mr. BROMWELL. I rise to ask a question about the order of this proceeding, and I think the Chair will hold it to be a pertinent question. I wish to know, and there are a hundred men here who wish to know, by what authority the Chair makes the ruling denying the right of appeal in this convention from the decision of the Chair.

The PRESIDENT. We are proceeding under a concurrent resolution of both bodies, which has declared how the counting and announcement of the vote shall be proceeded with.

Mr. BROMWELL. But does the concurrent resolution of both bodies prescribe who shall determine when that order is executed in order? [Cries of "Order!"]

Mr. BANKS. I ask leave of the convention to make a suggestion which I think will relieve us from the difficulty in which we are placed. [Shouts of "Hear him!" "No!" "No!" "Announce the vote!"]

Mr. ELDRIDGE. We want a fair fight. If anybody is going to pitch in let us all have a chance. [Laughter.] I object.

The PRESIDENT. Objection being made, no debate is in order, and the vote will be announced. The tellers will proceed with the count. [Cries of "Object!" "The vote!" "The vote!" and great uproar.]

Mr. BANKS. I ask leave of the convention to say a word. [Continued uproar.]

Mr. WOOD. I hope the Chair will do his duty. I demand a count of the votes.

Mr. BUTLER, of Massachusetts. I move that this convention now be dissolved, and that the Senate have leave to retire. [Continued cries of "Order!" "Order!"] And on that motion I demand a vote. [Cries of "Order!" "Order!" from various parts of the hall.] We certainly have the right to clear the hall of interlopers.

The PRESIDENT. The tellers will now declare the result.

Senator CONKLING (one of the tellers) then proceeded to declare the result, amid great noise and disorder, the President endeavoring to maintain order by repeated raps of the gavel.

The uproar continuing,

The SPEAKER said: The Speaker of the House appeals to members of the House to preserve order. The Sergeant-at-Arms of the House will arrest any member refusing to obey the order of the President of this convention.

The result of the vote, as announced by the tellers, was as follows:

List of votes for President and Vice-President of the United States for the constitutional term to commence on the 4th of March, 1869.

States.	Number of electoral votes.	For President.		For Vice-President.	
		Ulysses S. Grant, of Illinois.	Horatio Seymour, of New York.	Schuyler Colfax, of Indiana.	Francis P. Blair, jr., of Missouri.
Maine.....	7	7	.....	7	.....
New Hampshire.....	5	5	.....	5	.....
Vermont.....	5	5	.....	5	.....
Massachusetts.....	12	12	.....	12	.....
Rhode Island.....	4	4	.....	4	.....
Connecticut.....	6	6	.....	6	.....
New York.....	33	.....	33	.....	33
New Jersey.....	7	.....	7	.....	7
Pennsylvania.....	26	26	.....	26	.....
Delaware.....	3	.....	3	.....	3
Maryland.....	7	.....	7	.....	7
North Carolina.....	9	9	.....	9	.....
South Carolina.....	6	6	.....	6	.....
Georgia.....	9	.....	9	.....	9
Alabama.....	8	8	.....	8	.....
Louisiana.....	7	.....	7	.....	7
Ohio.....	21	21	.....	21	.....
Kentucky.....	11	.....	11	.....	11
Tennessee.....	10	10	.....	10	.....
Indiana.....	13	13	.....	13	.....
Illinois.....	16	16	.....	16	.....
Missouri.....	11	11	.....	11	.....
Arkansas.....	5	5	.....	5	.....
Michigan.....	8	8	.....	8	.....
Florida.....	3	3	.....	3	.....
Iowa.....	8	8	.....	8	.....
Wisconsin.....	8	8	.....	8	.....
California.....	5	5	.....	5	.....
Minnesota.....	4	4	.....	4	.....
Oregon.....	3	.....	3	.....	3
Kansas.....	3	3	.....	3	.....
West Virginia.....	5	5	.....	5	.....
Nevada.....	3	3	.....	3	.....
Nebraska.....	2	3	.....	3	.....
Including Georgia.....	294	214	80	214	80
Excluding Georgia.....	285	214	71	214	71

The PRESIDENT. The tellers report that the whole number of votes cast for President and Vice-President of the United States, including the votes of the State of

Georgia, is 294, of which the majority is 148; excluding the votes of the State of Georgia, it is 285, of which the majority is 143. The result of the vote, as reported by the tellers, for President of the United States, including the State of Georgia, is—for Ulysses S. Grant, of Illinois, 214 votes; for Horatio Seymour, of New York, 80 votes. Excluding the State of Georgia, the result of the vote is—for Ulysses S. Grant, of Illinois, 214 votes; for Horatio Seymour, of New York, 71 votes. The result of the vote, as reported by the tellers, for Vice-President of the United States, including the State of Georgia, is—for Schuyler Colfax, of Indiana, 214 votes; and for Francis P. Blair, of Missouri, 80 votes. Excluding the State of Georgia, the result of the vote is—for Schuyler Colfax, of Indiana, 214 votes; and for Francis P. Blair, of Missouri, 71 votes.

Wherefore, in either case, whether the votes of the State of Georgia be included or excluded, I do declare that Ulysses S. Grant, of the State of Illinois, having received a majority of the whole number of electoral votes, is duly elected President of the United States for four years, commencing on the 4th day of March, 1869; and that Schuyler Colfax, of the State of Indiana, having received a majority of the whole number of electoral votes for Vice-President of the United States, is duly elected Vice-President of the United States for four years, commencing on the 4th day of March, 1869.

The object for which the House and Senate have assembled in joint convention having transpired, the Senate will retire to its chamber.

IN THE HOUSE OF REPRESENTATIVES, *February 10, 1869.*

QUESTION OF PRIVILEGE.

Mr. BUTLER, of Massachusetts, said: I rise to a question of privilege, and offer the following resolution:

Resolved, That the House protest that the counting of the vote of Georgia by the order of the Vice-President *pro tempore* was a gross act of oppression and an invasion of the rights and privileges of the House."

Mr. HOLMAN. I object to the introduction of that resolution.

The SPEAKER. The gentleman from Massachusetts [Mr. Butler] claims this to be a question of privilege, and the Chair decides that it is.

Mr. RANDALL. I rise to a question of order.

The SPEAKER. The gentleman will state his point of order.

Mr. RANDALL. My point of order is that this House has no right to make reflections upon the other house.

The SPEAKER. The House has the right to adopt such resolutions as it may consider proper when it deems that its rights and privileges have been infringed upon. The Chair asks permission to make a statement in relation to what occurred in the joint convention, and has created so much feeling.

There was no objection.

The SPEAKER. The Chair desires to submit the history of the joint rules, the apparent conflict in which has produced the excitement in the joint convention of the two houses.

By the Constitution of the United States the President of the Senate presides in joint convention when the electoral votes are counted. The Constitution proceeds no further; it simply provides that—

"The President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates, and the votes shall then be counted; the person having the greatest number of votes for President shall be President"—

And—

"the person having the greatest number of votes as Vice-President shall be the Vice-President, if such number be a majority of the whole number of electors appointed."

On the 6th day of February, 1865, the two houses of Congress adopted the twenty-second joint rule, in order, so far as possible, to prevent scenes like those which have occurred in the joint convention just adjourned. The second paragraph of that joint rule reads as follows:

"If upon the reading of such certificate by the tellers"—

This is the certificate of the vote of any State—

"Any question shall arise in regard to counting the votes therein certified, the same having been stated by the Presiding Officer, the Senate shall thereupon withdraw, and said question shall be submitted to that body for its decision; and the Speaker of the House of Representatives shall in like manner submit said question to the House of Representatives for its decision. And no question shall be decided affirmatively, and no vote objected to shall be counted, except by the concurrent votes of the two houses; which being obtained, the two houses shall immediately re-assemble, and the Presiding Officer shall then announce the decision of the question submitted; and upon any such question there shall be no debate in either house."

If this rule stood alone it would follow necessarily that if any objection were made to the counting of any vote from any State of the Union, whether that vote was uncontested or contested, the two houses must meet in their respective chambers and without debate decide the question. A few days since, however, the same legislative power that enacted this joint rule saw fit to enact another in the form of a concurrent resolution covering part of the precise ground covered by the twenty-second joint rule. This was adopted in both branches upon the yeas and nays with direct reference to the joint meeting which has just been held. The Chair, though not a lawyer, supposes it to be one of the fundamental principles of legal interpretation that when there are two statutes bearing upon any question, and it is impossible to reconcile them, the later statute must have the prevailing force. If they can be reconciled, they must both stand. The same bodies which enacted the twenty-second joint rule adopted, on votes by yeas and nays in both branches, a concurrent resolution, the preamble to which has been overlooked amid the feeling which has grown up in the joint convention. The twenty-second joint rule provides that "if upon the reading of any such certificate," that is the certificate from any State, "any question shall arise in regard to counting the votes therein certified," a certain procedure shall then follow. The concurrent resolution, however, adopted within the last few days, lays down a different rule in regard to one State, and in the opinion of the Speaker of the House takes that State out of the operation of the twenty-second rule. The Chair thinks it was intended to be taken out, that intelligent gentlemen in voting for it intended to withdraw the State of Georgia from the operation of the twenty-second joint rule; otherwise, as the Chair will show, it would in the concluding part be an absurdity. The preamble to this concurrent resolution reads as follows:

"Whereas the question whether the State of Georgia has become and is entitled to representation in the two houses of Congress is now pending and undetermined"—

That apparently being a fact within the knowledge of members of both branches of Congress—

"and whereas by the joint resolution of Congress, passed July 20, 1868, entitled 'A resolution excluding from the electoral college votes of States lately in rebellion, which shall not have been re-organized,' it was provided that no electoral votes from any of the States lately in rebellion should be received or counted for President or Vice-President of the United States until, among other things, such State should have become entitled to representation in Congress pursuant to the acts of Congress in that behalf: Therefore,

"Resolved by the Senate, (the House of Representatives concurring,) That on the assembling of the two houses on the second Wednesday of February, 1869, for the counting of the electoral votes for President and Vice-President, as provided by law and the joint rules, if the counting or omitting to count the electoral votes, if any, which may be presented, as of the State of Georgia, shall not essentially change the result, in that case they shall be reported by the President of the Senate in the following manner:"

This is the language which the resolution commands shall be uttered by the mouth of the President of the Senate:

"Were the votes presented, as of the State of Georgia, to be counted, the result would be, for ——— for President of the United States, ——— votes; if not counted, for ——— for President of the United States, ——— votes; but in either case ——— is elected President of the United States; and in the same manner for Vice-President."

This concurrent resolution, adopted by the same legal authority which adopted the joint rule, declares in its preamble that it is a fact apparent to Congress that it is a grave question whether the State of Georgia is entitled to representation; that that question is undetermined; and that therefore, when the two houses shall assemble, "as provided by law and by the joint rules," then if the counting, or the omitting to count, the electoral votes of Georgia shall not affect the result, the result shall be announced by the President of the Senate in a form of language which he is imperatively required to adopt. The President of the Senate has complied with the law which the two houses laid down for him. In the opinion of the Chair, he would have been subject to the censure of the two houses if he had not complied with the law which these bodies laid down for the performance of his duties in joint convention. The Chair entertained the objection of the gentleman from Massachusetts, [Mr. Butler,] when the Senate retired, because the Senate retired upon the ruling of their own President. But the Chair thinks that in the subsequent proceedings of the joint convention the President of the Senate complied exactly with his oath and his duty under the joint rules and the concurrent resolution, the latter being the later, and, so far as it differs from the other, qualifying and repealing it.

MR. BUTLER, of Massachusetts. Mr. Speaker, I desire now to address the House for a few moments on my resolution.

THE SPEAKER. The question is debatable.

MR. SPALDING. I hope the gentleman from Massachusetts will yield for a motion to adjourn.

Mr. BUTLER, of Massachusetts. No, sir. There is no time like the present to settle a great question like this.

Mr. SPALDING. I move that the House do now adjourn.

Mr. BUTLER, of Massachusetts. No, sir; I do not yield for that motion.

Mr. DRIGGS. I hope the resolution which the gentleman from Massachusetts has offered will be again read, so that we may see what is before the House.

The resolution was again read.

Mr. FARNSWORTH. I rise to a question of order. I desire to know whether it is not in the power of the House to decide whether that shall be entertained as a question of privilege or not.

The SPEAKER. It was, if the Chair had submitted it to the House; but it has already been decided to be a question of privilege.

Mr. ELDRIDGE. I appeal from that decision of the Chair.

The SPEAKER. The Chair declines to entertain the appeal on the well-known ground that when a point of order is once decided it cannot be again renewed. When a point of order is once decided it cannot be again renewed, although additional reasons may be assigned for it.

Mr. FARNSWORTH. I withdraw the point of order, because the Chair wished to make a statement.

The SPEAKER. It is too late now; and the Chair, after making his own statements, would not like to see the gentleman from Massachusetts deprived of the privilege of replying to them.

Mr. BUTLER, of Massachusetts. I ask the privilege of the House, Mr. Speaker, that during the remarks which I propose to submit I shall not be interrupted, and for this reason: the point which is now before the House is as grave a one as ever came to be settled by any legislative body. Whatever our feelings may be, under what we deem to be a gross invasion of our privileges, of natural and ordinary heat arising from such oppression, I trust that the few moments elapsing after the deed has been done are sufficient to allow us to bring our minds calmly, coolly, and dispassionately to see the exact merits of the question. Allow me to premise, sir, that I think this resolution stands outside of all the remarks of the Speaker of this House. Even if the Vice-President were right in doing what he did, yet, for the manner in which he did it, we are without redress, and if he were wrong it was the greatest outrage upon the rights and privileges of this House.

Now, Mr. Speaker, let us see exactly where we stand. The Constitution of the United States says that the President of the Senate shall open in convention all of the votes of all of the States, and they shall be therein counted, and it is as impossible for this House or the Senate, either jointly or separately, in concurrence or otherwise, to stop the operation of that constitutional enactment as it is to turn back the sun in its course; for, as you will see, sir, we stand in this position: if the House and the Senate, by joint action before had, can determine what votes shall be counted and what votes shall not be counted, then the House and the Senate can determine who is and who is not to be the President of the United States, and who is and who is not to be the Vice-President of the United States.

The SPEAKER. The gentleman will yield to receive a message from the Senate of the United States.

Mr. BUTLER, of Massachusetts. I do not know whether I should or not.

MESSAGE FROM THE SENATE.

A message was received from the Senate, by Mr. McDonald, its chief clerk, notifying the House that the Senate had passed a resolution for the appointment of a committee of one on its part to join such committee as may be appointed on the part of the House to wait upon U. S. Grant, President-elect of the United States, and also upon Schuyler Colfax, Vice President-elect of the United States, and inform them of their election, and have appointed Mr. Morton, of Indiana, as such committee on its part.

QUESTION OF PRIVILEGE—AGAIN.

Mr. BUTLER, of Massachusetts. You will see in a moment, Mr. Speaker, that whether the vote of Georgia is counted or not at this time makes no difference; but if this House and the Senate can say that such a State shall be counted, and such a State shall not be counted, it is within the power of the House and the Senate to say who shall be President and who shall not be President. Nay, more; if it is in the power of the House of Representatives to make a rule that no vote of a State shall be counted unless both the House and the Senate agree together, then it puts it in the power of either House to determine who shall be President of the United States, and from this day henceforth there can be no election whenever the House and Senate are opposed to each other. Think of it a moment, gentlemen. Suppose a case of a presidential election when the House is one way and the Senate another. Under that joint rule, which

is constitutional and operating, the House will say, "We will not have the republican votes counted," and the Senate will say, "We will not have the democratic votes counted," and there is an end to the proceeding of the election. Now, then, what did the Constitution mean? It meant that a convention should come together of the two houses. What is meant by that convention? It is claimed on the part of the Senate that they sit in the convention as an independent body, and, in deference to their claim of privilege—because they are a small body, and by practice their votes would be overthrown—we have permitted heretofore by the rule that all questions should be considered in the separate bodies.

The SPEAKER *pro tempore*, (Mr. DAWES in the chair.) The House will preserve order. Mr. BUTLER, of Massachusetts. I am sorry to speak when gentlemen have so little disposition to hear; but still I must do my duty, whatever it is.

Mr. JONES, of Kentucky. Is it in order to raise a question of order?

The SPEAKER *pro tempore*. It is.

Mr. JONES, of Kentucky. I protest that this is not a question of privilege. Every member in this House will have a right to discuss the matter the gentleman is discussing.

The SPEAKER *pro tempore*. The Speaker has already decided this to be a question of privilege, and it has been already entertained as such by the House.

Mr. JONES, of Kentucky. I insist, then, that the gentleman is not arguing a question of privilege which he has raised, but is discussing the question whether the electoral vote of Georgia ought to be counted or not.

The SPEAKER *pro tempore*. The gentleman from Massachusetts will proceed.

Mr. SPALDING. Mr. Speaker, is it in order to move to go to business on the Speaker's table? If so, I make that motion.

The SPEAKER *pro tempore*. The gentleman from Massachusetts is entitled to the floor, and declines to yield to any one.

Mr. SPALDING. I supposed as he took me off the floor the other day by that motion that I could do the same with him.

Mr. BUTLER, of Massachusetts. It is not after the morning hour.

The SPEAKER *pro tempore*. It is only after the morning hour that that rule prevails.

Mr. FARNSWORTH. I want to get the permission of the House that there shall be no further business transacted to-night.

The SPEAKER *pro tempore*. Does the gentleman from Massachusetts yield for that motion?

Mr. BUTLER, of Massachusetts. I have asked that I may not be interrupted.

Mr. FARNSWORTH. Then the gentleman can speak without interruption.

The SPEAKER *pro tempore*. Does the gentleman decline to yield to take the sense of the House whether there shall be any further business transacted to-night?

Mr. BUTLER, of Massachusetts. I have over and over again said I decline to yield. My friend may go if he does not want to hear me.

Mr. FARNSWORTH. I do not understand what the gentleman—

Calls to order.

Mr. BUTLER, of Massachusetts. I was about saying, when I was interrupted, that this therefore becomes a question of great gravity, because while the Speaker has thought that the action of the President of the Senate was right, admitting that for a moment, what could have happened if he had been wrong, as I believe him to have been? What redress had we suppose he had declared, standing in his place, Horatio Seymour President of the United States against our protest? He might have done that just as well as what he did do, and we should have been as powerless under the Constitution as we are now, with nothing left to us but the great right of revolution. The same arbitrary proceeding; the same crowding down of the representatives of the people; the same—I do not want to use an unparliamentary word—the same exercise of arbitrary, despotic, monarchical power which he put upon the Representatives of the people could just as well have declared Horatio Seymour President of the United States, and there would have been no redress under the Constitution and within the rule.

Now, suppose that the Senate had gone to their chamber after the votes of New York and New Jersey, which gave a majority for Seymour, had been counted, and had decided that the votes of no more States should be counted, and having so decided had ordered their President to take the stand there with the gavel in his hand and pound down everybody else until he had declared that by all the votes counted Horatio Seymour was elected President of the United States, and whenever you get a Senate opposed to the House, and opposed to the action of the people, when there can be any pretext whatever for doing it, from that moment, under this precedent, unless the House asserts its privileges, our liberties and the liberties of this country are gone, and we are in the hands of the executive body known as the Senate of the United States.

Now, then, let us see where we are. Let us take a point of departure; and I call attention to it because I saw an act on the part of the Speaker which, while well intended, and which I have no doubt proceeded from his convictions of duty, and which,

therefore, I do not personally criticise, yet suppose when the President of the Senate hereafter, of whom I have been speaking, shall make the declaration that a Vice-President is elected who is not really elected, and that Vice-President shall happen to be the Speaker of the House, he then orders the Sergeant-at-Arms to stifle the voice of the people's Representatives in order to secure his own election!

Mr. COLFAX, (the Speaker.) Does the gentleman desire a reply?

Mr. BUTLER, of Massachusetts. No, sir.

Mr. COLFAX. He does not.

Mr. BUTLER, of Massachusetts. I am only putting a question, not in any manner criticising, and the reason why I do not desire a reply is that I do not want to be misunderstood by admitting that my words need a personal reply. I said at the beginning that the Speaker did exactly what he believed to be his duty, and I do not think that he was influenced one hair, because he could not doubt that he was the choice of the people, and that under no circumstances would the people permit that choice of theirs to be overridden; and, therefore, he had not a single personal thought in the matter. And the reason why I do not allow him to reply was that I would not, by allowing a reply, be thought for a moment to be attacking his position. But I put it to his own good sense—and I would as lief argue to that than to any other judge on earth—suppose we had had a man who was doubtful whether he was elected by the voice of the people—for it may be that next time our then Speaker is the man who is to be President—and he can by the *gens d'armes* of the House, by the constabulary of the House, check the voice of the people through their Representatives, and allow the President of the Senate to declare a man elected who was not elected!

I am speaking of a supposed case only, and one which I wish, in every form that words can state it, to divorce the Speaker from, because he did, I have no doubt, what he thought was right to be done. And I call his attention to the fact that the moment he made that decision—which was a decision within his power to make and within the proprieties of his position to make—I call upon him to notice that from that moment I took my seat and did not interfere with the proceedings, because I yielded to his authority as I always have done and always have been happy to do. But I am only showing the danger and showing the necessity that there is that this House should assert its privileges for the safety of the nation and for the liberties of the people.

Now, then, let us come directly to what was done. The House and Senate passed a joint rule, the twenty-second; and, having passed that joint rule, there was thought to be necessary on the part of the Senate a resolution that the vote of Georgia should not be counted because of its want of capacity as a State; that being put in a preamble. It was agreed to for that reason and provided that the State of Georgia should not be counted except in a given way. I say I think it wholly unparliamentary and wholly unconstitutional. I think that concurrent resolution had not any more force and effect than the blank paper it was written on. I cannot but remember that it was put through the Senate with very little debate, that it was put through this House at night without a single word of debate, under a suspension of the rules, and without anybody knowing what it was.

Mr. ELDRIDGE. And a large portion of the House absent.

Mr. BUTLER, of Massachusetts. Nearly one-half of the House were absent; one hundred and seven members. Now, under these circumstances, what happened? We came into this joint convention, and in the first place an objection was made to counting the vote of Georgia for reasons that were wholly outside of that stated in the concurrent resolution. The first and last grounds of the reasons which I assigned for that objection are wholly outside of that concurrent resolution. That objection having been made, the President of the convention ruled that it was well taken, and he took the Senate with him over to their chamber to consider upon—what? What the joint rule styles “an objection stated in the convention.” And they had no right under the rule to consider any other question. After the Senate had retired the Speaker took the chair, and very properly put before the House the objection which had been made in joint convention. Why did not the Speaker then say to us, “Gentlemen, you cannot vote upon this objection. You have tied your hands in regard to it; you cannot consider it for a moment. You must count the electoral vote of Georgia, although the chairman of her electoral college had his hands dripping with the blood of our soldiers. We are bound to receive the vote of an unreconstructed State, with her electors still unregenerated and unpurged of every crime known to the Decalogue.” That is, in fact, what this concurrent resolution says. It says that we have no power to prevent the vote of Georgia being counted. Why? Because it may make no difference in the result.

And that brings me to another proposition to which I wish to call the attention of the House. Heretofore, from the time the first electoral vote was counted down to to-day, the States have been called in one or the other of two regular orders: either in alphabetical order or, after the original thirteen, in the order of their admission into the Union. But to-day the States were called for the first time in all sorts of order, if order can be said to be where order there was none. The State of New Hampshire

was called before Maine, Maine before Minnesota, and so on in every possible way. And the State of Georgia was called last, so that it might be known whether the counting of the vote would make any difference in the result. No man could know officially and legally the fact we were here officially and legally to ascertain had Georgia been called in her regular place; no man could tell whether on opening the rest of the envelopes that we should not find the majority of the votes to be the other way. So, Georgia was cut loose from the rest and put off till the last.

Very well; when the objection to counting the vote of the State of Georgia came to be submitted to the House, every loyal member of this House on the republican side, and some I grant of the loyal men on the other side, at least I hope so, voted that under the circumstances the vote of Georgia ought not to be counted. And had her vote been for Grant and Colfax, I would not have counted it as soon as when it was given for the other side. We therefore voted that her vote was not to be counted. We had a joint rule which it is said is wrong. If it was wrong, then this concurrent resolution was wrong. If this concurrent resolution is right, then the joint rule is right; which says that the vote of no State can be counted if it is objected to by either house. The Speaker has told us that the President of the convention was right in counting the vote of Georgia, although the House protested against it, because the concurrent resolution of the two houses directed him so to do. Now, what is the force of a concurrent resolution? It is a declaration that the two houses, at the time of its passage, concurred in a certain act or declaration. Now, after we have concurred in a resolution, cannot we non-concur and rescind it, at least so far as we are concerned? And did we not non-concur and rescind that concurrent resolution when we voted that the vote of the State of Georgia should not be counted? I put that as a question of parliamentary law to the Speaker. We first concurred with the Senate that the vote of Georgia should be counted in a certain way. After a time, while acting as part of the convention, we changed our opinion, and told the Senate that we had non-concurred in that resolution, and had voted, three to one, to reverse our former action.

If we have no power to do that, then I ask gentlemen here, where are we? Then the House has lost its share of control over the Government; it never can rescind this concurrent resolution; it never can rescind this joint rule, I mean. I do not mean the concurrent resolution about the State of Georgia, but the joint rule in regard to the vote of any State to the counting of which either house shall object, without leave of the Senate. Now, I have here a resolution that that joint rule, so far as this House is concerned, shall be rescinded; but if the ruling is correct, then we never can rescind it. As a part of the convention we rescinded the concurrent resolution when we said that the vote of Georgia ought not to be counted under any circumstances.

Mr. FARNSWORTH. Will the gentleman allow me to ask him a question?

Mr. BUTLER, of Massachusetts. No, sir. I cannot permit myself to be interrupted just now.

Mr. FARNSWORTH. I advise the gentleman not to do so.

Mr. BUTLER, of Massachusetts. I take the gentleman's advice for what it is worth—nothing more.

Mr. FARNSWORTH. My question might expose the fallacy of the gentleman's argument.

Mr. BUTLER, of Massachusetts. The gentleman shall have ample time to do that.

Mr. Speaker, as I was saying, if we cannot rescind that resolution, there it stands. If the Senate can always control as they did to-day, by instructing their President what to do, where are we then? They instruct him before he comes in here: and when he comes here he takes the gavel and stands there, and we cannot appeal from his decision. We cannot even clear out our House so as to proceed with our deliberations by ourselves. He must remain there shouting "Order!" until they shut us up. The Senate, having got into our hall, hold themselves here, and a motion is not even entertained to dissolve the convention. In other words, the convention can be dissolved only by the order of the Senate, and not by the order of the House, because the convention happens to be held in the hall of the House. The Senate can retire whenever they please; but we cannot get them out till they want to go. Am I not right in this? Is there any escape from this conclusion?

When the President of the Senate refused to entertain my motion, that the Senate have permission to leave, I asked—and I saw that it grated on the feelings of some gentlemen—whether we had not the right to clear our hall. All I meant was that we had the right to inform the Senate that we wanted our hall ourselves; that they have no greater right here than we have, and I think it was the duty of the Presiding Officer to put the motion. The Senate had no business here any longer when we of the House desired the use of our hall for the purpose of consultation. If the President of the Senate will not put the motion for the Senate to leave; if they will not leave on so broad a hint as I gave them; if the Speaker will not turn them out, how are we ever to get rid of them? And there is no appeal; there is nothing to be said!

Thus there has been brought about this shameful spectacle—that when we have a

President and Vice-President elected with more unanimity than almost any of their predecessors, instead of the result being announced amid the pæans and shouts of an applauding people, the Presiding Officer of the Senate, in conjunction with that body, commits a gross violation of the rights of this House, and the declaration is made amid confusion and personal conflict. The only thing that ought to have been done under such circumstances is, it seems to me, illustrated in the history of the British Parliament in olden times. When they had a speaker who, at the command of the court, insisted that he would adjourn by leaving the chair, how did they prevent it? They placed their strong men there to hold him down, so that he should not get out. We in this case had only to reverse the process. We had our strong men; and why should we not have followed that old precedent of parliamentary history? Who is responsible for all this? I will tell you. It was the Presiding Officer of the Senate, and the Senate sustaining him, who were trampling upon our rights. And when the rights of the people are trampled upon in my person, I give ample notice that there will be at least a noise. [Laughter.] If I cannot speak in an orderly and proper manner, I will speak in a disorderly and improper manner. I will speak somehow; I will not be silenced. And I ask that this House shall now express its sense of this breach of its privileges.

Mr. Speaker, I trust I have not given even a strained version of this affair. Now, what is our remedy? I have not offered this resolution with the expectation of passing it to-night, because I do not want anything done under heat; I do not want anything done without great care. I have no doubt that this House would now vote almost *nem. con.* that this was a gross outrage on the privileges of the House. But what do I propose by this resolution and by another which I hold in my hand, providing that the joint rule be abrogated? I propose that the subject shall be referred to a select committee of five or seven, as the House may please, that they may at once proceed to examine and to report by bill or otherwise what action the House shall take for the purpose of preserving its rights and privileges and giving a proper construction of the Constitution, in order that this unseemly and disgraceful scene (whoever may be responsible for it) may never be repeated in this joint convention of the two houses.

Mr. Speaker, I wish to modify my resolution by adding the following additional resolutions:

Resolved, That the twenty-second joint rule of the House and Senate be, and hereby is, rescinded on the part of the House.

Resolved, That the resolutions now pending be, and are hereby, referred to a select committee of five, with leave to report at any time.

I now yield the remainder of my time to the gentleman from Ohio, who, I understand, wishes to be heard on this question.

Mr. COLFAX, (Speaker of the House.) I ask the gentleman from Ohio to yield to me for a short time.

Mr. SHELLABARGER. Certainly, with pleasure.

Mr. COLFAX. I acknowledge, Mr. Speaker, my surprise when directly referred to by the gentleman from Massachusetts in the case which he propounded as a hypothetical case, and when I asked of him the poor courtesy of replying at the moment, he declined to yield me the floor.

Mr. BUTLER, of Massachusetts. And he gave the reasons for so declining.

Mr. COLFAX. Now, sir, there are various ways of attacking a person. It may sometimes be by the charge direct, and sometimes by charging what might be done by him in the future. The gentleman from Massachusetts is master of both methods, and if in the remarks which the members of this House will read in the Globe in the morning he did not allude hypothetically to what might occur, when as Vice-President of the United States I may be called upon, sitting in that chair, presiding over the joint convention of the two houses to count the votes for President and Vice-President of the United States, after the next presidential election, then I did not understand the language which fell from his lips.

Mr. BUTLER, of Massachusetts. Just the contrary.

Mr. COLFAX. I yield to the gentleman, although he declined to yield to me.

Mr. BUTLER, of Massachusetts. I told the gentleman I did not refer to him hypothetically. I had not the gentleman in my mind at all, as I now assure him upon my honor.

Mr. COLFAX. I accept the explanation of the gentleman from Massachusetts, and I am glad to find that I was mistaken, although I listened attentively to his language and his similes.

A word in reference to the question which has arisen between the two houses. It will not be long before I must leave this hall, and the earnest warning which I would now address to my fellow-members is to avoid, as far as possible, any conflict between the two branches of Congress, in whose hands have been confided, by the Constitution and the people, the legislative power of this Government. If it be apparent that duties have been performed in conformity to the law standing on the statute-book, then I pray you beware how this House, or any member of the House, goes down to the coming generations of the future as voting in favor of an unjust resolution of condemnation.

Now, sir, this case is all in a nutshell. The Constitution of the United States declares that the President of the Senate, in presence of the Senate and House of Representatives, shall count the votes and declare the result. If there had been no other rule that power would have been absolute in the hands of the Vice-President. We saw that in 1856 when the question arose as to whether the electoral vote of the State of Wisconsin should be counted or thrown out. In that case the electors were prevented from meeting on the day fixed by law by a severe snow-storm, but they met on the succeeding day and cast their votes. I remember the scene well which took place in the old hall, but I will not take up the time of the House by describing it. Subsequently, in 1865, in consequence of the troublous condition of the country and the disorganized condition of many of the States, and in order that there might be no difficulty in reference to counting the votes, it was decided to adopt this joint rule, which declares that whenever the vote of any State is objected to by any person, the two branches should retire, each to its own chamber, there to decide upon the question. That rule gave Congress the power which it has this day exercised. I believe it to be constitutional and wise. Subsequently to this, within two or three days of the time we are sitting here in this brilliantly lit hall, Congress thought the case of Georgia was an exception to the cases covered by the twenty-second rule, and it deliberately declared that Georgia was on a different footing, and passed a concurrent resolution—for which I believe the gentleman himself voted—by which the President of the Senate is commanded to do certain things, and the very words which are to be used are placed in his mouth. And it declares in that concurrent resolution which was adopted, with the vote of the gentleman himself in favor of it, if I am not mistaken—

MR. BUTLER, of Massachusetts. I voted only for the suspension of the rules.

MR. WOODWARD. If the gentleman from Massachusetts was not here when that vote was taken, he ought to have been, so as to have made the argument he has made to-day. [Laughter.]

MR. COLFAX. The two houses adopted that resolution, declaring that when they came together in this hall in conformity to the laws and to the joint rule of Congress, then if the vote of the State of Georgia did not affect the result, the President of the Senate should say exactly what he did say. Now, it seems to me there is nothing clearer than the language of that rule, and I was surprised when I heard the supplemental argument of the gentleman from Massachusetts, in which he said that the action of this House, sending over its message to the Senate that it did not wish the vote of Georgia to be counted, abrogated the joint rule. I have never heard before that one house could abrogate a joint rule made by both houses.

MR. WOODWARD. I beg leave, with the permission of the gentleman, to correct a mistake into which I have fallen. The yeas and nays do show that the vote of the gentleman from Massachusetts was given on the question referred to.

MR. COLFAX. The gentleman says he did vote. That is immaterial.

MR. BROWNELL. I would like to ask a question.

MR. COLFAX. The gentleman will permit me to finish what I have to say; I wish to add only one further remark. It is impossible in a joint convention that there should be an appeal from the ruling of the Chair, because it could not be entertained by the Presiding Officer. There never has been an appeal in any joint convention of Congress. It might have been provided for in the rules, but has been omitted. Under the twenty-second joint rule, when the vote of any State is objected to the Senate must retire and each house must vote upon the question. But the two houses, with the full knowledge of that rule, by a deliberate vote took the case of Georgia outside of that joint rule and laid down a specific rule for that case; and the vote of that State was accordingly withheld until the last, so that the concurrent resolution, which was a command to the President of the Senate, should be carried out. There can be no appeal on a point of order in a joint convention of the two houses, for the reason that the Senate, representing the States, and the House of Representatives, representing the people of the United States, the convention is made up of different persons, each body representing the same number of people, but by different numbers and in different ways.

MR. BUTLER, of Massachusetts. Will the gentleman allow a question?

MR. COLFAX. Certainly.

MR. BUTLER, of Massachusetts. In a case of an election of a Senator of the United States, where it is provided that it shall be done in joint convention of the house of assembly and of the senate, where they go on and vote day by day until a Senator is elected, is there no appeal provided?

MR. COLFAX. The case is not analogous; therefore I do not answer it. I only have to say, in conclusion, that I regret to have occupied the time of the House. It is probably the last time I shall have occasion to do so until I shall, on leaving the chair, make my brief valedictory remarks. The electoral vote has been counted in accordance with the requirement of your own concurrent resolution. The President of the Senate uttered the very words you by your votes commanded him to utter. The vote of Georgia did not affect the result. The President rose and declared exactly what both branches of Congress ordered him to declare. I appeal to you, Representatives, on no

sudden excitement as this, to put upon your Journal a record that will not stand the rest and scrutiny of the people, nor of your own private judgment in the cooler period that will come to you hereafter.

Mr. SHELLABARGER resumed the floor.

Mr. WOOD. Will the gentleman yield to me to move that the House adjourn?

Mr. SHELLABARGER. I decline to yield.

Mr. ALLISON. I appeal to the gentleman to yield for that motion.

Several MEMBERS. Oh, no.

Mr. SHELLABARGER. I will yield for the purpose of ascertaining the pleasure of the House in regard to the matter of adjournment, provided I do not lose my opportunity to have the floor.

The SPEAKER *pro tempore*. The gentleman does not lose his right to the floor.

Mr. ALLISON. I move that the House do now adjourn.

The question being put, there were—ayes 83, noes 62.

Mr. FARNSWORTH. I demand the yeas and nays.

The yeas and nays were ordered.

Several MEMBERS. Withdraw the motion.

Mr. ALLISON. I do not propose to withdraw the motion to adjourn unless there is some arrangement made by which we may understand how long the debate is to last and who is to have an opportunity of disussing this question. It cannot be disposed of to-night, and I do not withdraw the motion.

Mr. JONES, of Kentucky. I rise to a question of order. It is this: The gentleman from Massachusetts [Mr. Butler] took the floor upon a question of privilege, and the gentleman from Ohio [Mr. Shellabarger] has no right to the floor unless he takes it, as the gentleman from Massachusetts did, on a question of privilege.

The SPEAKER *pro tempore*. The Chair overrules the point of order.

The question was taken on Mr. Allison's motion; and it was decided in the affirmative—yeas, 104; nays, 42; not voting, 76; as follows:

YEAS—Messrs. Allison, Ames, Delos R. Ashley, James M. Ashley, Baker, Barnes, Barnum, Beatty, Bingham, Blair, Boles, Boutwell, Boyer, Brownwell, Brooks, Broomall, Buckland, Buckley, Roderick R. Butler, Chanler, Churchill, Sidney Clarke, Cobb, Coburn, Cullom, Dawes, Dixon, Dockery, Dodge, Eckley, Edwards, Eldridge, Thomas D. Eliot, Ferriss, Garfield, Golladay, Gove, Haight, Haughey, Hawkins, Higby, Hill, Hopkins, Hotchkiss, Jenckes, Johnson, Thomas L. Jones, Kelley, Kerr, Ketcham, Koontz, Ladin, Lash, George V. Lawrence, William Lawrence, Loan, Mallory, Maynard, McCarthy, Morrell, Mungen, Niblack, Nicholson, Norris, O'Neill, Orth, Pettis, Phelps, Pike, Pile, Poland, Polsley, Pruyn, Randall, Raum, Ross, Schenck, Seofield, Selye, Shellabarger, Smith, Stewart, Stokes, Stone, Stover, Taber, Taylor, Thomas, Tift, Trowbridge, Twichell, Upson, Van Trump, Henry D. Washburn, William B. Washburn, Welker, Whittemore, Thomas Williams, Stephen F. Wilson, Windom, Wood, Woodbridge, Woodward and Young—104.

NAYS—Messrs. Banks, Beaman, Benton, Blaine, Burr, Cake, Cliff, Covode, Deweese, Dickey, Donnelly, Driggs, Ela, Farnsworth, Ferry, Fields, French, Getz, Gravely, Halsey, Hamilton, Heaton, Holman, Humphrey, Hunter, Ingersoll, Alexander H. Jones, Julian, Miller, Mullins, Perham, Peters, Robertson, Roots, Sawyer, Shanks, Starkweather, Stevens, Taffe, Van Auken, Burt Van Horn, and Robert T. Van Horn—42.

NOT VOTING—Messrs. Adams, Anderson, Archer, Arnell, Axtell, Bailey, Baldwin, Beck, Benjamin, Blackburn, Bowen, Boyden, Benjamin F. Butler, Callis, Cary, Reader W. Clarke, Cook, Corley, Cornell Delano, Eggleston, James T. Elliott, Fox, Glossbrenner, Goss, Griswold, Grover, Harding, Hooper, Asahel W. Hubbard, Chester D. Hubbard, Richard D. Hubbard, Hulbard, Judd, Kellogg, Kelsey, Kitchen, Knott, Lincoln, Logan, Longbridge, Lynch, Marshall, Marvin, McCormick, McCullough, McKee, Mercur, Moore, Morehead, Morrissey, Myers, Newcomb, Newsham, Nunn, Paine, Pierce, Plants, Pomeroy, Price, Prince, Robinson, Sitgreaves, Spalding, Sypher, John Trimble, Lawrence S. Trimble, Van Aernam, Van Wyck, Vidal, Ward, Cadwalader C. Washburn, Elibu B. Washburne, William Williams, James F. Wilson, and John T. Wilson—76.

So the motion was agreed to; and thereupon (at five o'clock and fifty minutes p. m.) the House adjourned.

IN THE HOUSE OF REPRESENTATIVES, February 11, 1869.

Mr. SHELLABARGER said:

Mr. Speaker, I desire to state that in all that I shall say I shall accord most sincerely and fully to every gentleman upon the floor all that integrity of purpose and desire fairly and properly to dispose of the important matter now before the House which I claim for myself. It is not wonderful, sir, that we have fallen into doubt and trouble about this matter, so new, so undefined, and one in which we are to so great an extent unaided by precedent furnishing to us a guide. I shall aim at making my utterances to-day practical and as intelligible as my feeble abilities will enable me to do. The resolution the gentleman from Massachusetts has submitted for our approval reads as follows:

“The House protests that the counting of the vote of Georgia by the order of the

Vice-President *pro tempore* was a gross act of oppression and an invasion of the privileges of the House."

Profoundly as I regret that occurrence, and deeply as I feel the wrong which the resolution does, I shall consider, calmly if I can, the justice of it. I shall do that by first assuming what I understand to be the position of the distinguished gentleman from Massachusetts, [Mr. Butler,] who introduces the resolution, that both the twenty-second joint rule of the date of February 6, 1865, and also the concurrent resolution of the two houses of the date of February 6, 1863, are alike unconstitutional, alike without legal significance and force, and, to adopt his words, equivalent to waste paper. From this stand-point of the gentleman from Massachusetts I proceed to consider the resolution which he has seen fit to introduce.

Mr. BUTLER, of Massachusetts. The gentleman will permit me to say that in the language to which he refers I was not characterizing the joint rule, but the concurrent resolution recently adopted.

Mr. SHELLABARGER. Mr. Speaker, I understood the gentleman to characterize the joint rule of 1865 as unconstitutional also. In the morning Chronicle he is reported as using these words:

"Think of it a moment, gentlemen! Suppose at the next election the House of Representatives is one way and the Senate is another. Under that joint rule, if it is constitutional and operative, the House can say, 'We will not have the republican votes counted,' and the Senate can say, 'We will not have the democratic votes counted,' and there is an end to presidential elections."

Let me now bring together some very familiar things, but things which dispose of this resolution. Let it first be remarked and kept in mind that the Constitution provides that the legislatures of the several States shall fix the manner of choosing the electors. In the next place, Congress is authorized by the Constitution to fix the time of casting the vote of the presidential electors. The language is:

"Congress may determine the time of choosing the electors, and the day on which they shall give their votes, which day shall be the same throughout the United States."

Next, I beg that the purposes and importance of this provision of the Constitution shall be kept in mind. It requires that the day of voting in the several States shall be the same. With reference to the importance of this constitutional provision, Justice Story, in his Commentaries, uses this language:

"The propriety of this power would seem to be almost self-evident. Every reason of public policy and convenience seems in favor of fixing a time of giving the electoral votes, and that it should be the same throughout the Union. Such a measure is calculated to repress political intrigues and speculations by rendering a combination among the electoral colleges as to their votes, if not utterly impracticable, at least very difficult, and thus secures the people against those ready expedients which corruption never fails to employ to accomplish its designs."

Next, I invite the attention of the House to the legislation of Congress, carrying into effect and providing for the things covered by these provisions of the Constitution. The act of Congress of 1792 fixes the time in accordance with the constitutional requirement upon the same day throughout the Union. The fifth section of that act provides, in substance, the same thing that it provided in the terms of the twelfth amendment itself, and I shall presently read it.

It will be seen that this act of 1792 furnishes no additional guide for the counting of the electoral votes beyond what the Constitution furnishes.

I shall now proceed to consider the resolution before the House as if there was no twenty-second rule nor any concurrent resolution of this Congress upon the subject; and I am inquiring whether the resolution ought to be passed, assuming that we have no other guide than the guides furnished us by the statute and the Constitution. That article of the Constitution, Mr. Speaker, in so far as it relates to the matter now before the House, provides for that matter in these words:

"The President of the Senate shall, in the presence of the Senate and the House of Representatives, open all the certificates; and the votes shall then be counted."

That is the light the Constitution gives us on the subject as to how the count shall be made, and by whom it shall be made. The thing, it will be observed, to be done in express terms by the President of the Senate, is to open the certificates. The count is to be made then, but by whom is not expressly stated.

Now, Mr. Speaker, I go to the difficulty that exists in the Constitution itself, which has brought upon the Government again and again, at least three times over, the same experience which we encountered here yesterday, an experience regretted at its first occurrence with the most intense feeling of anxiety and alarm by all the country, and pointed to as an indication of weakness and of danger in the very framework and structure of your Government. To that danger Mr. Story points in exceedingly suggestive words, to which I will now call the attention of the House. He says:

"In the original plan as well as in the amendment no provision is made for the dis-

cussion or the decision of any questions which may arise as to the regularity and authenticity of the returns of the electoral votes"—

The very difficulty we on yesterday, under circumstances so painful, were brought again to encounter. He proceeds:

"or the right of the persons who gave the votes or the manner or circumstances in which they ought to be counted. It seems to have been taken for granted that no question could ever arise upon the subject, and that nothing more was necessary than to open the certificates which were produced in the presence of both houses, and to count the names and numbers returned. Yet it is easily to be conceived that very delicate and interesting inquiries may occur, fit to be debated and decided by some deliberative body. In fact a question did occur upon the counting of the votes for the Presidency in 1821 upon the re-election of Mr. Monroe, whether the vote of the State of Missouri should be counted; but as the count would make no difference in the choice, and the declaration was made of his re-election, the Senate immediately withdrew, and the jurisdiction, as well as the course of proceeding in a case of real controversy, was left in a most embarrassing situation."

Then follow these words: "Another defect in the Constitution is," &c.; indicating that the learned commentator regarded this as one of the defects of the Constitution. I call attention to this uncertainty and defect in the Constitution for the two purposes: first, of reminding gentlemen of the high and commanding duty which the existence of this uncertainty and infirmity in the Constitution imposes upon us, and that in dealing with this matter of the electoral vote the utmost forbearance, wisdom, and moderation in our conduct is required, and that violence, excitement, and precipitate or erroneous action here may overthrow the Government itself; second, I allude to this uncertainty in the Constitution to show that the action of the President of the Senate denounced by this resolution was in a matter where it does not become us nor the gentleman from Massachusetts to be over-confident of his being right, and where language or resolutions of denunciation are exceedingly inopportune, unworthy, and dangerous.

Mr. Speaker, this brings me now to the first and elementary proposition in the poor argument I am about to submit; and it is this, that whatever infirmity there may be in the Constitution in this regard, that infirmity does not go to the extent of leaving everything uncertain, but that there are at least two things made certain, mandatory, and conclusive upon Congress in the terms which the Constitution employs. One of these is that the President of the Senate and nobody else can be authorized, either by an act of Congress or by concurrent resolution or otherwise, to open the votes. That must be done by the President of the Senate. So in words says the Constitution. The other thing made absolutely certain is that when that thing is done, called in the Constitution "be counted" occurs, then and there there must be present together in one presence, along with the President of the Senate, the two houses of Congress, and that nothing which in the sense of the Constitution amounts to a counting can occur except in that presence. This is a presence made up of three constituent elements, namely, a President of the Senate, a Senate, and a House of Representatives. So that nothing that amounts to a "counting" can occur, whoever it is that may be permitted to make it, no refusal to count, no agreement to count, nothing that comes to a count, can, by any rules or contrivance, be made to occur, except in that presence and body or convention made up of the three elements I have named, to wit, a President of the Senate, a Senate, and a House of Representatives. Thus far, Mr. Speaker, there is no room for doubt or debate.

Now, sir, what conclusion does that bring us to? To this: first, that there can be no authority given by law or otherwise, resolution or otherwise, that a count shall be made up by the separate constituencies, acting as distinct or separate bodies, that make up the convention in whose presence a count is to be made. It follows from this inevitably that no concurrent or joint resolution, no act of Congress, can be law which shall resolve these elements making up the convention that makes the constitutional count, and which sends them to make the count in their separate chambers as separate bodies. It is, therefore, exactly impossible that this provision of the Constitution can be made by the aid of any concurrent resolution or rule, or even act of Congress, to permit either the Senate or the House or the President of the Senate to separate and go to themselves, and by themselves adopt any form of order or decision which shall render it impossible for the joint convention when re-assembled to count any one of the States.

Next, Mr. Speaker, I come to the question who it is in the convention that makes the count; and I here venture to state this as a proposition which I stand upon, with an unaffected deference to the opinions of other gentlemen, and yet I state it with very great confidence, that that count, in the absence of legislation upon the subject, is to be made by the President of the Senate. Why? First, Mr. Speaker, because that seems to be the natural sense of the Constitution. It provides that the opening shall be by the President himself. It provides simply that it shall be done in a particular presence, not giving any office or duties to that presence of the Senate and House of

Representatives, except that they shall be present. It does assign a particular duty to the President of the Senate in opening the votes, and there it stops, it is true; but taken in connection it seems natural to me that it should be supposed that he is to do the counting.

I know the difficulty that we will encounter from this position, that it gives very great power to the President of the Senate; but it will be seen that there are difficulties whichever way we turn—difficulties pointed out by Justice Story in the language which I have read to the House. The danger of giving the power to reject the votes to either or both houses, in at least some views, is even greater than in giving it to the President of the Senate, because by rejecting the votes the Senate and House can throw, by their own act, the election of the President into the House and of the Vice-President into the Senate.

Another reason why I think it probable that under the present state of the legislation upon this subject, and in the absence of the twenty-second joint rule, or if it be invalid, the President of the Senate is to make the count in the presence of the Senate and House of Representatives, is that the act of Congress of 1792 so indicates. This act is older than the twelfth amendment itself—for that twelfth amendment was brought into existence by reason of the difficulty that occurred at the election by the House of Representatives of Mr. Jefferson in 1801, as is stated in Story's Commentaries, section 1466. The fifth section of that act of 1792 provides—

"That Congress shall be in session on the second Wednesday in February, 1793, and on the second Wednesday in February succeeding every meeting of the electors, and the said certificates, or so many of them as shall have been received, shall then be opened, the votes counted, and the persons who shall fill the offices of President and Vice-President ascertained and declared agreeably to the Constitution."

The use that I make of this section is simply that it will be seen here that the statute declares that certain things shall be done. One is that the votes shall be opened; another is that they shall be counted. The Constitution says who shall do the opening, and therefore we are not in doubt about that. But that statute connects the opening and counting together, seemingly making it the act of one and the same instrumentality. But as we know that one of these acts—the opening—must, by the Constitution, be the act of the President of the Senate, and as the statute seems to require the person who does that to do the counting also, it thereby seems to indicate that the President of the Senate counts the votes. This is of course an argument not conclusive; it is only persuasive. But now I turn to another authority, which is more than persuasive in the absence of higher law. I turn to that man who is recognized by us all as one of the masters, not only of our American law, our constitutional law, but of the civilized world's common and international law; I allude to Chancellor Kent. In his commentaries on this part of the Constitution he uses this language:

"The President of the Senate on the second Wednesday in February succeeding every meeting of the electors, in the presence of both Houses of Congress, opens all the certificates, and the votes are then to be counted. The Constitution does not expressly declare by whom the votes are to be counted and the result declared. In the case of questionable votes and a closely-contested election, this power may be all-important; and I presume, in the absence of all legislative provisions on the subject, that the President of the Senate counts the votes and determines the result, and that the two houses are present only as spectators to witness the fairness and accuracy of the transaction, and to act only if no choice be made by the electors."

There, sir, for the purposes of my argument to-day I leave this proposition. It is a proposition that commends itself to my own judgment as a sound one, one vindicated by the most illustrious private opinions that are obtainable in this country. The use I shall make of that proposition will appear more fully as I proceed. It is sufficient for me to say here that if Chancellor Kent be indeed not mistaken, and if the President of the Senate, "in the absence of all legislative provision on the subject"—and I am now assuming that the twenty-second rule is invalid, because it deprives as would seem everybody of all power to count any State if either the Senate or House should by its separate vote refuse to count it—then, instead of the President of the Senate having been guilty of "an act of oppression and an invasion of the privileges of this House," it was an invasion of the powers and solemn duties of that officer for this House by its separate vote to attempt to compel him not to set down the vote of Georgia in the way he did set it down, provided that way was not evidently "unfair" or dishonest.

Let us go now to consider the consequences which will logically be absolutely inevitable from holding that a separate vote of this House shall be permitted to estop both the President of the Senate and the Senate, and the joint convention of President of Senate, the Senate, and the House, each, all, and either, from ever setting aside the decision of this House that Georgia should not be counted. For, mark you, that if the President of the Senate has grossly oppressed and invaded the privileges of this House, it has been done by denying this House the privilege of refusing by its separate vote to reject the vote of a State for President. Suppose that each house separately may proceed to ascertain and decide upon the counting or not counting of the vote of any State, what con-

sequences will follow from it? They have been in part stated already by the gentleman from Massachusetts [Mr. Butler] in what I have already quoted in vindication of the position that he takes, that it will enable the Senate or the House, either and each, to defeat the election absolutely and in every case of any President, and this for partisan or for worse than partisan purposes. That is so evident that to state it is to prove it. Indeed, the gentleman from Massachusetts, who proposes this most severe and extraordinary censure, has exclaimed himself more than I can exclaim against the frightful consequences which would come from permitting one or either house of Congress to get by itself, and there, in separate session, by the *per capita* vote of its individual members, without debate, vote out the decision of the people of any and every State in selecting the Chief Magistrate of the Republic.

This, then, Mr. Speaker, brings us to again direct attention to the logical and startling consequences of our here declaring that the President of the Senate has been guilty of an act of usurpation and outrage. Outrage in refusing to do what? In refusing to permit the House of Representatives by its own separate vote to defeat (if the case had been, as it might be, of that sort) the election of a President at all; and that is an exceedingly possible case, and one that could have readily occurred at the time of the count of Mr. Clay's last vote for the Presidency. And when the privileges of the House are declared by this resolution to have been invaded, it is material for us to know what those privileges so invaded are. The privilege invaded is the very one the supposed existence of which the gentleman from Massachusetts himself denounced as one of the most fearful suppositions that could be conceived. The power of the House which has been invaded is that power which would enable this House to elect every President, or else to defeat the election of every one. This is the only power that the House has sought to exercise. The act of oppression is in refusing not to obey the separate order of this House, by counting Georgia's vote in the way it was.

MR. HIGBY. Will the gentleman yield to me for a question?

MR. SHELLABARGER. Not now; after I have concluded my remarks I will yield to the gentleman for a question if I have time.

Now, I agree therefore with what I understood was most earnestly said by the gentleman from Massachusetts himself, that the House has not the power to determine by itself whether the vote of any State shall or shall not be counted; and therefore no power of this House or privilege of this House has been invaded, for no such power did in fact exist. I do not allude, in all I have or shall say, to what was done by the President of the Senate in the matter of not entertaining the gentleman's appeal, because the resolution does not allude to or complain of that, but of counting Georgia in the way it was counted. The mistake of the President was in not ruling the gentleman's objection to counting Georgia to be out of order when it was made. It was clearly his duty, under the concurrent resolution of the 6th of this month, to have done that at the time the objection was made, because then it was known that the vote of Georgia did not change the result, and it was therefore known that that resolution required Georgia to be set down in the specific manner pointed out by the concurrent resolution. But the fact that he did not rule it out of order then and did order the Senate to retire, and the fact that the Senate sustained what the President had declared in convention, when the gentleman made the objection, that he was inclined to hold the houses to their own rule as to what should be done about Georgia, and the fact that the Senate went out, and the fact that it voted the objection to be out of order, and the fact that the President, on the return of the Senate, said that the Senate had voted the objection to be not in order—I say these facts, all put together or taken separately, did not add to or take from the power and duty of the President of the Senate to decide, at any and all times, that as Georgia's vote did not change the result it should be entered according to the command of our concurrent resolution. The error of the President was one committed on the invitation of the gentleman from Massachusetts in permitting the Senate to withdraw; but that took away no power given by the concurrent resolution. But this is aside from the question. I consider that the counting of Georgia was an invasion of the privileges of the House. There is another consideration which makes the danger of holding that the separate vote of this House can defeat the power of the President and the joint convention of the two houses to count any one of the States so clear that it will strike us as does the sunlight at noonday. It is this: this House, if it have the power by rejecting the vote of a State, may throw the election of the President into its own body, for it goes into the House of Representatives whenever no candidate shall have received the votes of a majority of all the electors appointed. It will enable the House to take away from a candidate really having a majority of the electoral votes the votes of a single State or of several States, thus reducing his vote below a majority; and in that way you give to the House the power to turn into its own body in every case the election of the Chief Magistrate. It is only necessary to call attention to such a consequence and its resulting danger to make it absolutely appalling, and drive us with one common instinct and consent from it. The idea that it could have been the intention of the framers of the Constitution to so frame it that

this House alone should have the power in every case not only to defeat the choice of the entire nation in the election of the highest and most powerful magistrate of the nation, and that they should be invited to do so by a bribe put into the Constitution rewarding the House for this defeat of the people's will, by giving to it the selection of that magistrate, is so preposterous and shocking as that it is incapable of argument. And yet if any privilege of this House has been invaded, as the gentleman's resolution says, then it is this privilege of the House to do that identical and monstrous thing!

Mr. BUTLER, of Massachusetts. The House itself, according to the gentleman's own authority, may defeat the election by withdrawing from the convention and not returning.

Mr. SHELLABARGER. It may be well enough for me to say right here, in reply to the suggestion of the gentleman from Massachusetts, what I meant to say in another place. He is shrewd and learned, and knows how to put things. But, while he is all that, he also knows right well how useless and impotent, when we are discussing with intelligent men, is the supposition of extreme and unsupportable cases. The case that the gentleman supposes, that the House has the right to retire and break up the joint convention, is simply to suppose the case of blank, unmitigated revolution; is to suppose an act done in defiance of the plain, express provision of the Constitution, for it commands that the House shall meet with the Senate and its President, and that then, in this presence, the vote shall be counted. To suppose that the House would leave, break up the convention, and defeat the election, is to suppose that the representatives of all the people have decided to overthrow their Government. It would be shorter and equally sensible to suppose that the people had refused entirely to vote, or that no electoral college had been created, or any other thing that would bring the Government to an end. The gentleman, of course, sees how different the case he supposes is from the case his position in the argument supposes, namely: that the framers of the Constitution deliberately put it into the Constitution that the House of Representatives alone should have power to defeat the people's election of their President, and then elect one themselves!

If the true interpretation of the twenty-second joint rule is that no vote shall be counted until both houses, by separate votes, concur in deciding that it shall be, then it is plainly void as in conflict with that provision of the Constitution which requires in so many words that every act that enters into and makes a counting of the votes shall be in the presence of the two houses—"the votes shall then be counted."

What I have now said results in this, that if the gentleman be right in declaring our own concurrent resolution of the 6th of February, 1869, unconstitutional, and not a justification of what the President of the Senate did, then his resolution is not aided by its abrogation, because it is impossible to hold that this House had the privilege by its separate vote, in its separate hall and out of the presence of the Senate and its President, to count or to refuse to count Georgia. The House having no such privilege to be violated, the President of the Senate did not violate it. And yet this is the only privilege of this House which the gentleman's resolution says the President of the Senate violated. I surely cannot be mistaken in this, sir. If I am not, the President is entitled to his country's gratitude—and mark it, sir, he will receive it—for delivering his country from the peril into which we had fallen.

Now that brings me to an inquiry in regard to what occurred yesterday. We did take a separate vote here in the House upon the question of receiving the vote of the State of Georgia. Against receiving that vote the great body of this House, including myself, voted. How came we to do that, it may be asked, if this was not, as I have argued, a constitutional method of the exercise of this House's power (granting it has some) of counting the vote of Georgia? The answer to that is to be found in two considerations. In the first place, there was no other privilege left to the members of this House to vote at all except the privilege of voting in the separate meetings of the two bodies. Whether it would have been wiser for a member of this House who did not regard as constitutional that provision of the twenty-second joint rule which separated the two houses and compelled the members, if they voted at all, to vote alone in separate bodies to have remained silent, or whether it was better for each to vote according to his convictions of what he ought to do if in a convention of the two houses, is a question upon which I do not propose now to enter. It is sufficient for the purpose of this case to say that the votes which were cast in the House were such votes as we ought to cast in convention, if we had been permitted to vote there at all, a privilege which we did not have. Whether we erred in casting the vote or not, I need not debate. To have been silent would have, as things were compelled to be conducted if the twenty-second rule were enforced, resulted in forever preventing the count or rejection in any way of Georgia, and thus it would have defeated the determination and official announcement of the election of the President of the United States.

I wish now to inquire for a moment whether the vote of Georgia is one which ought to have been counted by any body under any circumstances. Sir, I maintain that if it be not the law, as Kent says it is, in the absence of legislation, that the President of

the joint convention shall do the counting; and if, on the other hand, it be true that the joint body in convention counts the vote, then the vote of yesterday was a proper vote had it been cast in convention. And this is the true defense of the vote cast by the House yesterday. Why do I say that it was the vote that we ought to have cast? I will put a single case to show that it is impossible that there should not be the power to do, in some way, what we attempted yesterday to do touching Georgia, to wit, to exclude the vote for one of the reasons assigned in the objections of the gentleman from Massachusetts.

I have already read the provision of the Constitution that authorizes the State legislatures to prescribe the manner of choosing electors. Now, the State of Ohio has prescribed, under this provision of the Constitution, that the choosing of the presidential electors shall be by a popular vote. Suppose that there had been sent up to us from Ohio a certificate showing upon its face that the electors were chosen by the legislature of Ohio, now in session, and that we had been asked to count that vote. Is there a gentleman on either side of the House who will say that, in this matter of counting, we could not, or that somebody could not, (whoever may have the power to count,) reject such a vote sent from Ohio? Everybody will say it is impossible that we should be required to count such a vote, which on its face is shown to be one that in law has no significance. The power must exist somewhere to reject such a vote. And here, sir, I affirm, once for all, that the thing into which the power that can count this vote is permitted to look in deciding whether a vote shall be counted is the same into which, under similar law, all canvassing officers can look, namely, whether the papers which they inspect, being genuine and legally certified and executed, show that such an election was held or vote given as is authorized by law, and duly show its result.

Now, how was the case we voted on yesterday? I have already shown from Justice Story the reason why the Constitution has wisely required that the vote in each State should be cast "on the same day throughout the Union." By the same authority I show that this is a matter of substance, and not merely directory; that it goes to the very question whether there has been an election of electors. It shows it to be identically the same substance that these electors should vote on the day prescribed for the holding of their election as it is that the people of the State should vote for these electors on the day the law says they shall cast their votes. This act of the electors is not a ministerial act. Their minds are open and free to make the choice they want to make on the day fixed by law for that choice, and they have a right when they meet in the capitals of our respective States to cast their votes for whom they please as President, if the person voted for has the constitutional qualifications, and if they do not take both the President and the Vice-President from the State in which the electors reside. The act of the electors in casting their votes is therefore an election; and if the vote be cast on the wrong day, it is just as mischievous, just as fatal with regard to the validity of their action, as if the people had met on the wrong day to exercise their choice. I think we all agree about that. Hence I hold that I and my fellow-republicans voted rightly yesterday so far as regards the merits of the question; for I maintain that we did not have the privilege of voting—if we had the right to vote at all, if the whole right with regard to counting the vote be not in the President of the joint convention—we did not have the privilege of voting, under the operation of the twenty-second joint rule, in the way we ought to have had that privilege. Hence there can be no question but that our votes in the House were right so far as the merits of the question upon which we cast them are concerned. Whether it would have been better for us to have remained silent I have already alluded to as fully as I care to do. There, sir, I leave that.

Now, what is the application of this whole question, assuming that these rules are invalid? It is (and I commend this to the attention of the gentleman who introduces this resolution) that if the President of the Senate had the power to count the votes, then clearly we were invading his rights and privileges in attempting in any way to control that count except to see that it was "fair," to here adopt the word of Chancellor Kent.

Mr. BUTLER, of Massachusetts. How are we going to do that?

Mr. SHELLABARGER. Well, the gentleman may go for the answer to his question to Justice Story. The gentleman cannot defeat the argument by showing that there may be defects in the Constitution as to how we are to ascertain that, or a *casus omissus*, as was said yesterday by the Speaker. I answer further that we can prescribe rules by which shall be secured an honest and legal exercise of whatever powers and discretions we possess in making this count by whomsoever that power may be possessed and exercised; and it is because we have this power that I affirm, as the next proposition in my argument, that the concurrent resolution which we passed on the 6th of February is not unconstitutional, but was binding on the President of the Senate.

It is unlike the concurrent resolution of 1865, because that breaks the convention into two bodies and separates them for the purpose of doing that separately which can only be done in a joint convention. And it does not permit them to review or decide in joint convention what it requires to be voted on and decided in separate votes of

the two houses. This one of 1869 does none of these things. It does not dissolve the convention. It does not require any separate vote of the two houses. It does not permit the rejection of the vote of any State. It simply provides that if the vote of Georgia does not change the result, then that vote shall be set down in a particular way. What does the gentleman find unconstitutional in that, pray? Does the Constitution prescribe how the vote of a State shall be set down (either after it is rejected or counted) upon the official records of that count or on the journals? Has the Constitution prescribed how we shall make up formally the record of the count? Why, the gentleman with his great learning will still "fail to come to time" on a question like that. The Constitution has left the power in Congress to prescribe the rules under which that count shall be made and how it shall be set down. The resolution that we passed the other day does not really provide for the receiving or rejecting of the vote of Georgia in the substantial sense of the words of the Constitution, "shall be counted." It simply says it shall be entered according to a certain form of statement; and that is what the gentleman says is unconstitutional. It would be clearly unconstitutional if it undertook to count the vote of Georgia in or out. It assumes to do no such thing, but it only says that if it shall be immaterial to the result of the election whether the vote of that State be "counted" or not, then, for a prescribed reason, it need not be decided by the convention whether the vote is a legal one or not a legal one, and that it shall without any decision of that question be entered of record in a prescribed form. This resolution is not, therefore, amenable to the criticism that it undertakes to count the vote of a State before that vote is opened or known. Now, notice just what that resolution is, what brings it into operation, and what it accomplishes when brought into operation.

Mr. Speaker, it is the failure to be thorough, discriminating, and accurate as to this last thing that produces the confusion of debate and of conclusions and of our conduct in the fearful and sadly painful emergency we have just passed through. Let us carefully consider these. First and all the time it must be kept in mind that this resolution was by its express terms to have no effect whatever, was not to be at all in force, nor to be a law to anybody as to the count of Georgia nor any State except in a certain specified contingency. That contingency must be found to have happened before the concurrent resolution became in any sense a law for the guidance of any one. That contingency was, that the same persons would be elected by the votes of the other States whether the vote of Georgia were valid or invalid, counted or not counted. In other words, the resolution only went into force when and after it had, by the count of the other States, been ascertained and decided that the "count" of the vote of Georgia—decision of the validity or invalidity of her vote—was absolutely immaterial and unnecessary to the ascertainment of the result. When that conclusion was reached, that the vote of Georgia was immaterial to the result, and that its validity was not necessary to be decided in order to know with the same certainty who was elected as would be attained after it was decided, then, and only then, the concurrent resolution went into force and play. Thus far there is plainly no possible room for doubt or dispute.

After this point had been reached, which brought the resolution into play, I implore members to tell me what practical good could come out of deciding whether the vote of Georgia was legal or illegal? If there be no such practical good to come from that decision, then I ask does the Constitution or the law compel us to do a vain thing when the doing of it may result in infinite mischief? Surely not. The law never requires a vain thing as a condition-precedent to the attainment of great and substantial ends which the same law provides for and secures. If it did, the whole law would be vain, vicious, and absurd.

Now, Mr. Speaker, when this immateriality of Georgia's vote had been so ascertained and determined, and our concurrent resolution was thereby brought into force and play, what was its force, what did it do? First, it authorized the President of the Senate to decide and pronounce those to be elected President and Vice-President whom the other States had elected, and who were elected whether Georgia's vote were valid or invalid, counted or uncounted. Now, sir, suppose this official decision and announcement of who is elected cannot be announced unless and until after it has been officially decided by the convention how Georgia voted, and suppose the returns of Georgia's vote were lost or destroyed so that the convention could neither know nor count her vote—and, sir, this is far from an extreme or impossible supposition—then, sir, would it be unconstitutional or illegal to decide or proclaim who is elected? Must we, then, march into revolution and the Government's overthrow, just because that vain and impossible thing, the count of Georgia, has not been done? Who will venture to affirm such a thing? Who will not exclaim that the result of the great people's choice can be legally ascertained and proclaimed though Georgia is not counted? If so, I pray you to tell me whether a concurrent resolution directing that this decision and announcement of the result, without the count of the lost vote of Georgia, would be either unconstitutional or render the ascertainment and announcement of the result illegal? It would not; and therefore that requirement of this resolution, that the

President of the Senate should decide and declare who was elected without regard to Georgia's vote, is valid and binding on that President. But this resolution, in the event that brought it into play, required another thing, namely, that the record should state how the vote would stand with Georgia counted and also uncounted. Is that way of making up the record unconstitutional? Why, Mr. Speaker, as I have already said, the proposition is so absolutely and self-evidently absurd that I can make the absurdity no plainer by my poor powers of argument, and I will leave that to those having powers adequate to the task.

Sir, the concurrent resolution was valid, and became a law to the convention and it President as to what they should do provided the objection made by the gentlemen from Massachusetts was not one which took Georgia's vote out of its operation, and compelled the convention to pass upon it as not being that specific objection to her vote which is named in the resolution's preamble, and the only one which the resolution authorized the convention to omit to decide. This is claimed to be the case, and that because the gentleman assigned other fatal objections to Georgia's vote besides that one in the preamble, as to whether she was such a State as could vote, therefore the resolution did not excuse the convention from deciding this additional objection, and therefore these must be decided as required by the twenty-second joint rule. And we are told that if this be not so, then every objection to Georgia's vote, however evidently fatal to its validity, would be by this concurrent resolution shielded from the convention's investigation and the vote be permitted to go unchallenged, though on its very face shown to be absolutely worthless and void. Why, Mr. Speaker, this position may be ingenious, but it is far more vicious than ingenious. Look at it. First it admits that it could legally, and did in fact, order the vote to be set down in a particular way and its validity not to be passed upon, and that the result of the election should be decided by the "counting" body, because one fatal objection to its validity probably existed to Georgia's vote, but it denies that the resolution ought to, did, or could order the same thing to be done, though two fatal objections should be found to the vote! Surely this cannot be. The resolution does not require the convention to admit or count the vote of Georgia if, on its inspection, the convention found it fatally defective. No such thing. But it does require that because there is probably one fatal objection known to exist at the passage of the resolution and before the vote is opened, which objection the convention and Congress cannot well pass upon before or in the convention, therefore the validity of that vote shall for this reason not be passed upon at all, however many other fatal objections to it may be found, unless its validity be found material to the determination of the result of the election.

The known difficulty of deciding the validity of Georgia's vote, which is named in the preamble, brought the resolution into existence, and the difficulty and impropriety of deciding that, if the decision was immaterial to the result, was reason why in express terms the resolution ordered the President to do precisely what he did do, and did in the very words of the resolution; and it, for this reason, required this of him, however many other objections there might be to the vote of Georgia. It made no exceptions. It made no exceptions in its terms by saying that if there were found other objections to Georgia's vote than that named in its preamble, then the President should not obey its orders. On the contrary, it did state one case in which he should not deem it in force or obey it, namely, if it did change the result. Then he was not to regard it, and by its express and unmistakable terms that was the only event in which he was not to regard it. Now, gentlemen say that there were other cases in which he was not to regard it, namely, if somebody should suggest some other objection to it. And for not disregarding this express letter of the rule we ourselves made for him, and for which the gentleman himself voted, he is to be by us, the author of the rule, denounced as our oppressor and the invader of our rights. He obeyed us not in spirit merely, but to the very letter—word for word, syllable by syllable, and letter by letter, he followed out and obeyed our law—saved the Republic from an appalling danger, and for that we are called upon to brand and blast him with our denunciations.

Mr. Speaker, the power of the President of the Senate to do what he did do was complete.

[Here the hammer fell.]

Mr. WOODWARD obtained the floor.

Mr. SCOFIELD. I ask unanimous consent that the gentleman from Ohio may have further time.

The SPEAKER *pro tempore*. Is there objection?

Mr. BUTLER, of Massachusetts. As I gave the gentleman all of his time, I ask that I may have the same amount of time to reply to him.

Mr. BENJAMIN. I object.

Mr. SCOFIELD. I rise to a question of order. The gentleman from Ohio was not speaking in the time of the gentleman from Massachusetts. The floor was assigned to him independently. I ask if he has had his hour?

The SPEAKER *pro tempore*. The gentleman from Ohio was speaking in his own time; but he had ten minutes last night, which he gave to the Speaker, and has had fifty minutes this morning.

Mr. SHELLABARGER. All I wish is to conclude my remarks by saying that in the election of Mr. Monroe, in 1821, the same concurrent resolution passed by us on the 8th of February was introduced by Mr. Clay from a joint committee of the two houses into the House of Representatives, and was adopted for the guidance of the two houses. These were its words:

"Resolved, That if any objection be made to the State of Missouri and the counting or omitting to count, which shall not essentially change the result of the election, in that case they shall be reported by the President of the Senate in the following manner: Were the votes of Missouri to be counted the result would be for A B for President of the United States, — votes; if not counted for A B as President of the United States, — votes; but in either event A B is elected President of the United States; and in the same manner for Vice-President."

This was adopted—yeas 90, nays 67. After its adoption the two houses came together, the President of the Senate passed to the tellers the opened votes of the States. When Missouri's was reached Mr. Livermore, of New Hampshire, objected to its count. A motion by a Senator was made, which prevailed, that the Senate retire to its chamber, which it did. The House was called to order, and Mr. Floyd moved that Missouri's vote be counted. A long debate arose on that in the House, in which Mr. Clay used these words: "The two houses ought not to have separated until they had consummated what had been stipulated for." Mr. Floyd's resolution was laid on the table, on Mr. Clay's motion, by a vote of 103 yeas. A message was sent to the Senate that the House is now ready to receive the Senate for the purpose of continuing the enumeration of the votes. The Senate appeared. The President of the Senate, in the presence of both houses, opened and handed the tellers the vote of Missouri, which was read and registered, and then the tellers made and handed to the President the compared lists of the votes of all the States, and the President, "in pursuance of the resolution" of Mr. Clay, "adopted by the two houses," proceeded to announce the vote, and had got so far as to declare that Monroe, of Virginia, had a majority of the votes for President, and Tompkins, of New York, for Vice-President but had not declared who was elected, when Floyd addressed the Chair demanding to know if Missouri had been counted; and thereupon great disorder arose. Randolph also addressed the Chair. The President decided everything out of order; the only business being at that present time that prescribed by the rule of the morning. There was murmur at this decision, but the President proceeded to announce who was elected; and then, on motion of a Senator, the Senate retired while Mr. Randolph was addressing the joint convention.

I refer to it for the purpose of saying that we have the authority of the distinguished names connected with the introduction and passage of that resolution for saying that the concurrent resolution of the 8th of February is constitutional, and the action of the President yesterday is sanctioned by precedent.

Mr. WOODWARD. The gentleman says that everything that occurred yesterday occurred in 1821. Did such a vote of the House as occurred yesterday occur then?

Mr. SHELLABARGER. Not such a vote as that of yesterday, but just such a setting down of the vote of Missouri in a hypothetical way—in the way in which Georgia was to be set down, and in which it was set down yesterday—did occur in the election of Mr. Monroe, and every other step in the case.

Mr. WOODWARD. But the House did not in that instance refuse to count the vote, as they did in this instance.

Mr. SHELLABARGER. There was then no such concurrent resolution as is now contained in the twenty-second rule. The whole thing was conducted under such a concurrent resolution as we passed on the 6th of this month.

NOTIFICATION OF ELECTION.

The Speaker *pro tempore*, under the order of the House, appointed as the committee on the part of the House to join the committee appointed on the part of the Senate to notify the President and Vice-President-elect of their election Mr. Wilson, of Iowa and Mr. Pruyn.

QUESTION OF PRIVILEGE—AGAIN.

Mr. WOODWARD. I now yield to the gentleman from Maryland, [Mr. Thomas.]

Mr. THOMAS. The gentleman from Pennsylvania [Mr. Woodward] has been kind enough to yield to me for a few moments. It was my fortune, some thirty-two years ago yesterday, to be named, in conjunction with a gentleman from the State of New York, and Mr. Grundy, a Senator from the State of Tennessee, to assist in counting the votes for President and Vice-President of the United States. At that time there was a difficulty in our path very similar to the difficulty that stood in our path prior to the assemblage of the joint convention on yesterday.

The people of Michigan, without, perhaps, any law authorizing it, had organized a State government in all its branches, elected members of the House of Representatives;

had elected Senators, and proceeded to vote in due time for electors for President and Vice-President. In one of the articles of the constitution of Michigan that State undertook to prescribe the boundaries of the State, and set forth a boundary which included a portion of territory then claimed in part by Ohio and in part by Indiana. At its session commencing in 1836 Congress had under consideration the question of that boundary, and were disposed to decide that question before the admission of Michigan into the Union, and while Michigan could be treated as one of the Territories of the United States; and that question was decided prior to the meeting of the joint convention. But Congress had not, in the judgment of some of its members, made provision for the election of electors of President and Vice-President in that State.

The vote of Michigan was very unimportant as affecting the result. Mr. Van Buren had a majority of the votes cast, whether the vote of Michigan were to be counted or not. It then became a question how far it was prudent, politic, and wise for Congress to encounter any difficulty in the joint convention of the two houses in a contest over the right of Michigan to vote or not to vote. The matter was looked into, and the precedent mentioned by the gentleman from Ohio [Mr. Shellabarger] was found spread upon the records of Congress. We found that a similar difficulty had previously presented itself in the case of Missouri while Congress was deliberating upon that very agitating subject which the admission of Missouri gave rise to; and we found that in that case Mr. Clay, with that far-seeing judgment which always distinguished him in a deliberative body, devised that very plan which was followed yesterday. I hold in my hand the resolutions reported to the Senate by Mr. Grundy, copied from the resolution of Mr. Clay in the case of Missouri, and intended to guard against difficulty in the case of Michigan. I will read but one of them, as that one alone is material to the elucidation of the point I wish to enforce. That resolution was in these words:

“Resolved, That in relation to the votes of Michigan, if the counting or omitting to count them, shall not essentially change the result of the election, they shall be reported by the President of the Senate in the following manner: ‘Were the votes of Michigan to be counted, the result would be for A B for President of the United States, — votes; if not counted, for A B for President of the United States. — votes; but in either event A B is elected President of the United States.’ And in the same manner for Vice-President.”

And in this connection it is perhaps proper that I should read from the very pregnant remarks made by Mr. Grundy on that occasion, as a reason why such precaution should be taken on the part of the two houses of Congress before they met in joint session, that it may not be in the power of a few insubordinate men, perhaps, to bring about a collision in the Government. I read now from the record of the debates on that occasion.

“Mr. Grundy observed that the committee were unanimous for reporting the second resolution objected to by the gentleman from Michigan. The same course had been pursued with regard to the State of Missouri, and under the like circumstances. And when Senators recollected that this was the very place where the rock lies which may destroy the Government, they would perceive that the committee had good reasons for recommending the resolution objected to. Suppose (said Mr. Grundy) the two houses should differ and separate, and suppose the House should refuse to send for the Senate again”—

God forbid that there was any such purpose here yesterday—
“where will be your President and Vice-President? Though he had been one of the most anxious for the admission of Michigan, yet he thought it better under the circumstances that her vote should not be counted, except in the way provided for by the second resolution.”

I will not say one word further as to the power of the Congress of the United States to pass such a concurrent resolution, in the *casus omissus* in the Constitution, where no rules are laid down by which those having charge of the counting were to be guided.

Unwilling to trespass longer on the time of the gentleman from Pennsylvania, I will refer only to the names of the Senators voting for that resolution. I have not before me the yeas and nays taken in the House of Representatives on the same question, but gentlemen who may refer to them will find among those voting in the affirmative the names of gentlemen highly entitled to the confidence of this body. Those voting in favor of the resolution in the Senate were—

Messrs. Bayard, Benton, Black, Brown, Buchanan, Clay, Clayton, Crittenden, Cuthbert, Dana, Davis, Ewing of Illinois, Ewing of Ohio, Grundy, Hendricks, Hubbard, Kent, King of Alabama, King of Georgia, Knight, Linn, Moore, Nicholas, Page, Prentiss, Rives, Robbins, Robinson, Sevier, Sonthard, Swift, Tipton, Tomlinson, and Wright—34.

There were but nine Senators voting in the negative, headed by Mr. Calhoun, the mischief-maker of that day:

Messrs. Calhoun, Fulton, Lyon, Morris, Niles, Norvell, Preston, Walker, and Wall—9.

I refer to this precedent to overbalance the authority of the distinguished jurists whose opinions have been quoted against the concurrent resolution adopted by the Senate and House as a rule for the guidance of the Presiding Officer in the joint convention of yesterday.

The gentleman from Ohio [Mr. Shellabarger] takes, I may be permitted to say, positions which are somewhat incompatible. If the President of the Senate, and he alone, is authorized to count these votes without any agency or participation on the part of the House, then it results that the President of the Senate alone should prescribe the rules under which the power conferred upon him by the Constitution should be exercised. That cannot be so. It cannot be that the Representatives of the people in this hall and the representatives of the States in the Senate should sit by here and permit the President of the Senate to make a false count if he chose to do so; thus, perhaps, throwing the country into confusion and giving himself the right to hold the presidential office for four years, though he had not been selected by the people for the position. At the time when this question was under consideration before, it was agreed on all hands, so far as my knowledge extends, that Congress had the power, by law or by joint resolution, not only to prescribe the manner in which the vote should be counted, but to inquire into the validity, the sufficiency, the actuality of the votes that might be presented to the Vice-President to be counted. If the seal of a State were to be conclusive as to the votes cast for the candidates for the Presidency, that seal might be fraudulently applied to a document, and the House must sit here quiet spectators to the counting of the votes thus fraudulently returned, though with a perfect knowledge that a proper investigation would show the fraud, and give the election to another candidate.

Thanking the gentleman from Pennsylvania [Mr. Woodward] for his courtesy, I will not trespass further on his time.

MR. WOODWARD. Mr. Speaker, I very much regret that my learned friend from Maryland, [Mr. Thomas,] my learned friend from Ohio, [Mr. Shellabarger,] and my learned friend from Massachusetts, [Mr. Butler,] were not here the other day to deliver the arguments against the passage of that concurrent resolution which they have made to-day. When I listened to the gentleman from Massachusetts last evening, when I listened to the gentleman from Ohio and the gentleman from Maryland to-day, I felt that this House had reason to deplore the absence of these learned men in that emergency.

As I know something of the history of that concurrent resolution, so far as regards the action of this House, permit me to state it. The resolution having passed the Senate, the gentleman from Iowa [Mr. Wilson] had charge of it in this House. And I will say that he treated the subject very differently, and much more satisfactorily, from a certain other subject to which his mind will instantly recur, and which I will not further characterize unless he desires me to do so. [Laughter.] Instead of springing this concurrent resolution upon a sleeping House, he took the trouble to come over to this side and advertise us as to what he was about to do. He came to me in person and called my attention to the resolution as it had passed the Senate. I went to the Clerk's desk and informed myself of its character. I then told him that we on this side of the House would probably oppose the resolution; and we did oppose it as well as we were permitted to do. We were not allowed to enter into any argument against it. We were screwed down by the previous question to that little speech "nay;" that was all that we were permitted to record against the resolution. But I acknowledge that in the fairest manner the gentleman from Iowa brought the matter to our attention. Now, sir, if these "learned Thebans" had been here on last Monday night to make their arguments against the resolution as we have heard those arguments to-day, the House would not have been involved in the difficulty in which it is involved; that scene, so discreditable to the nation, which occurred here yesterday, would not have occurred, and the grave constitutional questions which are now supposed to be involved in this discussion would have been all avoided. But, sir, these gentlemen were not here to make the argument, and we on this side of the House could have stated it as forcibly as they have done, even if we had been permitted to say anything. Thus the resolution was thrust upon us and carried by a party majority, and became the law of the convention which was charged by the Constitution with the duty of counting the electoral votes. Sir, that convention consists of two members, the Senate and the House. They are the constituent elements of the convention, and this concurrent resolution became a law to that body.

MR. SHELLABARGER. I ask to make a correction. The gentleman has said I was not here. I was here, and voted for the concurrent resolution, and in my remarks I sought to show that it was constitutional and proper.

MR. WOODWARD. I accept the correction.

MR. THOMAS. If I may be permitted, I will say that I invited the attention of members of the Judiciary Committee to the resolution adopted in 1837 in the case of Michigan, and voted for the resolution, which was adopted, to guard against difficulty respecting the electoral vote of Georgia, and I have this moment said in the presence of the House that, in my opinion, the joint resolution which has given rise to this debate is clearly constitutional.

MR. WOODWARD. Mr. Speaker, I do not complain that the gentlemen did not vote for the resolution. I complain that they did not bring to the view of the House the constitutional arguments they have now made upon the resolution of the gentleman from

Massachusetts, which arguments, had they been made at that time, I think, would have prevented the concurrence of this House in the concurrent resolution. But if I am mistaken in that, if they would not have had that effect, they at least would have extricated the House from the difficulty into which it fell by voting not to count Georgia yesterday after it had voted to concur in the resolution of the Senate.

Mr. THOMAS. It is a very unpleasant thing. This *argumentum ad hominem* is one I never engage in myself. Allow me simply to say, in that connection, that I was just as ready to have voted yea as nay on that question, for I did not want an unmeaning, unprofitable entanglement. Apprehending the Senate might take the ground the House took, I was perfectly willing there should be coincidence of opinion between the two bodies. The House will bear me witness that as soon as I had reason to suspect the contrary I asked consent to make a motion which would have relieved us from the embarrassment in which we were placed.

Mr. WOODWARD. I was wholly opposed to the concurrent resolution. The analogy which the gentleman has this morning stated has no resemblance to the case before us. Nor does the instance to which the gentleman from Ohio [Mr. Shellabarger] has alluded touch this case, for it is a case of an organized, recognized State in this Union.

Mr. ELDRIDGE. And represented on this floor.

Mr. WOODWARD. And represented on this floor. It is not a case of an unborn Territory, where the question is as to future admission as a State, or whether the people of that Territory are fully qualified to vote at a presidential election. It is a case of a State in the Union from the time of the Declaration of Independence down to the present moment, and represented on this floor by members sent here whom we have admitted. Now, I would thank gentlemen to show in the history of this country an analogy for that case. There are analogies which do not suit this case, yet such is the case we have got to deal with.

Mr. URSON. If the gentleman will permit me, at the time spoken of by the gentleman from Maryland [Mr. Thomas] Senators had been admitted from the State of Michigan, while members had not been admitted in the House. At this time members have been admitted in the House from Georgia, but Senators have been refused admission in the Senate.

Mr. WOODWARD. Still the cases are not analogous; because this is an organized, original State, in the Union before the gentleman was born, and never was out of it, in my judgment.

Now, Mr. Speaker, when this House passed that concurrent resolution they made it a law to the body that is charged by the Constitution with the duty of counting the electoral votes. For what is a concurrent resolution? I understand from the Digest that we have three kinds of resolutions. First, the simple resolution, which expresses the opinion of the House adopting it; we have the joint resolution, which is in the nature of a law and which requires the concurrence of the executive department; and we have the concurrent resolution, which is the recorded opinion of the two houses concurring, running together; and this resolution is of that nature. It came here from the Senate, and it was adopted by a party majority or nearly a party majority on the floor of this House. It became thus the law of that body subsequently constituted by the Senate and House—the convention. And when the gentleman who presided yesterday came here and declared that he would hold the Senate and the House to that resolution, he apprehended his duty precisely, in my judgment; he did precisely that which he was here to do; he was to hold these bodies to the rule they had prescribed for their own government, whether it were good, bad, or indifferent. It was the law of that body. They could not depart from it. No gentleman in the Senate or in the House, so far as we know, has ever proposed to repeal it or to modify it. I submit, then, that the President of the convention was bound to administer it. He did no more than it was his duty to do, and when the gentleman from Massachusetts proposes to censure him I am opposed to his resolution. I would rather vote for a resolution to applaud the conduct of the President of the convention for holding the two houses to the resolution, although I believe the resolution is one which never ought to have been passed. But then what did this House do? This House, having concurred with the Senate in solemnly agreeing that the vote of Georgia should be counted *sub modo*, turned round and declared it should not be counted at all!

My friend from Maryland [Mr. Thomas] appreciated the difficulty in which the House had placed itself, and proposed to reconsider the vote, but promptly there came a motion to lay his motion upon the table, and it was laid on the table by a large majority, and thus the House adhered to its resolution not to count the vote of Georgia at all. Now, the gentleman proposes to censure the Senate and the President of the convention for not recognizing that resolution of this House. Why, Mr. Speaker, if the adoption of the concurrent resolution was wrong under the circumstances of the case, the vote yesterday was utterly indefensible. When this House had solemnly declared that the vote of Georgia should be counted *sub modo*, what right had this House to declare that the vote of Georgia should not be counted at all; and when they had so declared, what right had they to expect the Presiding Officer to regard such a vote?

He treated it with the contempt it deserved. He would not be governed by it. He was governed by the concurrent resolution. For that, I say, he ought not to be censured, but ought rather to be praised.

Mr. BALDWIN. Will the gentleman allow me a question?

Mr. WOODWARD. No, sir; I have promised to yield to several other gentlemen, and I cannot yield to the gentleman.

I did not intend to enter into the general discussion of this subject. I say that the arguments which have been made here with regard to the constitutional powers and duties of the two houses in the matter of counting the electoral votes are quite outside of this question and beyond it. This question bottoms itself upon that concurrent resolution. So long as that concurrent resolution remained unrepealed it was a law to the convention. The President of the convention did no more and no less than his duty in administering it, and the Senate decided, very properly, I think, that the objection of the gentleman from Massachusetts [Mr. Butler] was not in order. It was clearly disorderly, for both houses had ordered that Georgia should be counted in a certain manner. In making that decision they had concluded all antecedent questions.

But now, Mr. Speaker, I beg to inquire why the vote of Georgia should not have been counted; why it should have been counted with a qualification? That qualification was admirably stated by the President of the convention when he said that the effect of the concurrent resolution was to count the vote of Georgia if it meant nothing, and not to count the vote if it meant anything. When he said that he stated the legal effect and consequence of that resolution precisely. Now, I ask, why should a sovereign State of this Union be treated in that manner? Listen to it! The nation will listen to the words of Mr. Wade, uttered from that seat yesterday, that the two houses had decided that if the vote of Georgia would effect nothing it should be counted, and if it would effect anything it should not be counted. If you treat Georgia in that manner this year, what State may you not treat in the same manner next year, or on some future occasion? What is that but a dissolution of the Union? Will you say that Georgia is not in the Union? Here are her members sitting on this floor. What right have they to be here if Georgia is not in the Union? Georgia has been in the Union from the beginning; she has never been out of the Union unless you allege what I deny, that her attempted secession took her out of the Union. But you say that her act of secession was null and void, and she herself has so declared and repealed the act, and you have reconstructed her. She is not only the original Georgia, but a Georgia reconstructed by this republican Congress. Then, I ask, why should not her electoral vote be counted like the vote of any other State?

Gentlemen will not find in the Constitution or laws of the United States, or in the commentaries of Chancellor Kent, or in the writings of Justice Story, or in any other authority of that kind, the true reason for the course that has been pursued in regard to Georgia. I will give them the reason. The Senate had refused to admit the Senators from Georgia. It was the Senate that originated this concurrent resolution and in an evil hour we concurred in it. And the President of the Senate came here and held us to our action, and he did well. But it was the Senate that invented this mode of excluding Georgia. Not because Georgia did not vote on the right day; that was not the reason; but the reason is contained in the preamble to the concurrent resolution, which sets forth that it is doubtful whether Georgia is within the Union, and that that question is now pending before Congress. That is the reason assigned by the Senate for excluding Georgia. The Senate is deliberating about admitting Senators from Georgia, and therefore does not want the vote of that State counted. I say, therefore, that this whole difficulty arises out of your reconstruction laws. If you would treat Georgia as Georgia ought to be treated—as a State in this Union—and admit her Senators into the Senate of the United States, as her members have been admitted on this floor, there is no more reason why the vote of Georgia should be counted with a slur or not counted at all than there is why the vote of Pennsylvania should be treated in like manner. That is the origin of this difficulty, and it is not to be removed by the adoption of the resolution submitted by the gentleman from Massachusetts, [Mr. Butler.] We are not to repair the wrong into which we have fallen by committing another wrong in censuring the President of the joint convention for holding the convention to the law which they had made for themselves. I am, therefore, opposed to the resolution of the gentleman from Massachusetts. If his proposition had been to repeal the concurrent resolution which was the cause of all this difficulty, no man on this floor would have voted for it more cordially and heartily than I would have done.

As I have already said, I do not intend to enter at large into this discussion. I have agreed to divide my time with friends around me. First I will yield five minutes to the gentleman from New York, [Mr. Wood,] after which I will yield the floor to the gentleman from Ohio, [Mr. Bingham.]

Mr. WOOD. Being unable to discuss this question properly in the time allowed me by the kindness of my friend from Pennsylvania, [Mr. Woodward,] I will, with his permission, yield to the gentleman from Wisconsin, [Mr. Eldridge.]

Mr. WOODWARD. Certainly; I have no objection.

Mr. ELDRIDGE. Mr. Speaker, I had not expected to have an opportunity of saying a word upon this question until a moment ago, when the gentleman from New York [Mr. Wood] informed me that he was allowed two or three minutes, but felt too unwell to address the House at this time, and that I might have his time. I thank him for his courtesy, and avail myself of it to state, as well as I can, my position upon the question before the House. I concur with gentlemen who have spoken upon it as to the great importance of the subject, the magnitude of the question involved. I thought I saw on yesterday, in advance of the difficulty and entanglement into which the House precipitated itself, that that result must follow. And I will declare, for I cannot argue in the short time allowed me, the view I take of this matter. I believe that the concurrent resolution and the twenty-second joint rule of the two houses are, both of them, in contravention of the Constitution; the first utterly, and the latter in part, at least, void—a nullity for that reason. I raised that question yesterday as a point of order before the convention; but no attention, no consideration was given to it by the Presiding Officer. He virtually decided that the resolution was higher authority than the Constitution. I believe if my point had been sustained, if it had been properly considered and decided, we would have avoided all the difficulties in which this House as well as the joint convention became involved. We should have avoided the disgraceful exhibition which the convention made of itself before the country and the world. We should have performed our duty to the country as required by the Constitution. We should have counted the votes of the States as the certificates were opened by the Presiding Officer, and though the result would have been the same, so far as the persons elected are concerned, we should not have felt the sting of mortification and shame which we now all feel at the manner in which that work was done. The Constitution provides expressly that the Senate—which, according to my judgment, means the organized Senate, with its officers and machinery—and the House of Representatives, which is the organized House of Representatives, with its officers and its machinery—shall be present when the Vice-President shall open the certificates; and that “the votes shall then be counted.” It must be, therefore, if there is in contemplation of the Constitution a proper certificate from a State, and that certificate has been opened by the Vice-President, the duty of the body composed of the Senate and House of Representatives as described, and assembled, to count those votes. It has no right or power to count them merely as a matter of count; but it must count them for the purpose of the result, for the purpose of ascertaining the result—the count itself determining the result. This is the obvious, and, it seems to me, the only true meaning of the Constitution. To count them conditionally or hypothetically, is no count at all.

The Constitution determines the effect of the vote; the joint convention has nothing to do with that, nor has the House of Representatives, or the Senate, or both combined. The vote of the State is to be counted, to be counted for a purpose, and that purpose is to ascertain who the people of the United States have by their will determined shall be the President and Vice-President for the four years next after the 4th of March. To count the vote of Georgia according to the concurrent resolution is a mockery; it is an insult. It matters not that it will not change the result as a matter of fact. If it can constitutionally be so counted in the case when it will not change the result, it may be so counted in case it would change the result. And then the voice of Georgia may be stifled; the voice of the people of a sovereign State may be suppressed. And it is not Georgia or the people of Georgia, but it is Massachusetts or Wisconsin that may not be allowed to utter its voice on the question.

Now, I assert further, and as an additional reason, that the concurrent resolution is in my judgment an utter nullity because it is in direct contravention of the statute of 1792, which provides substantially what the Constitution itself provides. No one, I trust, will have the hardihood to contend that the Senate and House of Representatives can by a concurrent resolution repeal an act of Congress; that a concurrent resolution can be valid when it conflicts with an act passed with all the legislative requirements to make it a law. The Senate, the House of Representatives, and the President of the United States concurred in the passage of the act of 1792, and no act of either branch can annul that law. It must stand till repealed by the concurrence of the same authorities. The section of that act to which I refer contains the following requirement:

“Congress shall be in session on the second Wednesday of February, 1793, and on the second Wednesday in February succeeding every meeting of the electors; and the said certificates, or so many of them as shall have been received, shall be opened, the votes counted, and the persons who shall fill the offices of President and Vice-President ascertained and declared agreeably to the Constitution.”

This is a law of Congress upon your statute-book, unrepealed, in full force, unless it be abrogated by this concurrent resolution. There is no doubt, it seems to me, that they are in direct conflict. The House and the Senate undertook by this concurrent resolution to declare that the vote of Georgia should not be counted if it had any effect upon the result. The statute and the Constitution say it shall be counted to ascertain

the result. And yet gentlemen contend that that resolution became the law of the convention; that the convention was bound to carry it out; that the Presiding Officer did his duty in obeying it; that it was our duty to record the vote precisely as that resolution directed. I hold that this cannot be so for the reason I have stated, that it is in conflict with the statute and the Constitution. Again, sir, if it be so the vote of Georgia was virtually counted, or the counting of it certainly determined upon, before the day fixed by law for counting the votes had arrived. If the convention must have followed or obeyed this resolution the vote was counted by the resolution or the act of the Senate and House of Representatives in the adoption of the resolution. There is no view that can be taken of it that does not clearly show the resolution to be null and void. The disgraceful scene which was exhibited here and the difficulties growing out of the action of the Senate and House are the result of the disregard of the Constitution. Its requirements are plain and simple, and obedience to its provision never brings upon the country troubles, disasters, or dishonor. It is only when some purpose outside of its authority for some selfish or partisan end is sought to be accomplished that the Congress and country is dishonored by the exhibitions of yesterday. This concurrent resolution is not the only piece of unconstitutional legislation that will torment its inventors. You will find it in your way and crossing your path at all times and in thousands of ways in a proper administration of the Government. There is but one course to pursue, and that is to reconsider what you have done amiss, come back to the Constitution, and follow and obey its requirements.

[Here the hammer fell.]

Mr. WOODWARD. I now yield to the gentleman from Ohio, [Mr. Bingham.]

Mr. BINGHAM. Mr. Speaker, I thank the gentleman from Pennsylvania [Mr. Woodward] for his courtesy in allowing me a few moments in which to express my views touching the question which is now pressed upon the consideration of the House. I agree with the gentleman from Massachusetts, [Mr. Butler,] who has opened this unfortunate controversy, that this is a very important question. I hope, sir, that in the very short time allowed me I may be able to demonstrate to the satisfaction of the House that the proposition presented by the gentleman from Massachusetts—and I refer more particularly to his first resolution—is a proposition that this House shall, by vote, solemnly declare themselves under their oaths violators of the law. On that point I take issue with the gentleman to-day; and not simply for to-day, but for all time.

It is with me, Mr. Speaker, as a representative of the people, a controlling principle that whether we be satisfied with the law or not we are bound to obey it. It was as obligatory upon this House as it was upon the Presiding Officer of the Senate to have respect to the concurrent resolution of the two houses. And I tell the gentleman from Massachusetts to-day, with all due respect for his acknowledged ability and learning, that it is too late to come in with *ad captandum* speeches to arraign the Constitution of the country and its interpretation by its makers and its builders from the day of the organization of the Government to this hour. The gentleman proceeds upon the hypothesis that the two houses by concurrent resolution cannot bind themselves. I tell the gentleman that the concurrent resolutions of the two houses have bound the action of the representative branch of the legislative department of this Government from the first year of its existence to this hour, and until the gentleman challenged the power yesterday, I undertake to say it never was challenged by a representative of the people. In what I have just said I refer to the concurrent resolution of the two houses, known as the joint rule touching bills or resolutions, passed in 1790. That rule binds the House to-day. Who has ever questioned its validity?

Why does not the gentleman rise in his place and introduce a similar resolution to this House and say of the joint resolution of June 10, 1790, it is an invasion of the rights of the House of Representatives? He might just as well do this as do what he proposes. You have a concurrent resolution here touching the counting of the vote of Georgia, which was followed in the letter and in the spirit by the Presiding Officer of the Senate, by which you not simply clothed him with the authority to do what he did do, but you imposed the duty upon him to obey it, and it was our duty to bow with respect before the requirement of that law. Yet the gentleman comes with this resolution and asks the House to pass it or to refer it; for I see he has an amendment to refer it. I shall ask a division of the question, because, as a Representative of the people, I cannot consent that a proposition of this sort shall even by intendment receive my approval. It is this:

“Resolved, That the House protest that the counting of the vote of Georgia by the order of the Vice-President *pro tempore* was a gross act of oppression and an invasion of the rights and privileges of the House.”

Now, sir, the Vice-President *pro tempore* of the Senate followed this concurrent resolution of the two houses:

“Resolved by the Senate, (the House of Representatives concurring,) That on the assembling of the two houses on the second Wednesday of February, 1869, for the counting of the electoral votes for President and Vice-President, as provided by law and the joint rules

if the counting or omitting to count the electoral votes, if any, which may be presented as of the State of Georgia shall not essentially change the result, in that case they shall be reported by the President of the Senate in the following manner: Were the votes presented as of the State of Georgia to be counted, the result would be, for ——— for President of the United States, ——— votes; if not counted, for ——— for President of the United States, ——— votes; but in either case ——— is elected President of the United States; and in the same manner for Vice President."

Mr. Speaker, that is precisely what was done on yesterday, and the gentleman in his resolution assumes that that fact is not as it is recorded. I tell the gentleman in all candor that it was unworthy of him, who is of the capacity to understand as well as any other gentleman on this floor the action of this body, to embody in his resolution that as a fact which is contradicted by your written record. I say, sir, that his resolution is contradicted by the written record of the two houses. That record as made is in accordance with the very letter and spirit of this concurrent resolution, and now comes the gentleman asking the House to stultify itself and say to the country, to use his own words, in violating our own law we have recourse to the sacred right of revolution. Sir, the right of revolution is never sacred save when exercised in vindication of a right and in the redress of a wrong. It is invoked here neither for the vindication of a right nor the redress of wrong. On the contrary, the sacred right of revolution is invoked here for the purpose of violating your own law.

Mr. BUTLER, of Massachusetts. Will the gentleman allow me——

Mr. BINGHAM. No, sir; I am limited to twenty minutes.

Mr. BUTLER, of Massachusetts. I only want to say that you are not quoting my words in that connection.

Mr. BINGHAM. Unfortunately the gentleman's remarks do not appear in the Daily Globe. I am guided only by the report given to us by the reporter of the Associated Press. I am glad if the gentleman takes back his words.

Mr. BUTLER, of Massachusetts. I take back nothing.

Mr. BINGHAM. Very well; then, if you take back nothing you have said, I ask the House to compel you to take back your revolutionary resolution, for whether the gentleman can retreat from what he said, in the absence of an official report of his words, or not, he cannot retreat from his revolutionary resolution; and I denounce it here to-day before this House and the country as unwarranted as any act of secession.

Sir, does the gentleman ask me for authority in the Constitution for this power which has been exercised by concurrent resolution from the first year of our national existence to this hour? I point him to the words that ought to be familiar to every school-boy in the land, that by the Constitution it is provided that each house shall make rules for the government of its own proceedings; I point him to the other words that the Congress of the United States, being composed of a Senate and House of Representatives, shall have power to pass all laws—that is to say, all rules, for a rule is a law—to carry into effect all powers vested by this Constitution in the Government of the United States, or any department, or in any officer thereof. Is not the President of the Senate an officer of the United States, and does not your Constitution say that he shall open the certificate of the electoral votes in the presence of the two houses and the same shall then be counted? Does not your concurrent resolution, which is a rule, a law for the government of the two houses, say what shall be done with it when it is opened? Have I not read it in the hearing of the House?

It never received my sanction as a Representative of the people. If I had been in my place and not confined by sickness to my bed I might have asked that in some respects it might be changed; but it is enough for me to know that it received the sanction of the two houses of Congress under the Constitution of my country. I insist that it was, therefore, as binding upon us when in convention assembled under the twelfth article of the Constitution to receive the certificates of the electoral votes of the States which the President of the Senate is directed by the Constitution to open in the presence of the two houses as any law upon your statute-book.

I have risen here under this limitation of time to denounce, as a Representative of the people, this attempt to inaugurate revolution on the floor of this House. I shall insist on, and by the help of my fellow Representatives I shall obtain, a division of this vote, and see whether this first resolution is to be concurred in even by a reference to a committee. Why, sir, by referring it you in some sort make yourselves consent seemingly to challenge the obligations of your own laws. How would it look for us to refer another resolution suggested by the speech of the gentleman from Massachusetts, and that is, that your Judiciary Committee, or whatever other committee it may be that you refer it to, in the elegant words of the gentleman, shall authorize this House, if the Senate will not retire at its request from the joint convention, to "kick them out," and that the gentleman from Massachusetts shall be the captain in the kicking operation? [Laughter.]

Mr. Speaker, the gentleman's speech in that behalf—which I think he cannot gain-say—which brought down the galleries and "split the ears of the groundlings," illustrates the *animus* of this resolution. I denounce it here as a resolution of revolution;

denounce it here as a resolution of anarchy. The idea of the House of Representatives kicking the Senate of the United States from its presence! About the time that is accomplished you will have kicked the law-making power of the people out of existence; about the time that is accomplished you will have proved yourselves greater architects of our country's ruin than the million of men who for four years waged war upon your Constitution and your laws, drenching your land in blood and ridging it all over with graves.

Now, Mr. Speaker, in order to enforce somewhat the remarks that I have made, I ask the attention of the House to the words of the twenty-second joint rule. If I understand aright the gentleman from Massachusetts [Mr. Butler] in his remarks yesterday—and I would not intentionally do him injustice—it was to the effect that the twenty-second joint rule was unconstitutional and ought to be repealed. And to show that I am not mistaken I will fortify my remark by a reference to the second of the series of resolutions offered by the gentleman from Massachusetts, a copy of which has been kindly furnished to me by the Clerk. That resolution is in these words:

“Resolved further, That the twenty-second joint rule of the House and Senate be, and is hereby, rescinded on the part of the House.”

Mr. Speaker, who before ever heard of a resolution for the repeal of a joint rule in that form? A concurrent resolution or a joint rule of the Senate and House of Representatives to be “rescinded on the part of the House!” You might just as well introduce a resolution here to-day that the act of 1792, covering this same question, referred to by the honorable gentleman from Wisconsin, [Mr. Eldridge,] “be, and the same is hereby, rescinded on the part of the House.” What business has the House, acting separately, to repeal a concurrent resolution or a joint rule of the two houses, or an act of Congress?

Wherein does that differ from the act of secession of South Carolina, wherein they said that the Constitution and laws of the United States, though declared to be the supreme law of the land, “are hereby repealed on the part of South Carolina?” The Grand Army of the Republic, under the lead of the honorable gentleman himself and of the honorable gentleman from Illinois [Mr. Farnsworth] who sits on my left, and is now giving me his attention, and of other gentlemen, notified the State of South Carolina, and other States that had followed her lead, that the laws of this country were not to be repealed by any body of men whatever without the concurrence of the Senate and House of Representatives, and the Constitution of the United States was not to be repealed or altered without the concurrence of the legislatures or the conventions of three-fourths of the States. The gentleman from Massachusetts now tells you that this joint rule is unconstitutional. What is it, and how does it stand with his argument, and where does it leave us if we follow his logic? That rule provides among other things—

“If, upon the reading of any such certificate by the tellers, any question shall arise in regard to counting the votes therein specified, the same having been stated by the Presiding Officer, the Senate shall thereupon withdraw, and said question shall be submitted to that body for its decision, and the Speaker of the House of Representatives shall, in like manner, submit said question to the House of Representatives for its decision; and no question shall be decided affirmatively, and no vote objected to shall be counted, except by the concurrent votes of the two houses; which being obtained, the two houses shall immediately re-assemble, and the Presiding Officer shall then announce the decision of the question submitted, and upon any such question there shall be no debate in either house.”

The gentleman says that is unconstitutional. Nothing, then, would seem to snit him. This twenty-second rule, if it had not been reformed or changed by the subsequent joint action of the House and Senate, expressly required that if the two houses did not concur in receiving the vote of a State to which objection had been made in joint convention, that vote should not be counted.

But the two houses did, by concurrent resolution, agree that if the vote of Georgia did not change the result, the record should be made precisely as it was made. Then why all this noise? The vote of Georgia was not counted so as to affect the result, and nobody knows that better than the gentleman from Massachusetts. It was counted simply as the concurrent resolution of the two houses of the Fortieth Congress directed it to be counted. It was the sworn duty of the President of the Senate, presiding over the joint convention, to obey that law, whether he approved it or not, as it is our sworn duty to obey it, whether we approve it or not. For doing his duty this House is called upon to censure the President of the joint convention and to charge him with oppression of the House, and an invasion of its rights!

Sir, it will be a sad day for America when it goes out to the people that the House of Representatives has denounced a commissioned officer of the people, acting under the obligation of his oath, for obeying the law even in the presence of a mob spirit that would disgrace any assemblage of men that ever convened on the face of God's footstool. Sir, I honor the grand old Roman for standing in his place unawed, and saying, “Come what will, I will abide by the law.” Notwithstanding the clamor and uproar

he stood unmoved, without anger, without passion, bowing before the majesty of the law, demanding that the tellers appointed under the rules of the convention should announce the result according to the express letter of your law.

Sir, if Benjamin Wade had never done any other act in his life than this, it should entitle him to the respect of his countrymen. If he had fallen amid the clamor and tumult which the gentleman from Massachusetts raised here in his place, it might have been written over his grave, "Go tell those who survive me that I lie here in obedience to your law, and in defiance of the clamor of a mob." Sir, I denounce the gentleman's proposition as a proposition of anarchy; that anarchy which has no head and cannot think, that anarchy which has no heart and cannot feel; which in its fury and its madness tramples down law and with it order; tramples down childhood and youth, defenseless womanhood, vigorous manhood, and venerable age; which hushes the sweet voices of home, shatters its altars, and scatters darkness over its hearthstone. I ask the representatives of the people to put their seal of condemnation on this resolution, and to lay it on the table, there to rot.

Mr. Schenck was recognized by the Speaker *pro tempore*.

MR. SCHENCK. Mr. Speaker, I do not wish to be considered as having manifested any undue warmth in this matter, but a practice has grown up here of stifling all debate. [Laughter.] Gentlemen may think it amusing, but I think there is plenty of talk in this Hall, and perhaps I take my share in it, though I think I may truly say that I seldom talk about anything except that which comes from my own committee, but not much of what is properly called debate. I took the precaution yesterday to inscribe my name on the roll of members who desired to speak, as is the custom here—the first time I think I ever did it, though it has been done for me once or twice before—and I found great difficulty this morning in getting the benefit of that inscription. Therefore, I feel a desire, if I am permitted to take part in this debate at all, to do it when it is fresh before the House and before it should be considered all on one side and then laid on the table without an opportunity to reply to the argument already made.

So far as the grave question before the House is concerned, nothing is farther from my intention than to indulge in any warmth or undue or excited feeling about it. Nobody can regret more than I the very painful scene which took place in this hall yesterday upon the occasion of counting the votes for President and Vice-President. The disorder it may be said was principally on this side of the House, confined to members of the House of Representatives, and those, too, of the dominant party of the country. From that I draw this lesson and this inference. Here the republicans sat witnessing with satisfaction the result of our labor in the late campaign, knowing that those whom we had chosen to be President and Vice-President were to be declared elected as such. Therefore it cannot be supposed that those who manifested any excitement on this side of the House were actuated by a disposition to interfere with a declaration of that result for which we had so much longed, and which we were so gratified in seeing accomplished. How, then, do you account for it that the very friends of those who were to be declared President and Vice-President should have been those who made objection to the course of procedure here unless you give them credit for some feeling of indignation or sense of impropriety in the character of that proceeding?

Now, sir, I share in that feeling with others, and sharing in that feeling, and believing that all that then transpired occurred in such a way as to raise a very grave and important question with regard to the relative rights of the House and Senate before the people of the country, I am not disposed to be seduced either by the rhetoric of my colleague [Mr. Bingham] or by any general denunciation from any source from asserting what I believe in regard to the manner in which the Senate and the Presiding Officer of the Senate transcended the limits which ought to have shut in the action of that body in connection with the House yesterday.

My colleague who first addressed the House this morning [Mr. Shellabarger] gave us, in his very forcible, logical manner, his views of this case as it involves questions of constitutional law and of legislation. I think, however, that I will attempt to show that my colleague was not as happy as usual in connecting his premises and conclusions in that argument of his. Let us look at his argument, beginning where he did with the Constitution of the United States and its provisions bearing upon this subject as the starting-point for all the consideration that is to be given to the question involved. It is provided in the Constitution that the President of the Senate shall open the certificates from the different States and the votes shall then be counted. It is, as my colleague says, not prescribed by the Constitution who shall be the counter of the votes. He infers that if we rested upon the Constitution alone, and there were no legal provisions of any kind upon the subject, it would follow that this counting was to be done by the President of the Senate. I will make no issue with him upon that point. He quotes Kent as an eminent jurist for the opinion that, the Constitution being silent, the counting would be done by the President of the Senate, unless some legislative provisions were enacted determining how that counting should be done. I will make no issue with him upon that. My colleague proceeds a step further and

argues that, for want of legislation upon this subject, as I understood him, having only a joint rule made between the House and the Senate upon the subject, the power remains with the President of the Senate. That I understood to be his argument. I understood him to take the ground that these joint rules which we had adopted were unconstitutional.

Mr. SHELLABARGER. O, no.

Mr. SCHENCK. Then I beg my colleague to explain what he did argue, because that was the impression he made upon others besides myself.

Mr. SHELLABARGER. I thank my colleague for the privilege of explaining. I state first that, in the absence of all legislation, my opinion agrees with that expressed by Chancellor Kent, that, subject to such rules as may be prescribed for the purpose, the President of the Senate would do the counting, guided by any rules that might be provided, if any be provided, as there ought to be. Then I state farther that if there be no constitutional rule provided, in the absence of such rule, the count must be made in a convention composed of the President of the Senate and of the two houses, and that any attempt to count in the separate bodies would be in contravention of that provision of the Constitution which requires that it shall be done in the presence of the three constituent elements; and that, therefore, the provision of the twenty-second rule which dissolves the convention by separating the parties to it and provides for a count in a different way is, in my judgment, in contravention of the Constitution, and that we are left to the operation of a rule that we made ourselves.

Mr. SCHENCK. I do not yet understand whether my colleague denies that joint rules on the subject are constitutional.

Mr. SHELLABARGER. I stated distinctly that I regard the twenty-second rule as unconstitutional, for the reason that it requires or authorizes the counting in separate bodies, and I say that the concurrent resolution, which does not require that, is constitutional, and that it justified what was done by the President of the Senate yesterday.

Mr. SCHENCK. I think I apprehend the gentleman's point now; and my answer shall be made just here without waiting to come to that point in the line of my argument, and it is this: that when the two branches of the legislative department meet in convention, hold joint meetings, and a question arises and they separate, the Senate retiring to its Chamber, the House remaining as it is, each to pass its opinion upon the subject, and then to compare to see whether they concur or not, they are yet not sitting as a Senate and a House, properly considered, but each is acting as a part of the joint meeting, just as is done under the law in cases where the election of a United States Senator takes place in a State legislature.

I hold, therefore, that there is nothing in the joint rule that amounts to anything more than legislation to carry out the provisions of the Constitution in the only way in which that legislation could reasonably be expected to be made. It is true that instead of agreeing upon a joint rule between the Senate and the House there might have been an act passed embodying the same matter, to be approved and signed by the President of the United States. But this I hold would have given it no greater certainty. The President of the United States is in no sense whatever a party to the counting of the votes for President and Vice-President. My colleague [Mr. Shellabarger] well remarked that there are three parties to that transaction: the President of the Senate, the Senate, and the House of Representatives, coming together in joint meeting, over which the President of the Senate is to preside. Therefore, inasmuch as it related to that which the House and the Senate were to do jointly and concurrently, there was no necessity for legislation by act of Congress, to be approved by the President, to settle the mode of proceeding; but that might be done by a joint rule or concurrent resolution.

I then hold that the joint rule under which we act is not only a constitutional provision, in regard to its details as to the manner of counting, but I also hold that it is just such a legislative act, in one sense, as alone was necessary; because it was one of those acts which, relating simply to the concurrent action of the two houses, did not need the sanction or approval of the President of the United States, as in the case of an ordinary enactment.

Mr. SHELLABARGER. Will the gentleman yield to me for a moment?

Mr. SCHENCK. Well, I have but little time to spare; but I will yield.

Mr. SHELLABARGER. I wish to ask the gentleman this question: the two houses differed yesterday about the vote of Georgia. The one house came to one conclusion, and the other house to another. Now, suppose that it was competent under the twenty-second rule to refuse to count a State unless both houses concur in so doing, and the two houses come to opposite conclusions on the subject. How could the vote of the State ever be counted, the two houses not agreeing that it should be counted, as the rule requires that they shall do before it can be counted?

Mr. SCHENCK. That goes to the whole question of the power of legislation to carry out that provision of the Constitution. I have no trouble at all in my own mind about that constitutional question, because I do not see the same difficulty that my colleague

does in the joint rule upon the subject. I hold that it is a *casus omisus* in the Constitution; that the Constitution requires not that the President of the Senate shall count the votes at all. There is no such declaration in the Constitution; but it declares that he shall open the certificates and that the votes shall be counted.

That provision of the Constitution, not necessarily executing itself, is to be aided by such provisions in reference to its execution as may be needed in the form of legislation, in order that the provision of the Constitution may be carried out like any other provision in the Constitution which needs auxiliary legislation. And I hold, as I said before, that legislation in the shape of a concurrent resolution of the two houses, or of a joint rule, a concurrent resolution put upon your Journal, as was the one passed last Monday, is sufficient for that purpose, because it is a matter where there is no duty devolving upon the President of the United States, but it only concerns the Senate and the House.

Now, if I am right in assuming that the joint rule of the Senate and of the House is constitutional in all its parts—and I do not know that my colleague [Mr. Shellabarger] denies that fact—what next? Last Monday, in view of the peculiar condition of affairs in Georgia, we passed a concurrent resolution, which, to all intents and purposes, was a joint rule looking to a special case and to some particular question which might arise in that case. It was no more and no less than that. Look at it. The concurrent resolution explains its very object in the recital of the preamble, which is as follows:

“Whereas the question whether the State of Georgia has become and is entitled to representation in the two houses of Congress is now pending and undetermined; and whereas, by the joint resolution of Congress passed July 20, 1868, entitled ‘A resolution excluding from the electoral college votes of States lately in rebellion which shall not have been re-organized,’ it was provided that no electoral votes from any of the States lately in rebellion should be received or counted for President or Vice-President of the United States until, among other things, such State should have become entitled to representation in Congress pursuant to acts of Congress in that behalf: Therefore, Resolved,” &c.:

Resolved what? That when the State of Georgia came to have her vote presented as contained in the sealed certificate which might be brought here, and that certificate was opened, it should be the duty of the President of the Senate, when all else that the Constitution and the joint rule required had been done, to declare that if that vote were recorded such and such would be the result, and that if it were not counted there would be another result, and that there his duty was to end.

The mistake which I think some gentlemen make is in supposing that this concurrent resolution repeats, or in any respect whatever conflicts with, the joint rules of the House and the Senate. This concurrent resolution confines itself to the question whether Georgia is entitled to be represented or not. It does not touch the question of the certificate nor what the certificate contains. It does not touch the question of examining the contents of the certificate with a view to counting the vote. Now, let me put a case. Suppose, coming here with your concurrent resolution, which does not reach beyond the mere question of the title of Georgia to be represented, you find upon the table of the President of the Senate or in his hand, the seals being broken by him, a certificate from Georgia, which, when opened, proves to be a paper without seal and without signature. Can any objection be made? According to the theory which I am now combatting no objection can be entertained. Under this concurrent resolution, as gentlemen here construe it, the President of the Senate, as a mere automation, is to rise in his place and say, “If this vote be counted the result will be so; if it be not counted it will be thus.” Suppose you open the envelope supposed to contain the return and find no return at all, but an old newspaper, the President of the Senate is still to go through the mummeries and farce of rising and saying that if it be counted the result will be so, and if it be not counted the result will be otherwise! Suppose you open the return and find that the electors of the State of Georgia have met in the capital of the State of South Carolina, you cannot take notice of that fact, because your concurrent resolution says that the President of the Senate, as a mere puppet, must rise in his place and say, “If this be counted the result is so; if it be not counted the result is thus.” Suppose on opening that return you find that the State of Georgia instead of casting the number of electoral votes to which she is entitled has cast twenty votes; the President of the Senate, still acting in his mere automatic capacity, must get up and say, “If you count those twenty votes the result will be so; and if you do not count them the result will be thus.”

What does all this prove? It proves that your concurrent resolution does not touch the question in regard to what shall be done when the certificates are opened. It does not reach the question of counting. It deals with none of these grave forms which are to be observed in order to ascertain whether the votes certified in any particular return are to be counted. It stops at the threshold upon a preliminary question, avoiding the other and graver question that lies behind. It provides what shall be done that there may be no committal on that question; but it leaves all that relates to the count, all that relates to the form of the certificate and its sufficiency entirely open, to be dis-

posed of under the joint rules of the two houses. That is the proposition I make in regard to this matter; and I say that gentlemen all along have begged the question, and none more so than my colleague, [Mr. Bingham,] when he denounced the views of those who differ from him and maintain—

Mr. BINGHAM. The gentleman will allow me to correct him. I did not denounce the views of those who differ from me. I denounced the resolution of the gentleman from Massachusetts, as I had a perfect right to do.

Mr. SCHENCK. I beg my colleague's pardon if I am mistaken, but I thought he characterized all this proceeding as "revolutionary," and—

Mr. BINGHAM. I characterized the pending resolution as "revolutionary."

Mr. SCHENCK. And we heard a great deal about "anarchy," in which the gentleman soared so high that I could not follow him, although I would have been glad to do so, because I always admire his rhetoric. At least I am justified in saying, in regard to the position of my colleague—and he knows that I like him too well to use toward him any language in an offensive sense—that he with other gentlemen has assumed that the two acts of the Senate and the House, the concurrent resolution and the twenty-second joint rule, are in conflict with each other, so that, in the language of the Speaker, that last passed repeals the other. I hold no such doctrine.

I say that there stands the joint rule covering all the questions that may arise after the certificate is opened in regard to what is in the certificate, and that the concurrent resolution stops short of all that, and merely deals with the preliminary question whether we will commit ourselves in anything we do upon the question whether Georgia is or is not entitled to representation, or to have its electors for President and Vice-President counted.

What is our twenty-second joint rule?

"If upon the reading of any such certificate by the tellers any question shall arise"—

In regard to what?

"in regard to counting the votes therein certified, the same having been stated by the Presiding Officer, the Senate shall thereupon withdraw."

If any question shall arise after the opening of the certificates with regard to the counting of the votes therein certified. Did your concurrent resolution relate to that? Did it refer to what was in the sealed package in the hands of the President of the Senate? That was impossible. When the House and Senate on Monday last tried, by their concurrent resolution, to take some safe ground by which they should not be led to commit themselves upon the question whether Georgia was or was not entitled to have electors, they never reached forward into, they never pried under the seal, nor tried to divine the contents of the certificate, which was to them a sealed book; but they waited until a question should arise in regard to the counting of the votes therein certified.

Now, if my colleague maintains that our joint resolution upon this subject is unconstitutional, I am afraid his argument will go too far. What right have we to make rules at all? The Constitution of the United States says that each house shall make rules for its own proceedings, but it is silent about joint rules. Inferentially, because each house may make rules in regard to its own proceedings, it has been held from the origin of the Government that the House and Senate may agree together in regard to a joint rule which relates to that in which they have a mutual interest, or where mutual and reciprocal duties are to be discharged. If my colleague succeeds in satisfying the House that this joint rule is unconstitutional I very much fear his argument will go to the extent under the Constitution of making all joint rules unconstitutional; for all joint rules are made under the inferential power that, as each house can make rules for its own proceeding, they may also regulate what may take place between themselves or where they are jointly concerned.

I repeat, then, my proposition. We have a general rule upon the subject, and then, to say the least of it, we have a concurrent rule passed at the beginning of this week amendatory of the joint rule in reference to a special case, and a particular question or class of questions that may arise in that case, and the two, so far from being irreconcilable, can each be sustained without one being regarded as conflicting with or operating as a repeal of the other.

Now, sir, I come to a matter more delicate than this. This I lay down as the law under which we are to act. What did we do? We met. A question arose first in regard to the vote of the State of Louisiana, as to whether it should be counted or not. The Senate retired, the House remained. They passed resolutions. Those resolutions we find, upon comparison and mutual communication, to be concurrent. So it will appear, I presume, upon the record, if any be kept, of the joint meeting; and what has happened I presume is what ought to be recorded. And so the vote of Louisiana was counted. When we came to the State of Georgia a question was raised there again.

Now, it might have been possible if the ground which gentlemen take here now and which the Senate is understood afterward to have taken be correct, that the concur-

rent resolution overruled and blotted out all on the subject of Georgia which might otherwise be applicable to the case of that State under the joint rule of the House and Senate, that they would at once have put down the objection, refusing to entertain it upon the ground that it was not in order, and so have gone on with the count under the concurrent resolution, that being held to be the only thing which provided for any question that might relate to Georgia. But, sir, the common sense of the House and the Senate prevailed over any such construction. We were in a good deal of a muddle from various causes, but it was apparent to every one that here had come up a question which the concurrent resolution did not provide for. The first objection made by the gentleman from Massachusetts [Mr. Butler] to the counting of the vote of the State of Georgia was one which my colleague himself admits to have been a vital objection, to wit, that the electors had not met when alone the law authorized them to meet—on the 2d of the month—but had met on the 9th. Now go back to your concurrent resolution and read it; read it with all the lights that have been thrown upon it by the arguments of gentlemen here. Here is the resolution, that whereas questions have arisen as to whether Georgia is entitled to have electors or not, or has been reconstructed or not, under the laws passed for that purpose, and so forth; and when you have done with the reading of your concurrent resolution you are just where you were before. You find in it no law, no rule of action to regulate what you shall do when you find upon the opening of the certificate that the electors have voted at a different time from that which the law appoints. The common sense, therefore, of the Senate and of the House, disregarding any such strained construction as has since been attempted to be put upon this concurrent resolution, led them to separate, the Senate going to its room to consider this question. After they had separated what took place? The House had submitted to them, properly, as I think, and therefore I voted against reconsideration, the question whether they would or would not sustain the objection made by the gentleman from Massachusetts, and they decided that the objections were well taken. The Senate went to their room. We are not permitted by parliamentary courtesy to know what took place there any further than it was developed after their return to this chamber. And when they returned, what did we hear? I quote from the official report:

"The President, having resumed the chair, said: The objections of the gentleman from Massachusetts are overruled by the Senate, and the result of the vote will be stated as it would stand were the vote of the State of Georgia counted, and as it would stand if the vote of that State were not counted, under the concurrent resolution of the two houses."

That is, we are to infer that the Senate went off upon that question, which to my mind is an absurd conclusion. Other gentlemen differ from me, and therefore I say, to make due allowance for that difference, we are to infer that they went off upon the idea that the concurrent resolution overrode and repealed the joint rule upon all subjects in regard to finding out what was in the certificates when they came to be opened, and came back and gravely told us through their organ that the Senate had overruled the objections made by a member of this House in his place, while acting with the House in joint meeting with the Senate. What further? If you look at the official record you will find it was communicated to the House as a part of the record history of the joint convention what the Senate did; but you have no record whatever, nor was any allowed, as to what the House had done. You have a record in the House of Representatives, and you have a record of their decision as it was communicated to the Senate. These are records in the House as a House, and in the Senate as a Senate; but the joint meeting, the joint convention, never was permitted to know in any official way so as to make it a part of its record history what the House of Representatives did, although they had courteously separated for the purpose of each one passing its opinion in regard to whether an objection was well taken or not.

Now, then, gentlemen wonder that any of us should conclude that in any form of language whatever it is proper to consider whether this is not an invasion of the rights of the House. If it be not, then we are the merest ornamental appendage of the Senate in this proceeding of counting the votes that ever any one body was made while dancing attendance upon another. How came they to be separated? In obedience to the rule. For what? To consider the question. What question? A question which had arisen in regard to the contents of a certificate when it came to be opened. And the two parts of this joint convention, thus separated under the rule to consider and report to each other what each separate part of the convention had determined upon, were up to this point acting regularly, and only under the joint rule, without which all their proceedings would have no force; for there was nothing else that provided for their separation. And now we are told that that joint rule was all repealed in relation to Georgia. Yet what are the facts? The Senate said it was not repealed, by going to their chamber to decide, under the twenty-second rule, the question raised in regard to Georgia. The House said it was not repealed by remaining here in their seats and acting upon that question. And the Speaker said it was not repealed by putting the question to the House; and when the

two houses came together again in joint convention it was in obedience to the joint rule of the House and of the Senate, which required the two houses to come together and make record of what had been done by each part of the joint meeting. Now there is nothing in that record of the joint convention to show what the separate action of the House was in that case. We can only learn that the Senate acted in opposition to what the House had done by happening to know what the House did; and what the Senate overruled was not the action of the House directly, but the objection made by the gentleman from Massachusetts; the objection of the gentleman from Massachusetts, however, being made upon the construction of the House of its duty under the joint rule, and made upon the action of the House by which it gave its construction and interpretation of that joint rule; and when the Senate overruled it, it was not merely a squelching, or the attempt to squelch, a single member, but it was an attempt to abrogate and crush out the rights, powers, privileges, and immunities of the House of Representatives, as a part of this solemn procedure to assist at the opening of the votes for President and Vice-President.

We have often heard from our worthy Speaker about the propriety of standing up for the rights of the commons, the representatives of the people. And I thank him for many a good doctrine taught us upon that subject; they all have my hearty concurrence, and I am for them now. But I will say that it is idle, and worse than idle, for the House of Representatives, under your Constitution, under your joint rule, to come here under any circumstances to assist at the opening of these votes, if the Senate, through its Presiding Officer, can coolly come in here, after the two bodies have separated for the purpose of deciding any question, and say that upon second thought the Senate has agreed to overrule what was proposed on the part of the House, or of any member of the House, from which announcement there is no appeal, and about which there is to be no question, and in regard to which there is no record made. I do not want to attend any such meeting under such circumstances as a representative of the people. I will not sanction by my presence, of as little consequence as that may be to any one, any such doctrine as that which takes away the privilege—not even the privilege, but the bare right and duty, of taking part in a solemn ceremony, according to the form of the Constitution and as provided by law.

Now, sir, let me illustrate in another way; and the gentleman to whom I shall refer will know that I do it with the utmost respect and kindest regard for him. Let me illustrate by reference to the course pursued yesterday by the Speaker. The reporter for the Chronicle or for the Associated Press, who sometimes interpolates in his reports an expression of personal opinion, says that the Speaker made “a timely interruption” in threatening with arrest members of the House for disorder, when they expressed—somewhat too excitedly, perhaps—their feelings of indignation, honestly felt by them at this seeming disposition to trample them down and thrust them out of the way. How came the Speaker to make that order? I thought we were in joint meeting of the two houses, with the President of the Senate as the Presiding Officer; and with due deference to the Speaker and his authority, I hold that the gavel was not properly in his hand. I hold that, unless under some general claim as a peace-officer his jurisdiction extending over us solely, he ought not to have threatened us with arrest; and I can only account for his doing so by supposing that, like many of the rest of us, he was excited by the unusual confusion and warm feeling of the occasion.

Mr. COLFAX, (the Speaker.) Will the gentleman yield to me?

Mr. SCHENCK. With pleasure.

Mr. COLFAX. Having stated my views to the House last evening, I had intended not to participate further in this discussion unless my official conduct should be arraigned, as it is now being arraigned by the gentleman from Ohio, [Mr. Schenck.] The Speaker of this House feels that it is the right of every Representative to arraign him if he transgresses in the performance of his duties. In this case he performed his duty. He would have been derelict if he had not performed it. He would have been subject to the future censure of the House if he had not interposed when he did interpose to check the excitement that was then transpiring. The twenty-second rule of the House provides that—

“It shall be the duty of the Sergeant-at-Arms to attend the House during its sittings, to aid in the enforcement of order under the direction of the Speaker.”

The gentleman from Ohio has for half an hour insisted that “the House of Representatives,” under the Constitution, was “sitting” in this hall during joint session yesterday. It was a House of Representatives. There was a Speaker. The twenty-second joint rule requires that in joint convention he shall sit by the side of the Presiding Officer of the convention. But he is no less the Speaker of the House at that time. He is charged with the maintenance of order. When the House is “sitting,” this rule undoubtedly applies. It had met as a “House of Representatives” at noon, and had not adjourned for a moment. If, during the joint session, there was no House of Representatives here, then the Speaker exceeded his authority. If there was “a House” here, if the Constitution required “the House” to be here, then he performed his

duty in endeavoring to command order, which had been transgressed by the repeated refusals to obey the order of him who was then presiding in joint convention.

The Constitution provides distinctly, in the twelfth article of the amendment, that—
“The President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates.”

Hence there must be in the joint session “a House of Representatives.” There was “a House of Representatives” there yesterday. There was “a Speaker” there; there was “a Sergeant-at-Arms” there; and the rule provided where these officers should sit. They were not ciphers. They had some duties to perform.

Let me ask one question. When disorder existed in the joint convention, who was to perform the duty of restoring order? If the President of the Senate, amid the excitement then prevailing, had ordered the Sergeant-at-Arms of the Senate to enforce the rules of order upon members of the House of Representatives, the excitement would have been redoubled. It would have been said that the President of the Senate had not the power to order the Sergeant-at-Arms to enforce order upon members of “the House of Representatives” in their representative hall. But, under the twenty-second House rule, there was an officer endowed with the authority necessary in the emergency, and he shrank not from the performance of his duty. If he exceeded his authority, he is subject, as he is for all other official acts, to the condemnation of the House.

Mr. SCHENCK. I think he was excited very much, as the rest of us were, and he forgot himself.

Mr. COLFAX. No, he did not.

Mr. SCHENCK. It is only a difference of opinion, and I am fortified in that opinion—

Mr. Woodward rose.

Mr. SCHENCK. I cannot yield, when I am answering one interruption, to another.

Now, sir, I thought I might be acquitted of any feeling to arraign or impeach the motives of the Speaker, and he ought to know that I have no such feeling and no such purpose. I have too much respect and too much kindly regard for him to do so.

Mr. JONES, of Kentucky. I raise the point of order that there is too much disorder in the hall.

The SPEAKER *pro tempore*. The Chair sustains the point of order.

Mr. SCHENCK. I will proceed. If there is any issue between the Speaker and myself, it is of his seeking and not mine. I make none. I simply, as a question of law, say that when the House of Representatives is here in joint convention—joint meeting I think the rule calls it—with the Senate, it is prescribed that the President of the Senate shall preside over that joint meeting, and it is, therefore, not the Senate that sits here, not the House of Representatives, but a body composed jointly of those two branches; and when the Speaker, out of proper respect, is assigned a place alongside of the President, and these same Senators are assigned places on the right, and the tellers are told by the joint rule where they ought to take their seats, it is to give dignity and character to the occasion. It is a regulation in regard to the surroundings; but as regards the legal right of the Speaker to preside and keep order, let me say that it is not a double-headed monster, but one body with one head, that head for the time being the President of the Senate.

Now, I wish to quote an authority on that subject. It is from the proceedings of yesterday.

“Mr. THOMAS. I was about to ask the Chair a similar question. The inclination of my own mind is in that way very strong that it is not competent for the House of Representatives, by a vote of this character, to supersede the resolution adopted by the Senate and House concurrently. That resolution fixed the mode of action and prescribed the rule of conduct for the Senate and House in joint meeting. I have no reference to the separate action of this body.

“The SPEAKER. A reply to that question would involve a discussion of questions properly transpiring in joint convention of the two houses, over which the Speaker of this house has no power.”

That is the latest interpretation I have of the law on that subject, which was given to us by the Speaker yesterday in explaining his course of action. He said that he did not interfere because he had no power; that the Presiding Officer was the one to do it. I allude to this not for the purpose of arraigning the Speaker, but for the purpose of showing the general conclusion which here prevailed. And while we were in joint meeting of the House and Senate, more than once the House probably seemed to forget for the time being we were not in the more excitable House of Commons, and the Speaker shared in the excitement. I have referred to this for the purpose of showing that when we were thus united together under the joint rule, the law was that joint rule, as far as related to everything that we were called to do in joint meeting, and that the Senate and the House, and the President of the Senate and the Speaker of the House, took that view of it yesterday. Now, sir, I do not wish to follow up the argument which I have submitted.

Mr. BUTLER, of Massachusetts. I will send another authority to the gentleman from Ohio.

Mr. SCHENCK. It states that the Speaker's chair was vacated, and it was taken by the President of the Senate.

Mr. COLFAX. As the gentleman has received a suggestion from the gentleman from Massachusetts, I hope he will yield to me for a moment.

Mr. SCHENCK. Certainly, sir.

Mr. COLFAX. The Speaker ruled in the House of Representatives that he could not revise the ruling of the President of the Senate when presiding over the joint meeting of the Senate and House. The Speaker adheres to that ruling to-day. There is, however, some difference apparently between the gentleman from Ohio and myself as to the construction of language. There is an order in the twenty-second House rule, and I will again repeat it, in reference to the attendance of the Sergeant-at-Arms. The law commands that the Senate and "House of Representatives" shall be in session on the second Wednesday of February. The twenty-second House rule then requires "the Sergeant-at-Arms to attend the House during its sittings, to aid in the enforcement of order under the direction of the Speaker," &c. He could not do it under the direction of the President of the Senate. The rule would not allow him. He would forfeit his office if he obeyed the order of the President of the Senate. The rule says that the Sergeant-at-Arms shall attend their sitting to aid in the enforcement of order under the direction of the Speaker. I would therefore ask the gentleman from Ohio whether he would have asked the President of the Senate to command the Sergeant-at-Arms of the Senate to arrest a Representative for disorderly conduct—a member of a body with which he had no official connection whatever? If that had been attempted it would have increased the excitement already existing. Could he have required the Sergeant-at-Arms of the House to have arrested a member of the House? He had no power so to do under the rule.

The House of Representatives were here, and the Speaker was here, and the joint rule commanded that he should be here attended by the Sergeant-at-Arms. Why, sir, if the Sergeant-at-Arms of either house had attempted to arrest a member of the other house we might have had repeated here the scenes of the French Revolution, when the excitement of the galleries mingled with the excitement below. In the maintenance of order the President of the Senate had the control of the Sergeant-at-Arms of the Senate, and no one else. If he had sent the Sergeant-at-Arms of the Senate to arrest any Representative the member could have refused to obey, as he had no right to obey the order of any one but the Speaker. The Speaker was ordered to be here, and he supposed his duty required him to do that which he did in the maintenance of order and decorum. Order had to be preserved. The House had met as a House at noon and had not adjourned. It was a House of Representatives, and was sitting as the Constitution required its presence as a House. The Sergeant-at-Arms of the House was here, as required by the rule. It is his duty to aid in the enforcement of order under the direction of the Speaker, and no one else; and he received that direction from him.

Mr. SCHENCK. This does not at all take away from the force of my argument. My argument was as to the legislative condition in which we were, what we were doing, and where we were doing it. The joint rule provides that when the two houses have thus met in joint meeting the President of the Senate shall be their Presiding Officer; and I find in the last clause of that rule the following:

"At such joint meeting of the two houses seats shall be provided as follows: for the President of the Senate, the Speaker's chair; for the Speaker, a chair immediately upon his left; for Senators, in the body of the hall upon the right of the Presiding Officer; for the Representatives, in the body of the hall not occupied by the Senators; for the tellers, Secretary of the Senate, and Clerk of the House of Representatives, at the Clerk's desk; for the other officers of the two houses, in front of the Clerk's desk and upon either side of the Speaker's platform."

I do not know any difference of opinion in regard to the true construction of this joint rule or law, for it is a law. I do differ from the Speaker in this: I hold it is not a body with two heads. I hold it is not two bodies. I hold it is one body, composed of the Senate and House acting together in joint meeting, having one head to preside and to keep order as its Presiding Officer, and that Presiding Officer is the President of the Senate; and to aid the Presiding Officer to keep order it was intended, as well as for other purposes, to give character to the occasion, that the officers of both houses should be present here with the two houses. If I am right in this the Presiding Officer for the time being might have ordered the Sergeant-at-Arms of the Senate or the Sergeant-at-Arms of the House. In giving instructions it was as much his right to speak to the tellers on the part of the House and to direct them in receiving certificates as to speak to the teller of the Senate. It was as much his business to give instructions to the Clerk of the House as to the Secretary of the Senate. He was the Presiding Officer of the whole body thus met, and not only presided over that body, but could direct the steps of the officers met together for that purpose.

I am sorry in thus illustrating the condition in which we found ourselves here it has

led to this passage between the Speaker and myself. I do not think he has intended to say anything in an offensive sense toward me, and most certainly I intended nothing personally offensive to him.

Mr. COLFAX. As the Speaker never referred to the subject until it was broached by the gentleman from Massachusetts, he of course had a perfect right to vindicate himself.

Mr. SCHENCK. I merely refer to the matter as an illustration of my general argument, to which I will now go back. I say here is the Constitution of the United States, which provides that the President of the Senate shall open these certificates; that it further provides where the votes thus certified shall be counted; that to carry out that clause of the Constitution the two houses by a joint rule have declared how that shall be done; that in adopting that they refer to all questions with regard to the contents which shall be found in the certificates when they come to be opened; that when they passed the concurrent resolution amending *pro tanto* this joint resolution they did not touch those questions relating to what is contained in the certificates, but simply attempted to avoid the question which might arise as to whether the State of Georgia was in the Union or not. They left all else under the joint rule, and under that joint rule this question was made by the gentleman from Massachusetts, and the two houses retired to consider it.

[Here the hammer fell.]

Mr. GARFIELD. Mr. Speaker, I would not trespass a single moment on the time of the House were it not that as the immediate representative of the officer referred to in the resolution now pending, I feel it my duty to speak. We have wandered so far in this debate, Mr. Speaker, from the original question raised and the real question at issue that I desire to call the House back to the point of departure. Two questions are now involved in this discussion. The second one is an after-thought, and was not a part of the original proposition. It was invented as a lighter to carry the ship launched yesterday by the gentleman from Massachusetts over the bar in order to get it out to the open sea. I desire, sir, that we shall separate that lighter from the ship and let the gentleman's craft, whether it sink or float, meet such fate as it deserves.

As I have said, the subject debated most this morning is not the question we are now called upon to decide. The chief matter of discussion for the last two hours has been the constitutional prerogative and duties of the President of the Senate when he comes to open the electoral votes for President and Vice-President of the United States, and connected with that the constitutionality of the joint rule under which that officer acts. Our ears have been stunned and our fears alarmed at the danger we incur by leaving this joint rule un repealed. We are now told that all this tempest and turbulence have for their moving cause the desire to settle a great constitutional question for the future safety of the republic.

We are called upon in these last days of the session to lay aside all other business in order to provide for counting the electoral votes four years hence. I admit the importance of this subject, and at the proper time shall be glad to consider it; but, as now urged, it is a mere evasion, an attempt to escape from the real point now at issue.

Now, sir, I fully agree with many gentlemen who have spoken that we ought to have full discussion and careful legislation in reference to this business of counting the electoral votes for President and Vice-President; and in order to show that it is not a new question with me, Mr. Speaker, I call attention to the fact that there is a resolution now in possession of the Committee on the Judiciary of this House, sent to it by the House on my motion, as far back as the 24th of March, 1863, and it is in these words:

"Resolved, That the Committee on the Judiciary be directed to inquire into the expediency of providing by law for the settlement of contested elections for electors of the President and Vice-President of the United States, and that they report by bill or otherwise."

A standing committee of this House has this very subject under consideration and can report. We want no additional resolution or reference in order to bring it before the House. I dismiss that part of the gentleman's scheme, which is a manifest after-thought, a transparent attempt to evade the violent and indefensible measure which he proposed in these words:

"Resolved, That the House protest that the counting of the vote of Georgia by the order of the Vice-President *pro tempore* was a gross act of oppression and an invasion of the rights and privileges of the House."

That is the question, Mr. Speaker, and so far as I am able to prevent it he shall not escape the responsibility of his attempt. What, then, is the essence of the charge preferred against the Vice-President? Whether the counting of the vote of Georgia was "a gross act of oppression and an invasion of the rights and privileges of the House" depends solely upon one thing, and that is this: Did the Vice-President, in the discharge of his duty of opening the votes and declaring the result of the count yesterday, act in accordance with the law which the two houses had placed in his hands, or did he wantonly neglect or refuse to do something which the law required him to do? The decision of that question decides the merits of the gentleman's resolution.

Now, it will not do for the gentleman to allege that the rule was unconstitutional, and therefore the Vice-President did wrong to obey it. Was that officer to be the judge of the constitutionality of the rule enacted by both houses of Congress? The injunctions of that rule were peremptory, and left him no discretion. If he had gravely doubted both the constitutionality and propriety of the rule, who will say that he would have had the right, at that moment, to set it aside or violate its provisions in the smallest particular as against the declared will of the two houses?

Assuming, then, that neither the constitutionality nor the wisdom of the rules under which he was acting was a matter to be determined by him, we must look to the rules themselves to find what rights were conferred upon him and what duties were required of him. If the twenty-second joint rule had been his only guide, it is perfectly clear that an objection to counting the vote of Georgia would not only have been in order, but the vote of the House that it should not be counted would have made it his duty to omit from the count altogether the vote of that State.

This reduces the discussion to still narrower limits. If the Vice-President's course is justified, that justification must be found in the joint rule which passed this House in the form of a concurrent resolution on Monday evening last. Omitting the preamble, which is only a matter of inducement and cannot restrict the plain terms of the rule, the resolution is as follows:

Resolved by the Senate, (the House of Representatives concurring,) That on the assembling of the two houses on the second Wednesday of February, 1869, for the counting of the electoral votes for President and Vice-President, as provided by law and the joint rules, if the counting or omitting to count the electoral votes, if any, which may be presented as of the State of Georgia shall not essentially change the result, in that case they shall be reported by the President of the Senate in the following manner: Were the votes presented as of the State of Georgia to be counted, the result would be, for ——— for President of the United States, ——— votes; if not counted, for ——— for President of the United States, ——— votes; but in either case, ——— is elected President of the United States; and in the same manner for Vice-President."

In this rule is the whole issue now in debate. My colleague, [Mr. Scheuch,] who has just taken his seat, and who has made the strongest argument in favor of the opposite view which I have yet heard, virtually acknowledges that this is the whole issue when he declares that this joint resolution neither repeals the twenty-second rule nor does it come in conflict with it. Now, the application of this new rule depended upon one contingency, namely, whether the counting of the vote of Georgia would or would not change the result. If it would not, the new rule should apply; if it would change the result, this rule should not apply, but the Vice-President would be thrown back upon the provisions of the twenty-second rule, in which latter case it would be in order to object to counting the vote, and the sustaining of the objection by either House would make it the duty of the Vice-President to reject the vote from the count. The guide of his conduct in relation to Georgia required the settlement of one preliminary question, namely, will the vote of that State change the result? This he must ascertain before he can know under which rule he is to act. It may be that the new rule is no rule; for if he finds that the vote of Georgia will change the result, then this new rule is a nullity, an absolute nullity, because the conditions on which alone it was to have any force do not exist. But if, on the contrary, it be found that the vote of Georgia will not change the result, then the rule applies in full force, and, as I maintain, to the exclusion of all other rules. Therefore, before the Vice-President could determine whether this rule should apply to Georgia, he must have the electoral votes of the other States counted. That explains his conduct, which the gentleman from Massachusetts so severely commented upon yesterday, in regard to putting off the vote of Georgia to the last. Having ascertained by the official count of the votes of all the other States that the vote of Georgia could not change the result, he had reached a situation to which the new rule applied. The case had then arisen of which the new rule says expressly, "In that case they (the electoral votes of Georgia) shall be reported by the President of the Senate." It left him no discretion. It was made to cover one contingency, and no other. That contingency had arisen, and the Vice-President, in accordance with the rule, armed with it as his only law to apply to the State of Georgia, proceeded, or was about to proceed, to declare the vote of Georgia, when the gentleman from Massachusetts rose in his place and objected. The President of the Senate made this answer:

"The Chair is very much disposed to hold the Senate and House of Representatives to their own concurrent resolution. The purport of the resolution, as we understand it, is that if the votes of the State of Georgia do not change the result of the election they may be counted, but if they did alter the result they should not be counted."

He had already found that the vote of Georgia did not change the result, and knew, therefore, that the new rule rested upon him in full force. He had no discretion. The rule was imperative; but the gentleman from Massachusetts, though out of order, pressed his objection with vehemence. The Vice-President repeated his decision, and a second time declared that he felt bound to obey the concurrent resolution of the two

houses; but the gentleman from Massachusetts, with his accustomed persistence, still objecting, and the President of the Senate manifestly desiring out of abundant caution to do no injustice to any member of the Senate or House, stated that the Senate would retire. He did not at that time say that he entertained the objection of the gentleman from Massachusetts; he did not say that he ruled on the objection of the gentleman from Massachusetts; but he declared that the Senate would retire, and on that declaration the Senate did retire. A manifest difference of understanding arose between the two houses on this point. The House did not clearly understand on what ground the Senate had retired. The record shows that the gentleman from Wisconsin [Mr. Eldridge] claimed they had retired on a question raised by the gentleman from Kentucky, [Mr. Jones.]

Mr. INGERSOLL. I ask the gentleman to yield to me.

Mr. GARFIELD. For a moment.

Mr. INGERSOLL. I wish to correct him so this debate may be based upon the facts. The gentleman states that the President of the Senate, the Presiding Officer here, did not state upon what ground the Senate retired. Now, let us see how that matter stands, and I will read from the report of the Globe:

"The PRESIDENT. Objection being made, the Senate will retire to their chamber to deliberate, under the rules."

"Mr. WASHBURN, of Illinois. On what?"

"The PRESIDENT. On the objection that has been raised by the gentleman from Massachusetts."

There was the language of the President himself.

Mr. GARFIELD. I agree with the gentleman, but what was the objection? The gentleman from Massachusetts had not only filed an objection in writing against counting the vote of Georgia, but he had objected to the ruling of the Chair that ruled his objection not in order. Under these circumstances the President of the Senate ordered that body to retire. Why did it retire? Let me trace the history of their transactions, as exhibited in their message to the House. After reaching their chamber the Senate decided that they had no right to vote on the question of counting the vote of Georgia. Why? Because the joint rule had settled it that the vote of Georgia should be counted, and counted in a particular way. Therefore the Senate, as it had a perfect right to do, declared that it had no right to do otherwise than to count the vote of Georgia in the prescribed manner. The action of the Senate is seen in the following:

"Resolved, That under the special order of the two houses respecting the electoral vote from the State of Georgia, the objections made to the counting the vote of the electors of the State of Georgia are not in order."

In the mean time the House, supposing that the two bodies had separated, not for the purpose of settling a point of order, but the objection to counting the vote of Georgia, proceeded to vote on that question, and voted that it should not be counted. The Senate came back, and its President announced the result of their deliberations. I agree with my colleague [Mr. Schenck] that the words employed were not a strictly correct announcement of what the Senate had done, for the Senate did not in form, nor could it in fact, overrule the objection of a member of the House. But I call attention to the fact that when the President of the Senate came back he did what he had an undoubted right to do. He re-asserted his first decision, that the objection of the gentleman from Massachusetts to counting the vote of Georgia was not in order. It is true that he used the language which my colleague has repeated; but I trust that no member of this House will think it worth while to dispute about the mere form of words. The treatment of this House by the Senate must be exhibited in the official messages received from the Senate.

Mr. Speaker, I insist that under the new rule it was both the right and the duty of the Vice-President to rule out the objection of the gentleman from Massachusetts as not in order.

Mr. BUTLER, of Massachusetts. The gentleman must not state what I did not do. I did not ask him to rule it out. I appealed to the House, supposing the Speaker was in the chair.

Mr. GARFIELD. The gentleman does not understand me. I am talking of what occurred before the Senate went out the second time. I affirm again that before the Senate went out the second time it was perfectly competent for the President of the Senate to refuse to entertain the objection of the gentleman from Massachusetts. He did twice refuse it, and I only regret that he did not persist in his refusal. It was only because of the persistence of members of this House that he waived his own opinion until he had time to consider. When he came back, having concluded that he was right in the first place and that he ought to have persisted in his refusal to entertain the motion of the gentleman from Massachusetts, he announced that conclusion, and persisted accordingly. It is true that the vote of the House not to count the vote of Georgia placed us in an awkward and embarrassing position, but could not repeal the new joint rule.

Now, Mr. Speaker, my colleague [Mr. Schenck] is fertile in suppositions. He asks,

if the President of the Senate had opened the supposed returns of Georgia and found only a newspaper in the envelope, would he be bound to count it; or suppose they were sent from South Carolina. It is easy to suppose extreme and impossible cases. If any absurd result should follow from such supposition, the fault must be traced to the rule that makes such a result possible. But the votes were presented as of the State of Georgia, and the concurrent resolution provided that the President of the Senate must count them, and he did count them.

Mr. PAINE. I ask the gentleman from Ohio to yield to me.

Mr. GARFIELD. Certainly.

Mr. PAINE. I thank my friend for allowing me to ask him this question, Did the President of the joint convention order the vote of Georgia to be counted? Was that vote counted? Did the concurrent resolution of the two houses ever order that vote to be counted?

Mr. GARFIELD. The new rule provides a definite formula to be used by the Vice-President, as precise as the ritual of the church. He is to declare that if the vote of Georgia be counted the result for President will stand thus and thus, and if the vote of Georgia is not counted the result will stand thus and thus, but in either case the same persons are elected President and Vice-President.

Mr. PAINE. The resolution which is now pending before the House charges the President of the Senate, presiding in joint convention over of the two houses, with having counted, or censured to be counted, the vote of the State of Georgia. I ask the gentleman whether as a matter of fact the President of the Senate did any such thing?

Mr. GARFIELD. I presume that it may be said that in the strict meaning of the word "count" the vote of Georgia was not counted. We know it was not counted in the same manner as the votes of other States were counted; but it is apparent on the face of the transaction that they were counted hypothetically. I quite agree with my friend that in so far as the votes of Georgia were counted at all they were counted by the resolution and not by the President of the Senate.

Mr. PAINE. I wish to ask whether this resolution does not expressly provide that the president of a joint convention should declare if they are counted the result is so and so, and if they are not counted it is so and so, without requiring him to count them at all.

Mr. GARFIELD. That is correct. The gentleman from Massachusetts [Mr. Butler] asks whether the Constitution does not order otherwise. I answer that the President of the Senate was not to question the constitutionality, but was to carry out and obey the rule adopted for his guidance by both branches of Congress.

Mr. SCHENCK. I merely wish to call the gentleman's attention, as he is quoting the action and declaration of the President *pro tempore* of the Senate and the Presiding Officer of the joint convention, to what took place in the Senate. I am permitted to refer it, as I have it in the Globe. After they returned to the Senate, in answer to a question of Mr. Edmunds as to what had taken place and what had been decided, the President *pro tempore* said:

"The Chair will state that the gentleman from Massachusetts took exceptions to the counting of the vote for a different reason from any covered by the concurrent resolution. It was because the vote was not cast upon the day required by law, which goes behind the concurrent resolution, as it seemed to the Chair, for which reason it was thought best to retire and deliberate upon that. It was a different question, not involved in the concurrent resolution, perhaps lying back of that, based on the ground that the vote was informal and not to be counted at all."

I am glad that the President of the Senate was entirely of my opinion.

Mr. GARFIELD. What occurred between the President and members of the Senate in their own chamber is no part of this record. We have to do with the record properly authenticated and sent to us by the Senate, and that record declares that objections to counting the vote of Georgia are not in order. And even if my colleague's account of the transaction be admitted, it only shows that the Senate confirmed the ruling of the Vice-President, and not that they overruled the House.

And now, Mr. Speaker, I have come to the last point I desire to make in this discussion. We have heard it said that there was great excitement here, great turbulence, an unseemly performance, a shameful scene. I admit it, and deplore the fact more than any words of mine can express. But I appeal to the memory and conscience of every man in this House to say who inaugurated the unseemly performance, who began the excitement? What transpired here yesterday in the nature of turbulence? Was it not the theatrical attitude, the ferocity of manner, and the disorderly utterances of those in this House who thought they might, by clamor, uproar, and disorder prevent the execution of the law by the President of the Senate? Did not the shameful scene originate with members who, disregarding the orders of the Presiding Officer, made use of expressions like these:

"Mr. BUTLER, of Massachusetts. I move that this convention now be dissolved, and that the Senate have leave to retire. [Continued cries of 'Order!' 'Order!'] And on

that motion I demand a vote. [Cries of 'Order!' 'Order!' from various parts of the hall.] We certainly have the right to clear the hall of interlopers."

It was language like this; it was a manner and bearing of unparalleled insolence; it was the fell spirit of disorder—that spirit that prefers to "reign in hell rather than serve in heaven," that would bring chaos into this sacred hall, where order and calm deliberation should forever dwell. That, Mr. Speaker, was the spirit which disturbed the harmony and dignity of the proceedings of yesterday's assembly, and I believe that not only the members of this House but the whole country will recognize the debt of obligation they owe to the Speaker of this House, who threatened to use the constabulary force at his command to preserve order in this hall.

MR. MAYNARD. I rise to a point of order. Much that the gentleman has said trenches so nearly upon the line of unparliamentary language, if not transcends it, that I feel I ought to interpose as against my personal friend to save him from the result of the enforcement of the rule.

The SPEAKER *pro tempore*. Will the gentleman point out the language?

MR. MAYNARD. I rose rather for the purpose of interposing my objection to the style of remark the gentleman is indulging in. I withdraw the point of order.

MR. GARFIELD. As an exhortation to prudence of speech in this presence the remarks of my friend will be always welcome. But after six years' service on this floor, during which time a point of order for the use of unparliamentary language was not only never sustained but never made against me, I trust I shall not disturb any friend with the fear that I may forget the decorum which becomes this place.

MR. MAYNARD. It is to save my friend from interruption that I made the suggestion.

MR. GARFIELD. I did not feel myself in danger before, and certainly after the kind suggestion of my friend I am doubly armed. Indeed, more; for

"Thrice is he armed who hath his quarrel just."

I was only saying that if there was disorder in this House, if there was an unseemly exhibition here, I think the House cannot be slow to discover its source. Mr. Speaker, I did not rise to make a personal defense of the President of the Senate, but only to say, as I now say in conclusion, that had he acted otherwise than he did, had he been prevented from the performance of his high duty by any course of intimidation, coercion, or unseemly clamor, and had we in consequence found ourselves in chaos after the 4th of March next, with no President-elect, I do not think, sir, that the people of this country would find it difficult to point out the origin of that measureless disaster.

And now, Mr. Speaker, speaking in behalf of all who oppose this violent and unjustifiable measure, I move that the pending resolution be laid on the table.

MR. SPALDING. That is right.

MR. BUTLER, of Massachusetts. That is the meanest act I ever knew any mortal man to do.

MR. INGERSOLL. We will vote it down.

MR. GARFIELD. The motion I have made has but indicated my own wishes in the matter. As many of my friends desire further discussion, I withdraw the motion.

MR. LOGAN obtained the floor.

MR. LOGAN. I have the floor, and I will not yield for any interruption. I yield a portion of my time to the gentleman from Massachusetts, [Mr. Butler.]

The SPEAKER *pro tempore*. How much time?

MR. LOGAN. I yield to him for the present for fifteen minutes.

MR. INGERSOLL. It is generally understood that members are assigned the floor for the purpose of addressing the House according to a list that is made out and kept by the Speaker. Now, I desire to inquire, if that is the rule or order of our proceedings, how my colleague [Mr. Logan] obtained the floor to the exclusion of myself and my colleague [Mr. Bromwell] who are on the list? I would like to know. That is all.

MR. LOGAN. If the Chair will allow me a moment—

The SPEAKER *pro tempore*. The Chair does not entertain that as a point of order.

MR. LOGAN. I wanted to save the Chair from having to answer such questions. I got the floor for the reason that I caught the Speaker's eye first, as the rules of the House require.

MR. INGERSOLL. Then let us not have any list at all. [Cries of "Agreed."] It is a farce.

MR. BROMWELL. I would like to know, as a matter of information interesting to myself, whether the Chair goes by the list or not?

MR. LOGAN. I do not yield to the gentleman. I yield to the gentleman from Massachusetts.

MR. BUTLER, of Massachusetts. I trust, Mr. Speaker, this very grave matter of constitutional law and the privileges of this House, which, though it can have no present effect upon the order of business and the action of the Government, excites such unwonted sensibility in the House, we shall proceed to consider with that care, that calmness, and that candor which its importance demands. The question before the House is one compounded of fact and of law. To the facts I shall not speak. They

are known to and in the memory of every member. To the law I propose to address myself in such degree as I may. And now let me ask the House to pardon me if I do not reply to these unprovoked personal assaults upon me in the course of this debate. The House knows I have never begun a personal attack upon any member, but if I am pressed too far I will reply, and in a way that I have done on one occasion, and which I had hoped would have forever relieved me from such assaults. I was once told upon this floor that I had voted fifty-seven times for Jeff. Davis in order to lessen my standing with the members of the House and to provoke me to controversy. I returned that assault in such a manner that I thought the same man would never make another upon me; and I make it a rule in life never, unprovoked, to begin personal controversy.

In answer to the declamation in this case let me say the gentleman from Ohio [Mr. Bingham] has again made that splendid rhetorical display about "anarchy," which has neither heart to feel or a soul to be saved; that starry declamation about the "gathered wisdom of a thousand years," [laughter;] the "land drenched in blood of millions of your sons" and "dotted all over with their graves." [Laughter.] I only reply that I always did like that speech. [Much laughter.] And if everybody else likes it as much as I do, and we are to have it upon all proper occasions, perhaps I ought say no more about it. [Laughter.] To my friend from Ohio, [Mr. Garfield,] who, smarting a little under the failure of his defense of the Regular Army, has chosen to arraign my motives and send me to the country branded in parliamentary language as being actuated with the "spirit of hell," I have only to say "out of the abundance of the heart the mouth speaketh." [Great laughter.]

Waiving all that is personal and does not elucidate the question, let me draw attention to the law which governs the momentous power of counting and declaring the election of a Chief Magistrate of the first power on earth. It is this: The Constitution of the United States, by an original article, the second, if I mistake not, provides that upon an occasion like that of yesterday "the President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates, and the votes shall then be counted." The twelfth article of amendment has precisely the same provision, in precisely the same words, and no more; so that the gentleman from Ohio [Mr. Shellabarger] was not, as usual, correct this morning in saying that this provision was changed because of the trouble in the election between Jefferson, Burr, and Adams.

MR. SHELLABARGER. That is what was stated by Justice Story.

MR. BUTLER, of Massachusetts. I do not care what Justice Story states; the Constitution shows what the fact is.

MR. SHELLABARGER. It is a matter of history.

MR. BUTLER, of Massachusetts. I am never inclined to pin my faith upon the opinion or actions of any one man. God gave me my own reason to guide me and my own eyes to inform me. And because a man who is dead has asserted a given proposition, that alone does not compel me to believe it. The living may be as able to judge for themselves as the dead to judge for them.

The law is that the President of the Senate shall open *all* the certificates, and then the votes shall be counted in the presence of the two houses. Now, I apprehend there is no better and no more just rule of construction of constitutional or other law than that where power is expressly given by law to an officer to do a certain thing only, that power is limited, and a further power to do another thing not expressly conferred upon him cannot be given by intendment, and the very conferring of the power with a limit excludes such intendment. Now, the Constitution gives the power to the President of the Senate to open the certificate of the votes, because, being required to be transmitted to him, he has them in his custody. There it stops, so far as the President of the Senate is concerned. The Constitution then goes on to say that the "votes *shall* then be counted," and all this is to be done in the presence of the two houses. Why? My friend from Ohio [Mr. Shellabarger] says that it is in order that the two houses may be witnesses that it is done rightly. Exactly so. I agree with him. But if it is done wrongly, what is the remedy? If the President of the Senate may do in this matter as he pleases, as is now claimed to be the law, and we cannot help ourselves, whether it be as the great constitutional duty, wrongly or rightly, why, then, should the Constitution compel us to stay here as witnesses to a wrong with the committing of which we have neither the power or right to interfere? Are we thus compelled to sit here poor, inanimate witnesses, voiceless witnesses, powerless witnesses, incapable for good or ill? Although our position is claimed to be so poor, so degrading, yet the Speaker tells us that we were here as a House, in full vigor, with power even to order, through our Presiding Officer, the arrest of its members—the highest exercise of the power of the House. And the Senate was here likewise, by the provisions of the Constitution, as a Senate, with its Sergeant-at-Arms, to carry out its high behests, and arrest, it may be, its own members.

Why does the Constitution bring the two great legislative bodies of the nation together in their legislative capacity upon so solemn and great an occasion as the final

choice of the Chief Magistrate if it leaves them so impotent for good and so powerless to prevent evil, and so great an evil that the Senate and House must sit palsied by while the "foundations of the great deep" of our Government may be broken up and the land deluged in anarchy, with all its fearful and bloody consequences, because of the mistakes, perversity, or corruptions of a single man, who may himself aspire to the place from which by his own wrong he ejects the choice of the people?

Now, it is said, though if it were true in view of such a constitutional dilemma it would not alter my opinion upon the subject, that Chancellor Kent has given an opinion that the President of the Senate only is to count the votes. But what are his words? He only says—I presume it may be so considered—in commenting upon this part of the Constitution. Well, he gives neither a judicial opinion or any opinion at all. Justice Story says: "It is a *casus omissus*; the Constitution does not state who shall count the vote." So I bring Chancellor Kent and Justice Story in direct opposition, and thus dismiss them upon this point.

Now, where does the Constitution place us? We are placed here in joint convention to count the votes, or, what is the same thing, to see that they are justly and correctly counted. It is a power given by the Constitution, operating *ex proprio vigore*, to do an act of government. Therefore, all the power necessary to execute the power is also conferred. It is familiar law that when any power is given by law to any officer or body, all the powers incident to and necessary to carry out the power granted is also granted. Among those powers in the present case is a power in the two houses sitting in convention to preserve order, to establish rules for its own government, and to guide its deliberation; for being an aggregate body, or in any view composed of aggregate bodies, to determine questions for itself by deliberation. A part of that power is exercised by the House and a part by the Senate, whether in an aggregate body or separated opinion is divided. One theory is, and that theory seems to be generally entertained, that the Senate, being a smaller body than the House, ought not to be compelled to come into the convention to be overshadowed by the larger body in a *per capita* or aggregate vote. But that proposition is by no means a settled or ascertained one.

But, however that may be, whether we exercise that power separately or conjointly, apart from each other or in conjunction with each other, the power is given to the convention to preserve order, determine questions for itself, and to settle all other questions necessary to execute its work as a constitutional body. That, beyond all doubt, in my judgment, is the power given us by the Constitution as incident to the performance of the duty enjoined upon us, and that in its execution the Republic shall receive no detriment. If we can neither preserve order nor deliberate, nor examine, nor determine any question, how are we to find out what are the votes we are to count or to see counted? Suppose that upon the reading of a certificate I rise and object, saying: "Why, sir, that certificate is forged, and I have the evidence here." "But," says the President, "I cannot hear that. Don't you know the concurrent resolution will not permit us to examine this question, or I alone can judge of that, and I am without power to summon a witness?" I ask this House what we are to do in such a case. How are we to hear evidence, if necessary, if we have no power? I say, "I know that certificate is forged." Another gentleman says, "I know it is genuine;" and there is a conflict. Are we to count the votes certified by such certificate without determining anything about the genuineness of the certificate?

Again, sir, a question may arise: by whom is the certificate given? To be valid it must be the certificate of the electors. How are we to know that they were electors? To be legal electors they must be elected under certain constitutional forms and on a certain day. Must we not have all power necessary to ascertain such facts without the knowledge of which no action ought or can be had? Now, we have adopted a joint rule, the twenty-second joint rule—a rule which, whoever drew it, is in my judgment very badly worded and wanting in very many particulars for the conduct of business of the convention. But that twenty-second joint rule is not unconstitutional. So far as it relates to the conduct of business I have never said it was; for that rule determines what we have a right to determine, the mode of doing business in convention, the manner in which we shall exercise our power. We have a right under the Constitution to exercise our power in any manner we choose, either together or separately, provided it be not done in contravention of the Constitution.

The rule carefully provides that when an objection is made the two bodies shall separate and deliberate upon that objection. Either the Senate or the House must retire; for we might meet with the Senate in the Senate chamber if it were thought best. The object of the rule is that the two bodies should separate and each deliberate separately. But their determination is to be reported to whom? To the joint convention, to the President of the Senate sitting in the joint convention, and when they take form of conjoint deliberations they determine the question. The determination of the House alone amounts to nothing; the determination of the Senate alone amounts to nothing until they are brought in and become the action of the joint convention. When they are brought in and ruled, then we act in convention. The two bodies

having deliberated separately, the result is reported to the joint convention, and we act thereupon as a convention.

There is another point to be considered. I said, and I repeat it—although I have been denounced as “revolutionary”—that I do not think that concurrent resolution worth the paper it was written on. Why? For two reasons. In the first place, it undertakes to alter the Constitution. The Constitution provides that the vote of all States shall be counted; and we have no right in any way to abridge, alter, or amend that provision. Some of my friends ask just here, “Why, then, did you vote that the vote of the State of Georgia should not be counted?” Because I held that it was no vote; that it was not the expression of the will of the people of any State; that Georgia was not a State within the meaning of the Constitution, and had not voted accordingly to the constitutional requirement. For I agree with the gentleman from Ohio [Mr. Shellabarger] that by all fair intendment of law it is as necessary for the electoral colleges to assemble and vote on the same day appointed by law as it is that the people who elect them should vote on the day fixed by the Constitution. As great evils would follow the omission of the one requirement as the other. We cannot by concurrent resolution of the two houses alter the day on which the electors shall meet, that being fixed by law as well as the intendment of the Constitution. Certainly we cannot by such resolution alter the Constitution. We ought not if we could, and we could not if we would.

Again, we cannot, by concurrent resolution, say before the meeting of the joint convention which votes shall and which shall not be counted, because in so doing we arrogate to ourselves a duty and a right which the Constitution has given to the two houses acting together, and which cannot be exercised except when sitting as component parts of a joint convention.

[Here the hammer fell.]

Mr. BUTLER, of Massachusetts. I hope the gentleman from Illinois [Mr. Logan] will give me a little more time.

Mr. LOGAN. I give the gentleman ten minutes longer.

Mr. BUTLER, of Massachusetts. It is pretty hard, Mr. Speaker, to argue a great question of constitutional law with one foot in the stirrup, but I will go on as well as I may.

Mr. LOGAN. I will give the gentleman fifteen minutes. That will make half an hour altogether.

Mr. BUTLER, of Massachusetts. I do not mean to question the courtesy of my friend. I am very grateful for it. I am only stating how I am embarrassed by the limitation of time in the discussion of a great question like this.

Now, that being the state of the law if I am right in the argument, we stand here. When we come together we must have some means of conducting our business. How are we to get out of convention when we have once assembled? The first question is whether we have the means. Suppose the Senate do not choose to leave, may we not adjourn? If we cannot they may keep us here always. Do they have any more right, if we give them the use of our seats, than if they gave us the use of their seats? If we get in there can we stick, and can they not get rid of us if they desire to deliberate? Can they come in here and stick if we act here as two bodies and both desire to adjourn at one time? Shall we have the yeas and nays called in both houses here together at one time? Clearly not. Yet we must have equal rights. We are co-equal—no, I deny that fact in the broadest sense; for there is no power the equal to that of the representatives of the people when assembled in legislative capacity. That is higher than all. Is it possible that the Senate have the right to go into the Senate Chamber and determine an objection taken or a motion made and determined in the course of a joint business by a co-equal branch of this Government and co-equal branch of the convention, is out of order and shall not be entertained, and then can come here and force that upon us? Can that be the wisdom of our fathers as expressed in the Constitution, or, as the gentleman from Ohio [Mr. Bingham] more eloquently might have said, “the gathered wisdom of a thousand years?” Can it be that the Constitution provides no better than that for the transaction of so grave business? When we have the power we have the right.

Mr. LOGAN. I understand that a rule of the House was made that at half past four we should adjourn to meet at half past seven this evening. I was not aware of that fact, and inasmuch as the time of the gentleman from Massachusetts will bring us down to that time, I move that we shall dispense with the rule for a session this evening.

Objection was made.

Mr. SHELLABARGER. I ask the gentleman to yield to me for a question.

Mr. BUTLER, of Massachusetts. I yield to the gentleman, as he always puts his questions as a scholar and a gentleman seeking for the truth. I wish I could say as much of everybody putting questions.

Mr. SHELLABARGER. I thank the gentleman for his kindness, and my only object is to get at the interpretation of the law, and in that respect I desire to have the bene-

fit of the gentleman's learning. What I stated about this joint rule was that, if the construction I put upon it was the correct one, then, in my judgment, it was unconstitutional. As I understood the construction put upon the rule, and which, if it be the true construction, I maintain the rule is unconstitutional, is that every vote of a State could be objected to, and on that question the rule required that each house should act separately and not try it in any other way. Then it provided that unless they agreed separately to the same thing the vote of the State objected to should not be counted. If that were a correct interpretation it would be in the power of either house to throw out the vote of any State, and to decide that that vote could not be counted.

Mr. BUTLER, of Massachusetts. I will answer the question of the gentleman which he has so clearly and properly put. This is it: the two houses may determine each for itself separately, but they must come into joint convention and make that determination of the convention just precisely as a jury may retire from court and deliberate on their verdict and make it up, but it has no validity until after it has been declared in the court. The rule says that the deliberation must be done separately, but the Constitution compels joint action in counting the votes, so that the final action must be when the houses are together, however they may have settled what that action shall be. The deliberation is to be done separately and the decision is to be made jointly. Now, let me examine the concurrent resolution a little further. Suppose the power is given to the two houses by the Constitution to count the votes in convention—and I wish to call the attention of the House to it, for it is vital—can that power be regulated and put in execution through the means of a concurrent resolution? I now mean a concurrent resolution not approved by the President, and therefore I answer the whole argument of the gentleman from Ohio, [Mr. Bingham,] if that argument can be called where argument is not, when he declares in such brilliant sentences that proposition is revolutionary because it contravenes the law, and this resolution is the law.

There is no law made by the Congress of the United States except made by the Senate and by the House and approved by the President, or passed over his veto. The Constitution vested in Congress the power by law to carry out all the powers vested in any branch of the Government necessary to carry out the provisions of that Constitution, and not by concurrent resolutions, not by joint resolutions of the two houses only, but by an act in which both houses concur and which receives the approval of the President, or which, not receiving his approval, is passed over his veto by two-thirds of both branches. Therefore that concurrent resolution had not any power here. But it has been supposed that this resolution has something personal to the Presiding Officer of the Senate.

Now, let me here say—and I say it in all directness and sincerity—there is no man in this nation who has a higher appreciation, a greater love, or more faith and confidence in the President of the Senate, a gentleman who is known all over the country by the endearing name of honest old Ben Wade, than I have. That man, standing there yesterday, of himself and from himself would never take away the rights of this House nor those of a single human being. But it was because he was acting under a pernicious resolution deciding for us a point of order, which was passed, how and by whom, parliamentary courtesy will not allow me to say, and as the month-piece of those who passed and who are encroaching upon the rights and privileges of this House day by day. Members of the House of Representatives, do you know that to-day the Senate of the United States have entertained a resolution to ensure a majority of your members for what was done in this House yesterday? I think this would be a good time to pass it, that we might be aroused to the danger that the country is in of being governed by an oligarchy. The Senate have entertained such a resolution, as I am informed.

Mr. FARNSWORTH. Does the gentleman think that to be any worse than for the House yesterday to entertain a resolution of censure of the Senate?

Mr. BUTLER, of Massachusetts. I am by no means proposing to censure the Senate. I am maintaining the rights and privileges of this House, of the representatives of the people, which were invaded here by the action done yesterday. I mean to say I do not believe Mr. Wade did it for and of himself. He was the month-piece of somebody, and parliamentary courtesy forbids me saying what, and I do not say it.

Now, then, having determined what our rights are, I want to come directly to the resolutions, which I have modified so that I hardly think they can be objected to by anybody, and yet give up no right. I send them to the Chair and ask the Clerk to read them.

The Clerk read the modified resolutions, as follows:

Resolved, That the House protests against the manner of procedure and the order of the President of the Senate *pro tempore*, in presence of the two houses, in counting the vote of Georgia in obedience to the order of the Senate only, and against his acts dissolving the convention and the two houses at his own will, as an invasion of the rights and privileges of this House.

"Resolved, That the above resolution be, and hereby is, referred to a select committee of five, with leave to report at any time, and report by bill or otherwise."

Mr. BUTLER, of Massachusetts. Now, Mr. Speaker, what exactly is the proposition before the House? It is a resolution declaring that in our judgment our privileges were so much interfered with by what was done in the convention yesterday that we protest against such action, and ought to examine into it, and that we will refer it to a committee for that purpose. That is all there is of the proposition. Now, what is there in it to complain of that gentlemen should have attacked me so vehemently? My friend from Ohio [Mr. Shellabarger] says this House has no privilege of any kind in that convention save to sit by as witnesses. If that is so, then the resolution is wrong and useless. I agree we must stand on that or stand nowhere, because the Senate, by the act of the Presiding Officer, has treated us exactly as though we had no privileges. Therefore, it is a logical conclusion, a fair and just conclusion of the gentleman from Ohio [Mr. Shellabarger] that we had no privilege here. He must come to that to sustain the action of the Senate and its officer yesterday.

Now, I insist that we have high privileges as a portion of that convention, and they were given us for a great and useful purpose, and therefore I insist on this motion in order that hereafter, with a divided country, a divided vote for President, we may not have anarchy and civil war. I insist that we have rights and privileges here of the highest import, and that we should send this matter to a committee to ascertain and declare them and propose some legislation on the subject which may in the future avert danger from the country. And in that I am sustained by the gentleman from Ohio, [Mr. Garfield,] who says he thought it of so much importance that he sent out last year to the Committee on the Judiciary, and it is sent there now because they have not had time to consider it, and perhaps no one has brought it to their attention. But now that this matter is before the House and before the country, independent of all feeling, laying aside all the hard words that have been used about it, and doing everything, as I always try to do as far as I can, for the good of the country, I conjure the House of Representatives to send this question to a committee that can report at any time, as the Judiciary may not, in order that we may have legislation to define our rights and the rights of the Senate, so that this thing which happened yesterday may never happen again.

Whether I am responsible for the scene here yesterday or not, if its results are that we have legislation to sustain and fortify this part, which every man upon this floor knows to be, as Judge Story and Judge Kent both say, is the weak spot in our Constitution; if the result of the scene of yesterday shall be that now when there is no presidential election pending, and when there can be no possible motive for us to do wrong, but every motive to do right and to do the best for the country; if by that scene or by anything that has occurred we have so attracted the attention of the country, so attracted the attention of the House, and so attracted the attention of the Senate to this great defect in our Constitution, which the Speaker has characterized as *casus omissus*, can be remedied; if this committee, of which I hope the gentleman from Ohio [Mr. Shellabarger] will be one, can devise legislation which shall save the country from revolution in its hour of future peril, then I shall have deserved well in what I have done and all I have done in this behalf in my own conscience and in my own heart, whatever either of praise or blame may be accorded me by others, for I shall have aimed to throw around the Constitution safeguards and buttresses to render it stronger forever, and there will have arisen a great good out of the "spirit of hell," in whatever heart it may have been found.

Mr. LOGAN. I now yield five minutes to the gentleman from New Hampshire, [Mr. Benton.]

The SPEAKER *pro tempore*. The Chair will state that in three minutes from now the House will take a recess.

Mr. LOGAN. Well, I yield the gentleman that time.

Mr. BENTON. I have no time in three minutes to make any argument in this case, but it seems to me, although there is a disagreement between skilled and able gentlemen here, that there ought to be but little disagreement in this House as to the propositions advanced by the gentleman from Massachusetts. How was it, Mr. Speaker, yesterday, when the House was called upon to vote? When the question was submitted to the House a vote of 150 was recorded that that concurrent resolution was not binding upon the House.

It was true that after the return of the Senate the Presiding Officer notified the joint convention that the Senate had overruled the objection taken by the gentleman from Massachusetts, and upon that proceeded to direct the votes to be counted and declared. Now here was not a question of order, but a question of substance as to the extent and effect of that concurrent resolution, and upon that question the Senate were upon one side and the House upon the other. Was it for the Senate to declare that they were right and that the House was wrong? That was the effect of what they did. And was not the declaration of the Presiding Officer, declaring that that objection was not well taken and was overruled by the Senate, a proceeding calculated to alarm and

startle and excite the members of this House; and if there was excitement here on that occasion, was there any great cause of complaint or censure from any quarter? Was it not an exercise of authority on the part of the Senate over the House? I know there are many members of the House who, when they find their opinions are disagreed to by the Senate, become very weak and docile and ready to be instructed and directed by the Senate.

[Here the hammer fell.]

The House here took a recess until evening, when the following proceedings were had:

ELECTION OF PRESIDENT, ETC.

MR. ASHLEY, of Ohio. I ask unanimous consent of the House to have printed some amendments which I have prepared and propose to offer to the amendment of the Senate to the joint resolution proposing a constitutional amendment, recently passed by the House. That subject will soon come before the House, and I desire to have these amendments printed. The first amendment I have prepared is the one I prefer. If I cannot succeed in that, I then propose to offer the second amendment in lieu of the sixteenth article of amendment proposed by the Senate as preferable to the one they propose.

No objection was made; and the order to print was accordingly made.

The first amendment proposed by Mr. Ashley, of Ohio, is as follows:

"Amend section three of article one, by striking out clauses four and five, which read—

"The Vice-President of the United States shall be President of the Senate, but shall have no vote, unless they be equally divided.

"The Senate shall choose their other officers and also a President *pro tempore*, in the absence of the Vice-President, or when he shall exercise the office of President of the United States.

"And insert the following:

"The Senate shall choose their own presiding and other officers.

"In article two, section four, strike out the words 'Vice-President.'

"Amend section one, article two, by striking out the words 'together with the Vice-President chosen for the same term;' so that it will read—

"The executive power shall be vested in a President of the United States of America; he shall hold his office during the term of four years, and be elected as follows.

"In lieu of clauses two, three, four, and six of article two and of article twelve of the amendments insert the following:

"The qualified electors shall meet at the usual places of holding elections in their respective States on the first Monday in April, in the year of our Lord 1872, and on the first Monday in April every four years thereafter, under such rules and regulations as the Congress may by law prescribe, and vote by ballot for a citizen qualified under this Constitution to be President of the United States, and the result of such election in each State shall be certified, sealed, and forwarded to the seat of Government of the United States in such manner as the Congress may by law direct.

"The Congress shall be in session on the third Monday in May after such election, and on the Tuesday next succeeding the third Monday in May, if a quorum of each house shall be present, and if not, immediately on the assembling of such quorum, the Senators and members of the House of Representatives shall meet in the Representative Chamber in joint convention, and the President of the Senate, in the presence of the Senators and Representatives thus assembled, shall open all the returns of said election and declare the result. The person having the greatest number of votes for President shall be the President, if such number be a majority of the whole number of votes cast; if no person have such majority, or if the person having such majority decline the office or die before the counting of the vote, then the President of the Senate shall so proclaim; whereupon the joint convention shall order the proceedings to be officially published, stating particularly the number of votes given for each person for President.

"Another election shall thereupon take place on the second Tuesday of October next succeeding, at which election the duly qualified electors shall again meet at the usual places of holding elections in their respective States and vote for one of the persons then living having the highest number of votes, not exceeding four, on the list voted for as President at the preceding election in April, and the result of such election in each State shall be certified, sealed, and forwarded to the seat of the Government of the United States as provided by law.

"On the third Tuesday in December after such second election, or as soon thereafter as a quorum of each house shall be present, the Senators and members of the House of Representatives shall again meet in joint convention, and the President of the Senate, in presence of the Senators and Representatives thus assembled, shall open all the returns of said election and declare the person having the highest number of votes duly elected President for the ensuing term.

"No person thus elected to the office of President shall thereafter be eligible to be re-elected.

"In case of the removal of the President from office by impeachment, or of his death, resignation, or inability to discharge the powers and duties of the said office, the same shall devolve temporarily on the member of the executive department senior in years. If there be no officer of an executive department, then the Senator senior in years shall act until a successor is chosen and qualified.

"If Congress be in session at the time of the death, disability, or removal of the President, the Senators and Representatives shall meet in joint convention under such rules and regulations as the Congress may by law prescribe, and proceed to elect by *viva voce* vote a President to fill such vacancy. Each Senator and Representative having one vote, a quorum for this purpose shall consist of a majority in each house of the Senators and Representatives duly elected and qualified, and a majority of all the votes given shall be necessary to the choice of a President. The person thus elected as President shall discharge all the powers and duties of said office until the inauguration of the President elected at the next regular election.

"If the Congress be not in session, then the acting President* shall forthwith issue a proclamation convening Congress within sixty days after the death or disability of the President.

"On the assembling of a quorum in each house, the Senators and Representatives shall meet in joint convention and elect a President as hereinbefore provided.

"All questions arising during the sessions of the joint convention shall, on the demand of one-fifth of the Senators and Representatives present, be determined by yeas and nays, and the names of the persons voting for and against any proposition shall be entered on a journal to be kept for that purpose, and the Clerk of the House of Representatives shall be the clerk of the joint convention."

The second amendment is as follows :

"The qualified electors of the United States shall, on such day as the Congress may by law appoint, meet in their respective States at the usual places of holding elections, and vote by ballot for President and Vice-President of the United States, one of whom shall not be an inhabitant of the same State with themselves.

"The legislatures of the several States shall be in session on or before the second Tuesday in January next succeeding such election, and shall in such manner as the Congress may by law direct, canvass the returns of the election for President and Vice-President in said State, and divide the whole number of votes cast by the number of Senators and Representatives to which such State may be entitled in Congress, and the product of such division, rejecting fractions, shall be the ratio for one elector. The legislature shall thereupon appoint the number of electors to which the State is entitled, taking care to secure to each of the candidates voted for in the State an equitable representation, as near as may be, in the electoral college, as indicated by the number of votes returned for each candidate, and the electors thus appointed shall vote for one of the candidates named for President and one of the candidates named for Vice-President on the ballots cast by the qualified electors of the State at the general election."

IN THE HOUSE OF REPRESENTATIVES, *February 12, 1869.*

QUESTION OF PRIVILEGE.

The SPEAKER. The House resumes the consideration of the question of privilege pending at the close of the morning session yesterday, being the resolutions offered by the gentleman from Massachusetts, [Mr. Butler.] The gentleman from Illinois [Mr. Logan] is entitled to the floor.

Mr. LOGAN. I yield a few minutes to the gentleman from New Hampshire.

Mr. BENTON. The questions which arise in this discussion are not personal or partisan, but such as involve the rights, powers, and duties of both the Senate and the House. We should therefore divest our minds of all mere personal considerations. We are not to consider whether we shall vote one man up or another down, but ever and under all circumstances we should so vote and act as to uphold principle and vindicate the right. I quote the only provisions of the Constitution affording us any light upon the subject :

"Each State shall appoint in such manner as the legislature thereof may direct a number of electors equal to the whole number of Senators and Representatives to which the State may be entitled in Congress.

"The Congress may determine the time of choosing the electors, and the day on which they shall give their votes, which day shall be the same throughout the United States.

"The President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates, and the votes shall then be counted."

Who is to count the votes, and who has authority to decide whether the votes were

cast according to requirements of the Constitution, and therefore whether or not they should be counted? It is now claimed by those who can see nothing objectionable in the course of the President of the Senate that by the fair interpretation of the Constitution the President of the Senate alone has that power, and that in the exercise of it he is in no manner subject to the control of the Senate and the House.

Now, that position is manifestly an afterthought, and one directly in conflict with the action of both the Senate and the House in providing how the vote of Georgia should be counted or disposed of. The concurrent resolution provides how the vote of Georgia shall be counted or not counted, which the President of the Senate claimed he was bound to execute or adopt as his rule of action.

Now, it was claimed on the part of the House that there was a constitutional objection which was not known at the time of the adoption of the joint resolution, that did not admit of the vote of Georgia being counted, inasmuch as the requirements of the Constitution as to the time when the vote should have been cast were not complied with, the delegates voting as was proper according to the confederate and not Federal Constitution, as is said.

The gentleman from Ohio [Mr. Shellabarger] interprets the provision of the Constitution as to the time when the electors should meet and vote on the same day throughout the United States as not directory, but express and imperative, which there can be little question is the true construction; therefore the vote of Georgia could not be counted without disregarding the Constitution. If, then, the concurrent resolution in regard to counting the vote of Georgia was in conflict with the Constitution, which was to be regarded or obeyed, that or the Constitution?

But it is claimed that the House were estopped from objecting to the vote of Georgia being counted by the express terms of the resolution adopted by the House as well as the Senate as to how the vote of that State should be treated. The House, however, did not so interpret the force and extent of this resolution, for when the ground of objection disclosed by the papers was taken, the House voted against the vote being counted at all, (including both Mr. Bingham and Mr. Shellabarger.) Then here was a plain case of conflict of opinion between the Senate and the House; and without reference to the question which was in the right, was it not an assumption of power which a co-ordinate branch could not exercise, for the Senate to attempt to decide that the House was bound to assent to the counting of the vote under any and all circumstances; and was it not a high-minded proceeding on the part of the President of the Senate to cut the Gordian knot by forcing the count through in utter disregard of the objections, remonstrances, and protests of the House? I ought to say perhaps, in justice to Mr. Bingham, that he voted to reconsider the vote declaring that Georgia should not be counted.

To avoid the difficulty and danger of a conflict between the Senate and the House, or an erroneous decision, if acting together as a joint convention, does not the gentleman from Ohio [Mr. Shellabarger] go to the more dangerous extreme when he contends that the Constitution vests the power to determine what votes shall be counted and what rejected in the President of the Senate alone? Was the presiding officer of any other body ever before claimed to be anything more than the organ or executive of the body over which he was called to preside, and his chief duty to execute and not defeat its will? And is it not a bold assumption to claim that the framers of the Constitution ever intended to lodge the vast power in the hands of any one man to pass upon the validity of an election so vital to the very existence of the Government, so that by interpretation or construction he could make and unmake Presidents? I so declare it, as I am justified in doing by the action of both branches of Congress, as well as the recorded votes of one hundred and fifty members of this House, the immediate Representatives of the people.

MR. LOGAN. I yield a few minutes to the gentleman from Vermont, [Mr. Woodbridge.]

MR. WOODBRIDGE. It seems to me, Mr. Speaker, that this entire question lies within a very narrow compass. Section 1, article 2, of the Constitution, and the twelfth amendment, in respect to counting the electoral vote, are identical in language, and each provides that the President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates, and the votes shall then be counted. Not that the President of the Senate shall count the votes, but that he shall open the certificates in the presence of the two houses. Having done this, his power in the premises, under the Constitution, is expended. Here is a grant of power, an imposition of a duty, and the question is, how is this power to be exercised? How is this duty to be performed? It is a well-recognized principle that with a grant goes, as a necessary incident to it, the power to do that which may be necessary to put in execution and carry out the duty imposed by the grant. The twenty-second rule is merely the machinery whereby the constitutional provision or duty is executed. The rule may be wise or unwise, cumbrous or facile. It is nevertheless, having been adopted by the action of both houses of Congress, binding and valid until repealed,

and is not, in my judgment, obnoxious to the criticism of the learned gentleman from Ohio, [Mr. Shellabarger,] as being repugnant to the Constitution.

Now, sir, why does the Constitution provide that the President of the Senate shall open the certificates and that the votes shall be counted in the presence of the Senate and House of Representatives? Is it merely for a pageant? Is it merely for the purpose of giving dignity to the procedure? I think not, sir. Some higher and more practical purpose must have actuated the men who framed our Constitution. What was it? In my judgment, sir, it was that the legislative body of the nation might see to it that the votes were properly and fairly counted. Were the legislative body spectators only, then, sir, the President of the Senate might pass upon the formality or informality, the legality or illegality of the certificates, and for aught I can see his judgment would be supreme, and to him would be left the election of President and Vice-President. The illustration, sir, may be extreme, but I cannot see that it is untrue or illogical.

Then, sir, the two houses being present in joint convention for some purpose, they must have some power, and the question arises, what is that power? Under the Constitution, which is silent upon the subject, it must necessarily be limited, extending only to the establishment of such rules of procedure as will give full, fair, free, and lawful play to the execution of the duty which the Constitution imposes. Hence, the rule was established that upon the reading of a certificate a member may object to its reception, and upon a statement of the objection the two houses shall by themselves proceed to consider it.

Now, sir, while I consider the mode in which the objection must be considered, as prescribed by Rule 22, unwise and cumbersome, and perhaps, I may say, by a possibility disastrous in its consequences, I cannot see that it is in conflict with the Constitution. It is, to say the most of it, only the exercise of what I conceive to be a necessary power in an unfortunate manner. But, sir, passing from the rule, I will for a moment consider the joint resolution. I deem that resolution unnecessary and unwise, and had I been in my seat on the evening when it passed the House I should have voted against it.

The joint resolution in its preamble recites that which, respecting the condition of the State of Georgia, would render the certificate of her election void. The gentleman from Massachusetts admits this, but, as I understand him, claims that there were objections not included in the preamble, and hence that his point was well taken and should have been entertained by the Presiding Officer, and that the action of the Senate and of the President thereof upon the return of the Senate to this hall was a violation of the high privilege of the House and an infringement upon its prerogatives. Sir, there was one error and one misfortune in the acts of the Presiding Officer. The error was that he entertained at all the objection of the member from Massachusetts, and requested the Senate to retire. The misfortune was that when he resumed the chair he did not, in the exercise of that graceful snavity which adorns our Speaker, announce that his decision was erroneous, retract it, and proceed with the count. But, sir, I judge that "*suaviter in modo*" is not equal to "*fortiter in re*" in the character of the brave old statesman.

No one, I think, will deny that Congress had the constitutional power to pass the joint resolution. It received the sanction of the vote of the gentleman from Massachusetts. The statement in the preamble was sufficient, in his estimation, to reject the electoral vote of Georgia. In spite of that fatality he voted to receive the vote under certain circumstances prescribed in the body of the resolution. But he claims to have discovered another fatal defect; and while with one perfectly fatal defect he was willing to receive the certificate and count the vote, he was unwilling to do so with two fatal defects, and hence all this unfortunate, and, I may say, disgraceful collision between the two branches of Congress. But, sir, there is another point. The language of a bill or resolution which is so explicit that it will bear but one construction is not to be governed by the language of the preamble. The joint resolution asserts in direct and positive terms that—

"On the assembling of the two houses on the second Wednesday of February, 1869 for the counting of the electoral votes for President and Vice-President, as provided by law and the joint rules"—

Thereby recognizing the validity of the joint rule providing for the reception and counting of the electoral vote—

"if the counting or omitting to count the electoral votes, if any, which may be presented as of the State of Georgia shall not essentially change the result, in that case they shall be reported by the President of the Senate in the following manner: were the votes presented as of the State of Georgia to be counted, the result would be, for ——— for President of the United States, ——— votes; if not counted, for ——— for President of the United States, ——— votes; but in either case ——— is elected President of the United States; and in the same manner for Vice-President."

The only question that could arise, the only objection that could by any possibility be entertained, was that the counting of the vote of Georgia changed the result. No one was foolish enough to raise such an objection. The vote of the Senate, when they

had retired, that the objection raised by a member of the House was not in order, was a matter of taste. It may not be proper for me to criticise it; I will only say "*non disputandum est.*" That the decision of the Presiding Officer was correct in ordering the tellers to proceed with the count I have no doubt.

That the decision might have been rendered in a manner more congenial to the nervous nature and delicate sensibilities of my friend before me, and perhaps other gentlemen, I am willing to admit. I do not believe, however, that the Presiding Officer intended to insult the House or encroach upon its prerogatives. And while I think that the action of the Senate in tone and bearing might have been more considerate and respectful, and while I apprehend that often men are somewhat puffed up by the enjoyment of a little brief authority, politeness, and, indeed, truthfulness, compel me to say that on the whole they are entitled to the respect of the gentleman from Massachusetts, who loves a storm, and sometimes impresses me with the idea that he is a revolutionist by instinct, and also that of my excitable friend from Illinois, who apparently could only be restrained by the gentle imposition of the potent hand of the Sergeant-at-Arms.

Sir, I hope such scenes may never be re-enacted upon the floor of this House. To us, who believe that they will end as a farce always ends, they may be of no consequence. To the country and to the world it is far otherwise. The interests committed to the hands of the American Congress are too sacred and too vast to be trifled with. Anarchy, and not consolidation, has caused the downfall of all the republics which have preceded ours. We have tested our strength in the rebellion through which we have just passed. The people are as loyal to liberty as is the needle to the pole. They love the dear old flag as they love the memory of their mothers. Let us beware lest by our example we may teach them that liberty is not always and necessarily linked to law.

Mr. LOGAN. Mr. Speaker, in the few moments I have left I shall not attempt to discuss all the various questions that have been discussed by the gentlemen who have preceded me. I take a somewhat different view of the question from that which has been presented by any of the gentlemen who have spoken. So far as any change that might be made, or that would be proper to be made, in the twenty-second joint rule of the House, I think it would be well to do it, so that a similar scene to the one here enacted may not again occur. I would favor a law that would regulate the counting of the votes for President and Vice-President. I would even go further and say we might do well to provide for the contesting, by either of the parties, the election as in other cases. But in this case I do not propose to discuss that question, nor do I propose to discuss the constitutionality of the rule, or its effect in any particular whatever on the joint convention.

The particular question that strikes me is this: does the resolution that has been offered tend directly or indirectly to pronounce judgment against the Presiding Officer of the joint convention in the way of a censure upon the conduct of said officer? I think it does. I do not mean that such is the intention of the mover; but the resolution bears beneath its verbiage a sting that will have that effect. Now, I have understood this to be a principle of law, and it certainly should be applicable to rules governing this House as well when wrongs are claimed to have been done as where violations of law are claimed to have been perpetrated. It is a rule that where there is no intent or motive discovered to do wrong that there is no crime. So, when there is no intentional violation of a rule, and no act on the part of the party that shows any intention to trample upon the privileges of this joint convention or deliberative body, or upon any of its rules, there is nothing in the conduct of the party that can in any degree justify anything that would smack even of a censure.

Now, sir, as to whether the Presiding Officer of the joint convention did right in receiving the objection made by the gentleman from Massachusetts or not is not a question that I shall discuss. But I think that I would be justified in agreeing with the gentleman from Vermont [Mr. Woodbridge] that the accepting or recognizing the gentleman's motion was the error, if any there was, that was committed by the Presiding Officer. Under the joint rules of the two houses, he perhaps had no right to allow that motion, but inasmuch as it was allowed by him, having committed that error, if error it was, then the question is whether or not afterward a wrong was perpetrated upon the rights of this House, and such a wrong as would justify us in passing a resolution carrying in the remotest degree the sting of a censure which would be felt as such by that noble and venerable patriot, Benjamin F. Wade.

Now, sir, I have not time, nor, as I said, do I intend to discuss all the questions involved in this case. At the conclusion of my remarks I wish to move to lay the whole subject on the table. But inasmuch as there is some little feeling on the subject of my obtaining the floor, I may not do justice perhaps to others in doing so. I will say that if these resolutions shall be withdrawn, then I will not feel called upon to make that motion. If not, I shall make it, and insist upon it. Now, sir, why should we pass a resolution of the character of the one first introduced by the gentleman from Massachusetts? [Mr. Butler.] What reason is there for it? It has no application whatever to a remedy for the wrong complained of. It does not, nor will it, remedy

anything that occurred the other day so that a similar thing shall not occur in future in this hall. No good can come from it, and much harm may be done by its passage. It does in itself—and no man can read it but that will say that it does—carry the censure of this House upon the Presiding Officer of the joint convention. If it is passed we say to the world, to the country, and to our constituents that the Presiding Officer of the joint convention—did what? That he did—not by accident, for that is excusable; not by mistake, for that is excusable in law as well as morals, but by design—that which was intended for the purpose of abridging or trampling upon the rights of the members of this House.

Mr. ALLISON. There are some gentlemen about me who insist that the gentleman from Massachusetts [Mr. Butler] has modified his resolutions since they were originally offered. I have heard of no such modification.

Mr. LOGAN. I do not yield for any purpose of that kind.

Mr. ALLISON. No; but I want to know. I rise to a question of order.

Mr. LOGAN. It is not a question of order.

The SPEAKER *pro tempore*. The Chair does not entertain it as a question of order. Whenever the House is called upon to vote on the resolutions they will be reported at the Clerk's desk.

Mr. LOGAN. Mr. Speaker, when I was interrupted I was discussing the question whether there was anything in the conduct of the Presiding Officer of the joint convention that would justify the action that is asked here of this House. So far as the conduct on the part of members that has been characterized as "disgraceful" is concerned, I have naught to say. I was sorry to witness the scene that I did witness, but I have naught to say about it. It was an exciting time. There was some excuse or palliation for the conduct that we witnessed, perhaps. I did not participate in it, nor did I sympathize with it on either side, nor do I yet. But, sir, you are asked to do what—to censure whom? To censure a man in the sixty-ninth year of his age, a man who is the Presiding Officer of the United States Senate, a man who was the Presiding Officer of the joint convention that counted the votes, and who declared that General Grant was elected President and Schuyler Colfax Vice-President. You are asked to censure a man who has been thirty years in harness, a man who has done duty in the vanguard of liberty and freedom for that time—the old captain of the legions of universal freedom, upon whose head Heaven has showered its bouquets of sunshine, and who stands to-day a great living monument of the advance of this great age. You are asked to stretch forth the blighting hand of censure and wither the flowers that wreath his manly brow, and to place a thorn in the peace of his future existence by passing this resolution, because he unintentionally did what some conceive to be an unintentional wrong.

I ask the members of this House if they are ready to do this. I ask the members of this House if they are ready to assign to ignominy that man who was born a patriot, has lived a patriot, and will die a patriot. I ask the members of the House, before they vote on the resolutions, to cast their eyes on the record of this venerable patriot. What in all his life has he done that was intentionally wrong or that deserves the censure of this House? He has done naught. He stood firm as the adamantine hills; when many trembled for our future, he was one of the great pillars that stood for four years in the United States Senate beneath the rocking and reeling fabric of a mangled and assailed Constitution. He is one of the men who reached out their strong arms and seized the dagger of the assassin as it was about to be plunged into the vitals of the Republic of the United States. Yet, with all these facts before us, we are asked to do what, sir? To vote that that man trampled upon the rights and privileges of this House, not by accident, not by mistake, not through ignorance, but, you must presume, by intention and design.

Now, sir, however much respect I may have for the opinions of men here; however much respect I may have for my friend the learned gentleman from Massachusetts, [Mr. Butler;] however much respect I may have for the opinions entertained by this House as a part of that joint convention, still I say to them that when they ask me to record my vote where it shall stand for all time throwing a dark shade over the sunlight of that old patriot's life, I answer no, sir; never, never. What! Censure this old patriot, who was one of the planters of the great tree of republicanism, whose branches spread out far and wide, and embrace within their ample shade every living being within the confines of this country. He nourished that tree until it is large, until it is broad, until it is tall. And the very moment this tree comes out of the terrible storm through which it has passed, strong and upright, you ask—what? That the leaves thereof shall thicken and cast their shade over the bright sunlight of his former record and obscure it forever. I say that no such announcement must be made from these halls; no such thing shall ever be heard to resound or echo from here, that Benjamin Wade, one of the living patriots of the age, a man loved and admired on account of his honesty, on account of his iron will, on account of his integrity—that he shall have a blight cast upon the fair fame and record he has made from his childhood until the present day.

Mr. KELSEY. Will the gentleman yield to me for a moment?

Mr. LOGAN. For what purpose?

Mr. KELSEY. In the hope that we may have peace. I ask the gentleman from Massachusetts [Mr. Butler] to withdraw the resolutions that he has submitted, and to accept in lieu thereof what I send to the Clerk's desk and ask to have read.

Mr. FARNSWORTH. I object to the reading.

Mr. PRUYN. I have a resolution here which I would like to have read.

Mr. LOGAN. I have no objection to its being read.

Mr. FARNSWORTH. I object to its being read.

The SPEAKER *pro tempore*. It can be read as a part of the gentleman's remarks.

Mr. LOGAN. I do not want it read as a part of my remarks.

Mr. FARNSWORTH. I object to its being read unless as a part of the gentleman's remarks.

Mr. KELSEY. If the gentleman will yield to me, it can be read as a part of my remarks.

Mr. FARNSWORTH. I object. No member holding the floor can yield to another except for the purpose of explaining the matter under consideration.

Mr. LOGAN. I do not yield for any explanation.

The SPEAKER *pro tempore*. The gentleman from New York [Mr. Kelsey] can explain the matter under consideration in any way that seems to him pertinent and is not contrary to the rules.

Mr. KELSEY. Very well; I ask that the substitute may be read as a part of my remarks.

Mr. LOGAN. I have no objection to that.

The proposed substitute was read, as follows:

"Resolved, That the subject of an amendment of the joint rules governing the convention of the two houses of Congress for the purpose of counting the electoral vote for President and Vice-President of the United States be referred to a select committee of five, with power to report by bill or otherwise at any time."

Mr. PRUYN. Will the gentleman from Illinois [Mr. Logan] extend the same courtesies to me, and permit the Clerk to read a resolution I have prepared?

Mr. MULLINS. And I will ask to have mine read.

Mr. LOGAN. Does the gentleman from Massachusetts [Mr. Butler] withdraw his proposition? That is what I want to know.

Mr. BUTLER, of Massachusetts. I answer, that in order that we may get at the question involved in my resolution I have no pride of opinion at all in this case. And having had the question of the rights and privileges of this House amply discussed, I am ready to accept the substitute in order that we may be able to go on with the business of the House.

Mr. FARNSWORTH. I rise to a point of order, that the resolution offered as a substitute is not privileged, and that the gentleman cannot get in under cover of a privileged question what is not privileged. I submit that the resolution offered by the gentleman from New York [Mr. Kelsey] as a substitute is not privileged.

The SPEAKER *pro tempore*. The Chair is of the opinion, that the original proposition being a question of privilege, any substitute therefor which may be germane to the subject will be proper as an amendment thereto.

Mr. FARNSWORTH. I make the point of order that the substitute is not germane—not sufficiently germane to be a matter of privilege.

The SPEAKER *pro tempore*. The Chair will rule upon that point whenever the proposition of the gentleman from New York is offered as a substitute for the resolutions of the gentleman from Massachusetts.

Mr. PRUYN. Will the gentleman from Illinois [Mr. Logan] allow me to have a proposition read?

Mr. LOGAN. I cannot give away all my time. I certainly have been fully as generous in that respect as gentlemen usually are. I cannot yield any further.

Mr. GARFIELD. I rise to a point of order. My point is that the resolution as now proposed is not a question of privilege, and I object to its being entertained.

The SPEAKER *pro tempore*. The resolution of the gentleman from New York is not yet before the House. Whenever it shall be offered as a substitute for the resolutions of the gentleman from Massachusetts, the Chair will rule upon it.

Mr. GARFIELD. I understood the gentleman from Massachusetts to declare just now that he modified his resolutions by accepting the proposition of the gentleman from New York.

The SPEAKER *pro tempore*. The gentleman from Massachusetts was not entitled to the floor for that purpose; he simply expressed his willingness to do so. The gentleman from Illinois [Mr. Logan] is entitled to the floor, and declines to be interrupted.

Mr. LOGAN. Now, Mr. Speaker, I yielded for the purpose of allowing the gentleman from New York to have his proposition read, that the gentleman from Massachusetts might have an opportunity to withdraw his resolutions. Nothing would give me more satisfaction at this time than to see those resolutions withdrawn. Why? Because

then the whole sting would be taken out of this proceeding. A vote of the House would not then be required. But if a vote of this House is to be taken, I do not believe there is a man here who can put his hand upon his heart and say that he is ready to censure Mr. Wade as having acted from any improper motives. I prefer, as I have just said, to see the resolutions withdrawn.

Mr. BUTLER, of Massachusetts. Will the gentleman yield to me for a moment?

Mr. LOGAN. Yes, sir.

Mr. BUTLER, of Massachusetts. Mr. Speaker, the gentleman yields to me a moment of his time.

Mr. LOGAN. For the purpose of withdrawing the resolution.

Mr. BUTLER, of Massachusetts. In order that there may be no misunderstanding, I desire to say, as I said yesterday, that I never have believed, I do not now believe, that Ben. Wade ever meant to do, or ever did do, intentionally a wrong act. But I do believe that the privileges of this House have been invaded. That question has been discussed. What is necessary is to have legislation, so that the same thing may never happen again. Waiving all pride of opinion, announcing distinctly that I never have censured Ben. Wade, and never meant to censure him for any intentional act of his, maintaining only that his action, whether under the prompting of the Senate or of whomever else it may have been, was an invasion of the privileges of this House, still I will, in order to have this grave question settled for the future by legislation, agree to withdraw my resolutions, and accept that of the gentleman from New York [Mr. Kelsey] as a substitute, if such be the judgment of the House.

Mr. FARNSWORTH. I now raise the same question of order that I raised before, that the resolution now presented as a substitute is not a question of privilege.

The SPEAKER *pro tempore*. The Chair does not understand the resolutions of the gentleman from Massachusetts as being modified at the present time.

Mr. FARNSWORTH. I wish to understand whether the resolutions have been modified in the manner proposed.

The SPEAKER *pro tempore*. Is the Chair to understand that the gentleman from Massachusetts has modified his resolutions as indicated by the gentleman from New York?

Mr. BUTLER, of Massachusetts. If it can be accepted as a modification by the House, yes, sir.

Mr. BROOMALL. I make the point of order that it is not germane.

Mr. GARFIELD. I object under the rules of the House.

Mr. BUTLER, of Massachusetts. Is that the "spirit of hell"?

The SPEAKER *pro tempore*. Does the gentleman propose to modify his resolutions or to allow the gentleman from New York to offer his proposition as a substitute?

Mr. BUTLER, of Massachusetts. To offer his as a substitute—any way to get out of the matter.

The SPEAKER *pro tempore*. The Chair rules that the offer of the resolution of the gentleman from New York as a substitute for the resolutions of the gentleman from Massachusetts is in order. The resolutions of the gentleman from Massachusetts are before the House as a question of privilege, and the House can put them in such shape as it may see fit. If the gentleman modifies his resolutions by adopting the words of the resolution of the gentleman from New York, that reduces it to a resolution, not to one of privilege. But the substitute can be moved as an amendment.

Mr. FARNSWORTH. I do not make the point that the original resolutions are not before the House and are not privileged; but I make the point that the gentleman cannot offer a substitute for the resolutions which will not be privileged.

The SPEAKER *pro tempore*. The Chair rules that any matter germane to the matter of privilege in the resolution can be adopted by the House, as the House still retains it in its possession.

Mr. FARNSWORTH. The resolution of the gentleman from New York is proposed to be offered as a substitute for the resolutions of the gentleman from Massachusetts, as they were modified by him last evening. The resolutions, as they have been modified by the gentleman from Massachusetts, read as follows:

"Resolved, That the House protests against the manner of procedure and the order of the President of the Senate *pro tempore*, in presence of the two houses, in counting the vote of Georgia in obedience to the order of the Senate only, and against his acts dissolving the convention and the two houses at his own will as an invasion of the rights and privileges of this House.

"Resolved, That the above resolution be, and hereby is, referred to a select committee of five, with leave to report at any time, and report by bill or otherwise."

Now, the substitute provides that all the rules in reference to this subject shall be referred to a committee. I make the point that the substitute is not germane.

The SPEAKER *pro tempore*. The Chair overrules the point of order, being of the opinion that the proceedings in joint convention were proceedings under the rule, and the whole subject-matter under the rule has therefore been brought before the House, and it is in order to refer it to a special committee.

Mr. FARNSWORTH. I appeal from that decision of the Chair.

The SPEAKER *pro tempore*. The gentleman from Illinois appeals from the decision of the Chair. The Chair rules that the resolution of the gentleman from New York, offered as a substitute for the pending resolutions, is in order. The question now is, "Shall the decision of the Chair stand as the judgment of the House?"

Mr. KELSEY. I move that the appeal be laid on the table.

Mr. WILSON, of Iowa. I demand the yeas and nays on the motion to lay the appeal on the table.

Mr. LOGAN. I desire to know how I have been taken off the floor.

The SPEAKER *pro tempore*. The gentleman yielded to the gentleman from New York, who offered, by consent of the gentleman from Massachusetts, a substitute for the pending resolutions which was reported by the Clerk. The resolution having been offered, the gentleman from Illinois, upon the right of the Chair, rose to a point of order. On that point of order the Chair has ruled, and the gentleman having taken an appeal, the motion now is on laying that appeal upon the table, on which the yeas and nays have been demanded.

Mr. SCHENCK. I rise to a question of order. I wish to know whether we are to be compelled to vote on the appeal and on the motion to lay upon the table before we have before us the resolutions to which the other is said not to be germane. I ask that it be read. The substitute has been read, but the other resolutions have not.

The SPEAKER *pro tempore*. They will be read.

Mr. LOGAN. I ask the gentleman to withdraw his appeal and point of order until I have finished my remarks.

Mr. FARNSWORTH. I will withdraw them if the substitute is withdrawn until after the gentleman has concluded his remarks. I must make the point of order when it is presented.

Mr. LOGAN. It is not very generous of my colleague to refuse; that is all I have to say.

The resolutions of Mr. Butler, of Massachusetts, as modified yesterday, were again read.

Mr. ALLISON. I desire to have the original resolutions offered by the gentleman from Massachusetts read. I do not understand that those just read are before the House.

The SPEAKER *pro tempore*. It is in the power of the gentleman from Massachusetts to modify his resolutions at any time before action has been taken upon them. The Chair understands him to have modified them to the form in which they have now been read.

Mr. GARFIELD. He modified them as part of his remarks.

The SPEAKER *pro tempore*. The resolutions, as modified, were read yesterday.

Mr. ALLISON. The Globe, I believe, does not say so.

Mr. BINGHAM. The Globe does say so.

The yeas and nays were ordered on the motion to lay the appeal on the table.

The question was taken; and it was decided in the affirmative—yeas 131, nays 41, not voting 51, as follows:

YEAS—Messrs. Delos R. Ashley, James M. Ashley, Axtell, Baldwin, Banks, Benjamin, Benton, Blaine, Blair, Boles, Boutwell, Bowen, Bromwell, Buckley, Benjamin F. Butler, Roderick R. Butler, Cake, Churchill, Reader W. Clarke, Sidney Clarke, Clift, Cobb, Cornell, Covode, Cullom, Deweese, Dickey, Dixon, Dockery, Donnelly, Driggs, Eckley, Ela, Thomas D. Eliot, James T. Elliott, Ferriss, Ferry, Fields, French, Goss, Gove, Griswold, Halsey, Hamilton, Harding, Haughey, Hawkins, Heaton, Higby, Holman, Hooper, Hopkins, Chester D. Hubbard, Hulburd, Hunter, Ingersoll, Jenckes, Alexander H. Jones, Judd, Kelley, Kellogg, Kelsey, Ketcham, Kitchen, Lallin, Lash, William Lawrence, Lincoln, Longbridge, Lynch, Maynard, McCarthy, McCormick, McKee, Miller, Moore, Morrell, Mullins, Newsham, Norris, Nunn, O'Neill, Orth, Paine, Perham, Peters, Pettis, Pike, Poland, Pomeroy, Price, Prince, Prun, Randall, Raun, Robertson, Roots, Ross, Sawyer, Schenck, Seofield, Shanks, Shellabarger, Smith, Spalding, Starkweather, Stevens, Stewart, Stokes, Stover, Sypher, Taffe, John Trimble, Trowbridge, Twichell, Upson, Van Aernum, Burt Van Horn, Robert T. Van Horn, Van Wyck, Ward, Cadwalader C. Washburn, Henry D. Washburn, William B. Washburn, Welker, Whittemore, John T. Wilson, Stephen F. Wilson, Windom, Woodbridge, and the Speaker—131.

NAYS—Messrs. Archer, Baker, Barnes, Barnum, Beaman, Beatty, Beck, Bingham, Boyden, Boyer, Broomall, Buckland, Cary, Chanler, Eggleston, Farnsworth, Garfield, Getz, Golladay, Grover, Hotchkiss, Johnson, Thomas L. Jones, Kerr, Knott, Koontz, George V. Lawrence, Mallory, Moorhead, Mungen, Niblack, Nicholson, Phelps, Pile, Plants, Stone, Van Trump, Thomas Williams, James F. Wilson, Wood, and Woodward—41.

NOT VOTING—Messrs. Adams, Allison, Ames, Anderson, Arnell, Bailey, Blackburn, Brooks, Burr, Callis, Coburn, Cook, Corley, Dawes, Delano, Dodge, Edwards, Eldridge, Fox, Glossbrenner, Gravely, Haight, Hill, Asahel W. Hubbard, Richard D. Hubbard, Humphrey, Julian, Loan, Logan, Marshall, Marvin, McCullough, Mercur, Morrissey, Myers, Newcomb, Pierce, Polsley, Robinson, Selye, Sitgreaves, Taber, Taylor, Thomas, Tift, Lawrence S. Trimble, Van Auken, Vidal, Elihu B. Washburne, William Williams, and Young—51.

So the appeal was laid on the table.

Mr. FARNSWORTH. I now move to lay the resolutions on the table.

The SPEAKER *pro tempore*. The gentleman's colleague [Mr. Logan] is entitled to the floor for five minutes.

Mr. LOGAN. I am very much obliged for the generosity of my colleague. [Laughter.] I do not wish to dispute the Speaker, but when I quit speaking, he stated that I was entitled to nine minutes. [Laughter.]

The SPEAKER *pro tempore*. The Chair stands corrected. The gentleman is entitled to nine minutes.

Mr. LOGAN. Now, sir, I have no complaint to make of the course of the House, nor of the gentlemen who have so kindly taken me off my feet in the midst of my remarks; but the persistency with which they insisted on sticking to the point of not allowing me to go on has somewhat affected my opinions in reference to what I shall do in this case.

Mr. FARNSWORTH. Will the gentleman—

Mr. LOGAN. I decline to yield any further. I have never before known an act of generosity turned into an act, I will not say of unkindness, toward the individual who at first was disposed to be generous. I have tried to be generous to everybody. I do not know that I have received much generosity in return, nor that I am entitled to any, nor indeed do I care about that. The position of the question is such now that it certainly does give evidence to everybody in this House, to every cool and calculating mind, that the longer the question is discussed the more disturbing an element it becomes in this House. Hence I have concluded that excitement should cease; I have concluded that discussion should cease; and I believe that the best way and the only proper way to accomplish that end, as there seems to be a difficulty about the various propositions and amendments, is to lay the whole question on the table, and then let some gentleman offer a resolution that is disconnected entirely with this resolution, and let it be passed at some time, if the House sees proper, or let the matter be referred to a committee.

I have come to that conclusion from what I have seen of the disposition of members here. There is excitement on both sides unnecessarily, I think; but it is the case, and it is unavoidable, and there is no other remedy for it. The first resolution being a resolution of censure—whether so intended or not—the subsequent propositions, the substitutes and amendments, would carry the record with them. The resolution of censure would stand upon the record without having been voted down or disposed of, and the substitute would carry the same sting with it.

Now, I know, as the gentleman from Massachusetts [Mr. Butler] says, that he is a friend of Mr. Wade; he has no reason to censure him. He has no disposition to censure him. Hence I say to him, and to everybody else in this House who has no disposition of that kind, let the whole matter be laid on the table, and then let us take up the subject in a proper way, unconnected with a resolution of censure; and then you will get out of the difficulty without charging any one with having intentionally done wrong.

I said that I would not argue the constitutional and legal question. I am only reasoning in reference to our duty under the circumstances. Now, what right have we to censure Mr. Wade? I mean, what justice would there be in it? What wrong was intended to be perpetrated on this House or on the privileges of this House either by the President of the Senate or by the Speaker of this House?

Mr. WARD. Will the gentleman answer me a question?

Mr. LOGAN. I decline to yield.

Mr. WARD. I desire to ask the gentleman whether a motion to lay this subject upon the table without further debate would not be a violation of his own deliberate agreement not to make that motion?

Mr. LOGAN. Now, that is the kind of treatment I have received from gentlemen while I have been speaking. I will say to the gentleman from New York that yesterday I gave thirty minutes of my time to other gentlemen, and to-day I was asked if I would not give more of my time, and I did so. Then I was asked if I would move to lay the whole subject on the table, and I said I would not, because I wished to give the gentleman from New York [Mr. Ward] and my colleague from Illinois [Mr. Bromwell] a chance to speak, inasmuch as the Speaker was disposed to give them the floor. But inasmuch as gentlemen have taken me off my feet, and have not given me the same privileges on the floor that I have given to other gentlemen, I am disposed to take my own course in the matter, without reference to the dictation of anybody. Now I yield no further.

Mr. INGERSOLL. I hope the *lex talionis* will not prevail here.

Mr. WARD. I rise to a point of order. I wish to know whether it is ever in order for a man from the State of New York to speak, or is it always in order for the floor to be monopolized by others? [Laughter.]

The SPEAKER *pro tempore*. The Chair does not entertain that as a point of order.

Mr. LOGAN. Now, if I can be permitted to finish my remarks, I will be very much

obliged. I will say to the gentleman from New York [Mr. Ward] that it is certainly out of order for New York to be heard when it is not in order for New York to speak, as he himself evidenced here a moment since.

Now, I desire to say that I have no right to give a warning to the House or to dictate to the House; but, as a member of the House, I have a right to appeal to the members of this House, and I do ask them to reflect, as cool, honorable, just men, who would not knowingly wrong anybody. And I now ask them, as representatives of the people, to lay this whole subject on the table. And I now make that motion.

The question was upon the motion to lay on the table.

Mr. PILE. On that motion I call for the yeas and nays.

Mr. BROMWELL. I would like to ask my colleague [Mr. Logan] a question.

Mr. BINGHAM. I object; it is too late.

Mr. WILSON, of Iowa. I call for the regular order of business.

The SPEAKER *pro tempore*. The pending motion to lay on the table is not debatable.

The question was taken upon ordering the yeas and nays; and they were ordered.

Mr. HIGBY. I ask that the original resolutions, together with the proposed substitute, be read.

The resolutions submitted by Mr. BUTLER, of Massachusetts, as modified by him on yesterday, were read, as follows:

Resolved, That the House protests against the manner of procedure and the order of the President of the Senate *pro tempore*, in presence of the two houses, in counting the vote of Georgia in obedience to the order of the Senate only, and against his acts dissolving the convention and the two houses at his own will as an invasion of the rights and privileges of this House.

Resolved, That the above resolution be, and hereby is, referred to a select committee of five, with leave to report at any time, and report by bill or otherwise."

The substitute proposed by Mr. KELSEY was read, as follows:

Resolved, That the subject of an amendment of the joint rules governing the convention of the two houses of Congress for the purpose of counting electoral votes for President and Vice-President of the United States be referred to a select committee of five, with power to report by bill or otherwise at any time."

The question was then taken upon the motion to lay on the table; and it was decided in the affirmative—yeas 130, nays 55, not voting 33; as follows:

YEAS—Messrs. Allison, Ames, James M. Ashley, Baker, Barnes, Barnum, Beaman, Beatty, Beck, Benjamin, Bingham, Blaine, Bowen, Boyden, Boyer, Broomall, Buckland, Buckley, Burr, Roderick R. Butler, Cake, Callis, Cary, Chauler, Churchill, Reader W. Clarke, Cobb, Coburn, Cornell, Dawes, Deweese, Dixon, Dockery, Dodge, Eckley, Eggleston, James T. Elliott, Farnsworth, Ferriss, Ferry, Garfield, Getz, Glossbrenner, Griswold, Halsey, Haughey, Hawkins, Heaton, Holman, Hooper, Hopkins, Hotchkiss, Chester D. Hubbard, Hulburd, Hunter, Jenckes, Johnson, Alexander H. Jones, Judd, Kelley, Kellogg, Kerr, Ketcham, Kitchen, Knott, Koontz, Latlin, Lash, George V. Lawrence, William Lawrence, Lincoln, Logan, Loughridge, Mallory, Marvin, McCarthy, McCormick, Miller, Moore, Moorhead, Morrell, Newcomb, Newsham, Niblack, Nicholson, Norris, Nunn, O'Neill, Orth, Paine, Perham, Peters, Pettis, Phelps, Pile, Plants, Poland, Polsley, Pomeroy, Price, Pruyn, Randall, Raum, Robertson, Sawyer, Scofield, Shellabarger, Smith, Spalding, Starkweather, Stewart, Stokes, Stone, Taylor, Thomas, Twichell, Upson, Van Aernam, Van Auken, Burt Van Horn, Van Trump, Cadwalader C. Washburn, William B. Washburn, Welker, James F. Wilson, John T. Wilson, Wood, Woodbridge, Woodward, and the Speaker—130.

NAYS—Messrs. Archer, Delos R. Ashley, Axtell, Baldwin, Banks, Benton, Boutwell, Bromwell, Benjamin F. Butler, Sidney Clarke, Clift, Corley, Cullom, Dickey, Donnelly, Driggs, Ela, Eldridge, Thomas D. Eliot, Fields, Golladay, Goss, Gove, Grover, Haight, Hamilton, Higby, Ingersoll, Thomas L. Jones, Julian, Kelsey, Lynch, Marshall, Maynard, McKee, Mullins, Mungen, Pierce, Pike, Prince, Roots, Ross, Schenck, Shanks, Stevens, Stover, Sypher, Taffe, John Trimble, Trowbridge, Robert T. Van Horn, Van Wyck, Ward, Henry D. Washburn, and Whittemore—55.

NOT VOTING—Messrs. Adams, Anderson, Arnell, Bailey, Blackburn, Blair, Boles, Brooks, Cook, Covode, Delano, Edwards, Fox, French, Gravely, Harding, Hill, Asahel W. Hubbard, Richard D. Hubbard, Humphrey, Loan, McNollough, Mercur, Morrissey, Myers, Robinson, Selye, Sitgreaves, Taber, Tift, Lawrence S. Trimble, Vidal, Elihu B. Washburne, Thomas Williams, William Williams, Stephen F. Wilson, Windom, and Young—38.

So the motion to lay the resolutions and proposed substitute on the table was agreed to.

During the call of the roll,

Mr. HALSEY said: My colleague, [Mr. Hill,] has been called home on account of the death of a friend. If he were here he would doubtless vote "ay."

Mr. FARNSWORTH moved to reconsider the vote just taken; and also moved that the motion to reconsider be laid on the table.

Mr. ELDRIDGE. On that motion I call for the yeas and nays.

The question was taken upon ordering the yeas and nays ; and there were seventeen in the affirmative.

Before the noes were counted,

Mr. ELDRIDGE called for tellers on ordering the yeas and nays.

The question was taken upon ordering tellers ; and there were twenty-five in the affirmative.

So (the affirmative being more than one-fifth of a quorum) tellers were ordered ; and Mr. Eldridge and Mr. Farnsworth were appointed.

The House again divided ; and the tellers reported that there were—ayes thirty-two, noes not counted.

So the yeas and nays were ordered.

The question was taken ; and it was decided in the affirmative—yeas 129, nays 41, not voting 53 ; as follows :

YEAS—Messrs. Allison, Ames, Delos R. Ashley, James M. Ashley, Baker, Barnes, Barnum, Beaman, Beatty, Beck, Benjamin, Bingham, Blaine, Boles, Boutwell, Boyden, Boyer, Broomall, Buckland, Buckley, Burr, Roderick R. Butler, Cake, Callis, Cary, Chandler, Churchill, Cobb, Cornell, Cullom, Dawes, Deweese, Dixon, Dockery, Dodge, Eckley, Thomas D. Eliot, James T. Elliott, Farnsworth, Ferriss, Perry, Fields, Garfield, Getz, Glossbrenner, Griswold, Haughey, Hawkins, Heaton, Holman, Hooper, Hopkins, Hotchkiss, Chester D. Hubbard, Halburd, Hunter, Jenckes, Johnson, Alexander H. Jones, Judd, Kelley, Kerr, Ketcham, Kitchen, Knott, Koontz, Latlin, Lash, George V. Lawrence, William Lawrence, Logan, Longbridge, Mallory, Marvin, McCarthy, McCormick, McKee, Miller, Moore, Moorhead, Morrell, Niblack, Nicholson, Norris, Nunn, O'Neill, Orth, Paine, Perlum, Pettis, Phelps, Pile, Plants, Poland, Polsley, Pomeroy, Price, Prunyn, Randall, Raum, Robertson, Sawyer, Scofield, Shellabarger, Smith, Spalding, Starkweather, Stewart, Stokes, Stone, Taylor, Thomas, Twichell, Upson, Van Aernam, Van Auken, Burt Van Horn, Van Trump, Vidal, Cadwalader C. Washburn, William B. Washburn, Welker, Thomas Williams, James F. Wilson, John T. Wilson, Wood, Woodbridge, Woodward, and the Speaker—129.

NAYS—Messrs. Archer, Axtell, Baldwin, Benton, Blair, Bromwell, Benjamin F. Butler, Sidney Clarke, Corley, Dickey, Donnelly, Driggs, Eldridge, Golladay, Goss, Gove, Grover, Haight, Hamilton, Higby, Ingersoll, Thomas L. Jones, Julian, Kelsey, Mullins, Mungen, Newcomb, Newsham, Pike, Roots, Ross, Schenck, Shanks, Stevens, Stover, Sypher, John Trimble, Trowbridge, Robert T. Van Horn, Van Wyck, and Whittemore—41.

NOT VOTING—Messrs. Adams, Anderson, Arnell, Bailey, Banks, Blackburn, Bowen, Brooks, Reader W. Clarke, Clift, Coburn, Cook, Covode, Delano, Edwards, Eggleston, Ela, Fox, French, Gravely, Halsey, Harding, Hill, Asahel W. Hubbard, Richard D. Hubbard, Humphrey, Kellogg, Lincoln, Loan, Lynch, Marshall, Maynard, McCullough, Mercur, Morrissey, Myers, Peters, Pierce, Prince, Robinson, Selye, Sitgreaves, Taber, Taffe, Tift, Lawrence S. Trimble, Ward, Elihu B. Washburne, Henry D. Washburn, William Williams, Stephen F. Wilson, Windom, and Young—53.

So the motion to reconsider was laid on the table.

EVENING SESSION.

IN THE HOUSE OF REPRESENTATIVES,

February 13, 1869.

COUNTING THE ELECTORAL VOTES.

Mr. BOUTWELL. Mr. Chairman, the events of the present week have revived some old questions connected with the powers of the Senate and the House of Representatives in counting the electoral votes for President and Vice-President of the United States, and they have also suggested at least one new question. Two of these questions are of such importance that I have not felt willing to allow the occasion to go by without expressing the views which I entertain. I may say, however, that the importance of the events through which we have just passed is, in my mind, not due to the manifestations that took place on the floor of this House.

The excitement here, disagreeable as it was, is of no considerable importance with reference to the public welfare. It is true, however, at least it seems true to me, that what took place here and was complained of by us as occurring through the instrumentality of the Senate, was due chiefly, if not wholly, to errors and mistakes which did not involve any purpose upon the part of anybody to invade the rights or to impair the privileges of this House. The difficulty, I think, was largely due to the circumstance that when objection was made to the counting of the vote of Georgia, and when the Senate had retired to its own chamber, this House did not comprehend the purpose for which the Senate had retired ; at least this is to be inferred from the fact that the Senate passed upon one question and this House upon another. The resolution adopted by the Senate during its absence from this hall was in these words :

"Resolved, That under the special order of the two houses respecting the electoral vote from the State of Georgia, the objections made to the counting of the vote of the electors for the State of Georgia are not in order."

This was the result reached by the Senate, and it appears to have been the chief subject-matter of its deliberations. But in this House we voted upon the question whether the electoral vote of Georgia should be counted. The declaration of the Speaker after the vote was taken here was in these words:

"Upon the question, Shall the vote of Georgia be counted, notwithstanding the objections of the gentleman from Massachusetts, the yeas are 41, the nays are 150."

As a matter of fact there was a difference of understanding between the two houses as to the particular course that should be pursued upon the question raised by my colleague; and if there had not been that difference of understanding, which did not imply any improper purpose on the part of anybody, I have no idea that any considerable excitement would have occurred.

I do not, however, discuss this matter now for the purpose of considering the events of the past week in this particular. My honorable friend from the seventh district of Ohio, [Mr. SHELLABARGER,] in the very able speech that he made in the recent debate, took and maintained with great force a position from which I wholly dissent, although I am bound to say that he did not, as I understand him, irrevocably commit himself in opinion to that position; but the peculiarities of his statement and the course of his argument, as I understood it, will make upon those who may come after us, and in similar circumstances may be called upon to examine what was done upon this occasion, an impression that he was of the opinion upon the whole that the duty of counting the votes of the electors for President and Vice-President is committed exclusively to the President of the Senate.

Mr. SHELLABARGER. In the absence of legislation.

Mr. BOUTWELL. Well, I differ from my friend on that point; and it is chiefly on account of this difference of opinion that I seek this opportunity to state the views I entertain, that they may stand for whatever they may be worth. I am greatly impressed with the necessity of making some sort of protest, however weak or inefficient, against that proposition. I cannot concede that we have a constitution that has confided to one man the custody of the fortunes of this country when it is passing through the most critical moment of its existence; when it is taking upon itself for a period of four years a new life, which under our institutions is to be continually reproduced through all the successive stages of our national existence. I cannot concede that at such a time it is in the power of any one man to destroy or impede, or even to interfere with this renewed existence at the very moment of its birth.

Now, sir, I remember (for I was then on this floor) that eight years ago, on the second Wednesday of February, 1861, John C. Breckinridge, then Vice-President of the United States and President of the Senate, sat in that chair. His heart was then already filled with the pernicious influences of treason; and there is cause to believe that it was contemplated by a large portion of those with whom he was associated to seize the capital of the country and arrest various members of the Government on the night preceding the day on which the electoral votes were to be counted. I remember the circumstances under which members of Congress and others came here, anticipating possibly a declaration on his part inconsistent with the perpetuity of this Government. When I reflect that this country has passed through such a trial I cannot conceive of any doctrine more dangerous in its inculcation than the doctrine that to the President of the Senate is confided the duty and the power of counting the electoral votes. Therefore, on this view of the circumstances of the case, I hold it to be just, to be necessary, to give to the Constitution such an interpretation as will place this great power in safer hands. If under the Constitution this great power is confided to the President of the Senate, then we must seek an alteration of the Constitution as the only remedy.

Mr. SHELLABARGER. I ask the gentleman to yield to me.

Mr. BOUTWELL. Certainly, for correction.

Mr. SHELLABARGER. I ask that my statement shall not be taken out of the time of the gentleman from Massachusetts.

There was no objection; and it was ordered accordingly.

Mr. SHELLABARGER. My friend from Massachusetts has done me the kindness to allude to the position I occupied on this question, and that is the only reason why I wish to make a statement now. I did not know this matter was to come up to-night, and am here to-night by accident. I wish to restate what I meant to say, and the result of what I meant to say, as to who should do the counting in the absence of legislation. I meant to state, with caution and hesitation, that my convictions were that Chancellor Kent had rightly concluded that, in the absence of legislation on that subject-matter, the Constitution meant to leave the doing of the counting to the President of the Senate in the presence of the two houses, those two bodies being entitled to see that the counting was fair—to adopt the exact word of the authority. The only statement I desire to make in addition to that is this: my expression of opinion was to go to this extent, that there was a *casus omissus* in the Constitution; that it did not in terms provide the method of making the count, or by whom it should be done, and that from that fact legislation is needed. As in every case of that character, where

there is a *casus omissus* it is competent for legislation to supply the omission, and in this case to provide the very instrumentalities that shall do the counting, and the regulations by which the result and the legality of the election shall be determined.

The next thing I desire to state is this: this is in fact a recognized infirmity or oversight in the Constitution itself; that it ought not to have left the thing as it seems to have left it to be done, as a mere ministerial act of the counting officer. That is the defect of the Constitution; and it is because that defect exists my friend very properly says that we ought to have legislation. In the absence of that legislation, therefore, it would seem, I say, the Constitution did look upon this as a mere ministerial act; one to be exercised by the President of the Senate fairly in the presence of the two houses. That is all I desire to say.

Mr. THOMAS. I ask my friend from Massachusetts to yield to me, with the understanding that it shall not be taken out of his time.

There was no objection; and it was ordered accordingly.

Mr. THOMAS. Mr. Chairman, I was about to say that I had heard the subject once elaborately discussed, not in open session of Congress and not in a mode that has left any record behind it; and it may aid in reaching a right conclusion as to what is needed in the future to state the prevailing opinion in both branches of Congress at the time I alluded to yesterday. The opinion then entertained is utterly incompatible with the idea that the President of the Senate alone should be authorized to count the votes in the presence of the Congress of the United States. The belief was that the declaration of the Constitution that the votes for President and Vice-President were to be counted carried with it the idea necessarily that the character of the votes must first be inquired into, the validity of the votes must first be inquired into, the legality of the votes must first be inquired to. The sources from whence they came must first be inquired into before you can count them as votes. By what process could the President of the Senate reach the elucidation of that difficulty? Where is he clothed with the necessary power? The law-making power, and the law-making power alone, can prescribe the mode and manner in which the inquiries are to be which lie necessarily in your path before you can count the vote. Could the Vice-President go behind and inquire into the character of the laws of the several States where the electors are chosen? Has he the right to inquire whether the electors have voted in conformity to the Constitution of the United States as to the time the returns were sent here? All these difficulties standing in the way led to the conclusion at that day that necessarily when we spoke of counting the votes it was the duty of the law-making power under the Constitution to establish rules for the guidance of the Senate and House in joint meeting; and it would be the duty of the Presiding Officer of the joint meeting to see that those rules were obeyed and followed.

It was on this account that I threw out the idea to the gentleman from Ohio that I did not think he could sustain so strong a position as that he advanced. I will take occasion to say that the House and the country are indebted to the gentleman from Massachusetts to come on so calm an occasion to re-open this question. It was understood at the time to which I have referred that it was the duty of Congress to take the matter in hand and prescribe by joint resolution the manner of proceeding in counting the votes in joint meeting. The two houses are composed of different elements. The Senate is composed of two Senators from each State and the House is composed of members elected by the people, and it is no easy task to prescribe the precise powers of two bodies thus constituted when in joint session; and if the gentleman from Massachusetts will in the next Congress follow up this subject and by law deliberately guard against a recurrence of such scenes as we recently passed through, he will render a great service to the whole country.

Mr. BOUTWELL. I wish to have the opinions expressed by the gentleman from Ohio [Mr. Shellabarger] precisely as he presents them; for my object is not to engage in, much less to provoke, any discussion with him or anybody else upon this point, but to do something, if I may, to enable the country to arrive at what seems to me to be safe conclusions upon this great question.

I will, however, make a passing remark upon the danger—I think that not too strong a word to use—of relying for a practical interpretation of a great power in the Constitution exclusively upon men who have been students of constitutional law solely, or who have been students in a much larger degree than they have had opportunity to participate in the practical development of its provisions and powers. I do not hesitate to say that in my opinion Judge Story and Chancellor Kent would have been able to discuss with much greater clearness and power, with reference to the practical workings of the Government, the various provisions of the Constitution if they had had a larger opportunity to deal with the practical business of the Government in its political branches.

But, sir, to approach more nearly the great question which we have been called to consider, namely, the constitutional power of the Senate and House of Representatives to count the electoral votes of the several States. The provision of the Constitution is very simple. It says merely that the President of the Senate, in the

presence of the Senate and House of Representatives, shall open the certificates, and they shall be then counted. There is a specific declaration of the power which the President of the Senate has. Is it made the duty of the electors to return their certificates to him; it is then made his duty, in the presence of the Senate and House of Representatives, to open the certificates, and the votes shall then be counted. Can there be any doubt that when he has exercised the power which is specifically conferred upon him his power is exhausted; that he has nothing further to do except to announce the vote?

A MEMBER. How could he announce it without counting?

Mr. BOUTWELL. I will show how he could. The votes shall then be counted. First, what is counting the vote? Is it merely looking at the certificates of the electors and ascertaining what is written upon those certificates and for whom the votes of the electors have been given? Sir, I do not put such an interpretation upon the words. For if that be the case, it would be in the power of various parties—the messenger that might convey the returns to the President of the Senate, or the custodian of an unknown key of a safe in which these certificates might be deposited—to change the written certificate or to substitute a forged one for it. Sir, I take it that this power wherever vested is, with reference to the subject-matter, an omnipotent power; that is to say, a power sufficient to enable the party authorized by the Constitution to count these votes, to explore the history of the whole transaction, from the people who have declared their voice through their suffrages, and to ascertain whether all the proceedings have been right, or whether by some fraud or misconduct or error the certificate has been vitiated. If there be not this power somewhere, then, of course, this court is at the mercy of whoever may choose to be guilty of a fraud or who may inadvertently commit an error.

If, then, this be the nature of the duty imposed in the matter of counting the votes, the next inquiry is, upon whom is this duty imposed? I say, first, by the language of the Constitution it is not imposed upon the President of the Senate. I say, in the next place, that there is given to the President of the Senate by the Constitution no power by which he could institute the necessary inquiries and the proper scrutiny by which he could ascertain whether everything was fair and proper from the beginning to the end of this transaction. Then, if it be not in the President of the Senate, where by the necessity of the case must it be? It must be in the two houses of Congress. This work of opening the certificates is to be in the presence of the Senate and the House, and the vote is then to be counted. For what purpose are the Senate and the House here? Do gentlemen say that it is to see whether the work is properly done? Is that enough? What work properly done? To see whether the President of the Senate reports to the Senate and to the House of Representatives correctly what is written upon the papers called certificates which he opens in their presence? Is that enough to secure the people of this country against fraud, wrong, accident, or mistake? I think not.

The counting of the votes unquestionably is to be "in the presence of the two houses." Have the two houses power to do what by the Constitution is unavoidably made the duty of somebody to do—to see that the votes which are counted are real votes? By that I mean whether what is written upon the paper expresses the opinion which the people have given. Not only have the Senate and House of Representatives the power, but there is no other department of the Government that is clothed with that power. The President is not clothed with the power by any possible construction of the Constitution; the Supreme Court is not clothed with the power; there is no governmental instrumentality that can be named that has this power except the Senate and the House of Representatives. We all agree that under some circumstances this power ought to be exercised. We all agree that the Constitution contemplates purity, justice, not fraud or wrong.

Next, what has been the practice of the Government from the beginning? What was the course of proceeding on Wednesday last? Why that a Senator selected, by the Senate, and two members of this House, appointed, to be sure, by the Speaker—but the Speaker of the House does nothing as Speaker which the House might not without the agency of the Speaker do for itself—actually counted those votes. So it has always been. The tellers represent the two houses. The President of the Senate did nothing but hand down to the tellers the certificates which he had received after having opened them in the presence of the Senate and the House, and the tellers who represented not the President of the Senate, but who represented the Senate and the House of Representatives, actually counted the votes. It has been the uniform practice, as I understand, from the beginning of the Government, that the Senate and the House of Representatives have actually counted the votes.

Now, then, what has been the course of the two branches of the Government in another particular which bears distinctly upon the powers and duties of the two houses in reference to this business? In 1821, on the occasion alluded to by the venerable and honorable gentleman from Maryland, [Mr. Thomas,] under the lead of Mr. Clay, a resolution was passed in reference to the State of Missouri in terms precisely like that

which we passed in reference to the State of Georgia. If you will analyze the resolutions you will see that they contain an assertion of power to investigate the circumstances attending the elections in Georgia and in Missouri, for both of those resolutions declare that the return-certificates of those States should not be counted in the manner in which the certificates returned from other States were to be counted. The assertion of that power is an assertion of all the power for which I contend; which is that the Senate and House of Representatives, in exercising the power and performing the duty derived from the Constitution, and sanctioned by the uniform practice from the beginning of the Government till now, of counting the electoral votes through officers appointed by the Senate and the House, may institute an inquiry into every proceeding that has taken place from the deposit of the ballots by the people through all intermediate proceedings to the opening of the certificates by the President of the Senate in the presence of the Senate and House of Representatives, for the purpose of ascertaining whether the proceedings have been right, or whether they have been vitiated by error or fraud.

It may be said that this is a great power. It is a great power to institute an inquiry into proceedings touching so vital a matter as the exercise of the right of the people to be heard in the election of a President and Vice-President of the United States. But it is a power which must be lodged somewhere. It would be a dangerous doctrine to maintain that any paper coming here through the customary or authorized channels between the State and the National Government is to be received without any inquiry. That would be a most dangerous doctrine. I cannot conceive of any place where this power could be so safely deposited as in the Senate and in the House of Representatives. Hence I cannot agree with the gentleman from Ohio [Mr. Shellabarger] that there is a *casus omissus* in the Constitution. It being established, as I think it is established, that the Senate and House of Representatives are authorized and required to count the electoral votes, it follows, from the nature of the case, that the houses are clothed with power to make such rules as are needed to enable them to perform the duty in a proper manner. But if this be not so, then the eighth section of the first article of the Constitution clothes Congress with ample power. The provision gives to Congress power "to make all laws which shall be necessary and proper for carrying into execution the foregoing powers and all other powers vested by this Constitution in the Government of the United States, or in any Department or officer thereof." This power is ample for every contingency. Further, the wisdom of the Convention which framed the Constitution is shown in the omission to prescribe the details of duty or to set forth specifically the means by which powers granted are to be executed. It was assumed that there would be wisdom and patriotism in those who would be called to execute the powers granted, and that successive Congresses would prescribe such modes of proceeding as experience should suggest or require.

And this brings me to the consideration of a circumstance which occurred on the floor of this House, and which, when it occurred, disturbed me more than any other circumstance in my political experience. Upon objection to the vote of Georgia being made by my colleague, [Mr. Butler,] the Speaker, acting under the twenty-second rule, put this question to the House, "Shall the vote of Georgia be counted?" By that rule, as it stands in the Manual, the vote of Georgia was not to be counted if either house declared that it should not be counted.

When the resolutions submitted by my colleague [Mr. Butler] were under consideration, containing or implying a censure upon an officer of another branch of the Government, I reached the conclusion that I could not vote for them. But when he modified them by accepting a resolution authorizing a committee to inquire whether any amendment to the joint rules was needed, I was anxious that the resolutions should pass, for the purpose of bringing before such a committee the danger in which we stand to-day and the evils that may in some future time be brought about by and under the twenty-second joint rule of the two houses of Congress.

In my opinion, when the counting of the vote of a State is objected to, the question to be put to the Senate and to the House should be, not "Shall the vote of the State of — be counted?" but "Shall the vote of the State of — be rejected?" In my judgment, this difference in the form of the question is all the difference between peace, harmony, and quiet in some future difficulty like that through which we have just passed, on the one side, and disorder, anarchy, and revolution on the other. If in a great political excitement the vote of a State should be rejected by the action of one house of Congress, the other house not concurring in that action, no man can foretell the results that would flow from the proceeding. The trouble would not arise necessarily because the rejecting vote had been a wrong vote. All these evils might happen if the rejection of the vote of the State was right.

In this country it is especially necessary that there should be unity of opinion and of action in those departments of the Government that under our system are expected to co-operate in the execution of a great power. If the people find the Senate and the House agreeing in the rejection of the vote of a State, that harmony of opinion between the two houses carries great weight with the country. And even if that de-

cision were wrong, I know not if it would not be better for the country that it should be made erroneously by the two branches of Congress than that the vote of a State should rightfully be rejected by the power of one branch exercised against the judgment of the other.

Mr. SHELLABARGER. I would ask my friend if I understood him correctly to contend that this counting of the electoral votes can be done by the separate action of the two houses of Congress? If so, or even if not so, then I wish to ask his attention to this consideration: the gentleman says that that thing called "counting," investigation, exploration of the legality, &c., of this proceeding from the people up, is a thing about which the mind of the two houses can be and must be exercised in coming to a conclusion. Now, I understand the gentleman to say that the only question to be put to the separate houses is whether the vote of the State objected to shall be rejected.

Mr. BOUTWELL. I say that, as antagonizing the question which was put here, the question ought to be—I do not say it is the only question, but I say that the question which should be put as the alternative of the question put the other day is, "Shall the vote of — be rejected?"

Mr. SHELLABARGER. I now, perhaps, understand the gentleman better. That particular form of putting the vote is an important matter, arising, as I understand the gentleman, out of the twenty-second joint rule and the practice under it. But the Constitution does not drive us to such a method of voting nor confine us to that way of finding out whether the vote of a State ought to be counted in the constitutional sense. The suggestion I was going to make was that if it be true that under the Constitution the only question that can be taken is whether the vote of a State shall be rejected, then the position of my friend would result in this: that nobody, neither the President of the Senate nor the House of Representatives nor the Senate, would have the power to act affirmatively and say that the vote of a State should be counted. The only question would be whether the vote should be rejected.

Mr. BOUTWELL. Mr. Chairman, I do not find in the Constitution any declaration as to the questions that are to be proposed to the two houses, much less any declaration as to what shall be the form of questions; but I find in the Constitution a declaration that the votes shall be counted. I find that the Constitution provides for the two houses meeting together. I find that it is necessary for the safety of the republic that the power of the two houses shall be exercised, and that from the beginning of the Government it has been exercised in regard to the matter of counting the votes, and that as early as 1821 Mr. Clay, who was the author of the resolution from which our concurrent resolution with reference to Georgia was copied, led in the assertion of a principle which is sufficient to include all that I claim; that is, that the two houses have power under the Constitution to institute a scrutiny to ascertain whether the will of the people as expressed at the ballot-box is honestly expressed by the certificates upon the table of the President of the Senate.

Upon this basis I maintain that it is the duty of the two houses, under the Constitution, to proceed in such a manner as honestly to execute the duty which is imposed upon them by the Constitution. I say further that the duty imposed upon them by the Constitution cannot be executed safely under this twenty-second rule if the question is to be put as it was put by the Speaker of the House on Wednesday, and, as I think, fairly put under the rule. Hence it is, in my judgment, necessary, if we would leave a proper precedent for our successors, that this rule should be modified so that the vote of a State objected to shall not be excluded except by the voice of the two houses.

* This brings me to the consideration of the question how shall the voice of the two houses be expressed. I say at once that they are not to act together as a joint body. The reason for separate action is to be found in the nature of the case. If there should be a failure to elect a President, the power to elect devolves upon the House of Representatives. Now, if the House of Representatives, for example, were constituted with as large a majority in favor of one political party as is found in this House to-day, and if the Senate at the same time were constituted with as large a majority in favor of the opposite party as is the political majority in the Senate to-day—should the two houses act together, the majority in the House would be able to control the antagonistic majority in the Senate, and thus decide the matter for itself. Hence in such a case the question might as well be left to the House alone as to be left to the two houses. Then again, we have to consider that in no other particular is there any ground to assume that the two houses are to act as one body. In addition to that, no one can fail to see that there is greater security for the public peace, for the safety of the nation, if the concurrent action of the two houses be required than there would be if the question were left to the two houses acting jointly. It is said in the Constitution that "the votes shall then be counted," meaning undoubtedly that they shall be counted in the presence of the two houses. But the judgment of the houses as to whether a particular vote shall be counted may be made up when those houses are separate. If the Senate retires and decides that the vote of Georgia shall be counted, the vote is not then counted when merely the Senate has so decided. But when

the President of the Senate comes in and says the judgment of the Senate is that the vote of Georgia shall be counted, and also that the judgment of the House of Representatives is that the vote of Georgia shall be counted, the vote of Georgia is then to be counted in the presence of the two houses. When the certificate of the electoral votes of a State is laid upon the table of the President of the Senate, that so many votes were cast for a certain person for President, and so many for a certain other person for Vice-President, the *prima-facie* case, as we say, is that the transaction was an honest transaction, and the certificate is a faithful report of the result reached. It is for those who deny it to overthrow the *prima-facie* case made out by the presentation of the certificate under the Constitution, and that can only be overthrown by the opinion of the Senate expressed independently that there is fraud or error so as to vitiate the certificate, and the opinion of the House of Representatives, expressed independently, that there is fraud or error which vitiates the certificate. If either House says the vote of the State objected to shall be counted or shall not be rejected, it must be counted. I think there is no safety in any other rule.

MR. SUELLABARGER. The result is this. Although it might be known that the vote was fraudulent, still the fact could not be decided in that way if the House of Representatives refuses to decide it.

MR. BOUTWELL. How do we know whether the vote is fraudulent? Only by the decision of those who are to judge of it. The right of judgment is in the Senate and in the House, and their concurrent action is required to overthrow the *prima-facie* case made out by the presentation of the certificate. The two bodies are like any other tribunal. We may pass a bill in the House and may think it an important measure; but if the Senate does not concur, although the people may suffer from want of it, it is not the law. So if we object to the vote of a State and think we have sufficient reasons for so doing, and the Senate refuses to concur, the vote must be counted. Nothing can be done without the concurrence of the two branches of Congress. Under the Constitution and for the safety of the country the vote of every State must be counted unless the Senate and House by a concurrent vote declare that it should be rejected.

COUNTING THE ELECTORAL VOTES.

MR. BROOMALL. Mr. Chairman, I agree with the gentleman from Massachusetts who has just addressed the committee [Mr. Boutwell] that the questions which the resolution of his colleague [Mr. Butler] of Wednesday last indirectly brought before the House and into the discussion can hardly be overestimated in their importance to our national future. The substitution of one Executive for another, which our system of government requires to be done so frequently, must always be a dangerous operation unless the mass of the community believe it to be done fairly and in conformity with pre-existing laws. Hence the necessity of foreseeing every possible question that may arise upon which there may be honest difference of opinion and providing for its settlement beforehand by legislative enactment or by constitutional provision.

If the right of a State to have its electoral votes counted at any election should be a question upon which the thinking men of the country are nearly equally divided, if the counting of those votes should elect one candidate and throwing them out another, then to leave that question unsettled until the counting of the votes is to invite—more than that—it is to produce civil war. This case has not happened within the three-quarters of a century of our national existence. It may never happen. But we incur the risk of it once in four years, and prudence requires us properly to appreciate the danger and to guard against it if possible.

I have purposely limited my view of the danger to the case of an honest difference of opinion. I have no fear that the dominant party in the Government will ever, without at least a show of reason, throw out the electoral votes of sufficient States to elect a favorite candidate. Such a proceeding would be treated as a nullity by the people, and so few would be found to uphold it that even a resort to force would be unnecessary. Civil wars are always upon debatable questions. Whatever selfish motives the leaders may have, the masses of the people upon each side honestly believe their cause just. Our recent civil war was not an exception to this. If the States are sovereign and the Union a mere agency for the performance of certain limited functions, the South had a right to secede at any time; and this doctrine was the teaching of the dominant party of the country for more than half a century. I shall, therefore, limit myself to such questions as may fairly divide the community in opinion, and shall inquire what they are, and what means the Constitution has placed in our hands for providing a mode of settling them before the time of counting the votes, and in a manner to be acquiesced in by the people.

The questions naturally divide themselves into two classes: first, those which touch the right of the alleged State to cast an electoral vote at all; and second, those which affect the legality of the proceeding which furnishes the certificate of the alleged electoral votes.

The provisions of the Constitution are:

"Each State shall appoint, in such manner as the legislature thereof may direct, a number of electors equal to the whole number of Senators and Representatives to which the State may be entitled in Congress. The electors shall meet in their respective States and vote by ballot for President and Vice-President, one of whom at least shall not be an inhabitant of the same State with themselves. They shall name in their ballots the person voted for as President, and in distinct ballots the persons voted for as Vice-President; and they shall make distinct lists of all persons voted for as President, and of all persons voted for as Vice-President, and of the number of votes for each; which lists they shall sign and certify, and transmit, sealed, to the seat of Government of the United States, directed to the President of the Senate. The President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates, and the votes shall then be counted."

It is apparent that there is much left here for legislation. In the first place, what is or is not a State is not determined by the Constitution either in the clause quoted or anywhere else. Every State is entitled to its electors, and the question, what is a State, meets us at the very threshold of our inquiries, with the question, who shall decide it? The case of *Luther vs. Borden*, (7 Howard, 1,) furnishes an answer to both these questions. It is there held that the former question is a political and not a judicial one. It is a question which pertains to the enacting of laws, not to the expounding of them; that is to say, the status of a State is fixed by legislation. That, therefore, is a state which Congress admits and recognizes as such by law, and it would seem to follow logically that a State once recognized by law must retain its status until the law is changed.

In the recent case we refused to decide whether Georgia is or is not a State, but by concurrent resolution declared in effect that inasmuch as her vote could not change the result it should neither be counted nor rejected, but simply stated. In doing so we followed the precedent set in 1821, and repeated in 1833. It is much to be regretted that such precedent was ever established. It would have been better to meet the question in the case of Missouri in 1821 boldly, and give it a legislative decision. Such questions are liable to be presented at every presidential election, and we do not know how soon the settlement of one of them may turn the scale in favor of a particular candidate. When such a question will not affect the result it is much more likely to be determined justly, without party prejudice or partiality, than when it is vital. Every such settlement affords a precedent for future similar cases, and many such will familiarize the people with the principles upon which they are determined; and when a case shall arise in which the decision shall affect the result, it will be much more readily acquiesced in by the losing party if it follows a line of former precedents.

Secondly, granting the existence of the State, the electors are to be appointed in the manner directed by its legislature. They may be named directly by the legislature, or they may be elected by the people under State laws. The latter plan is now almost universal. Here an important question arises. By whom and in what manner are contested elections of electors to be determined? By Congress? I have failed to see any warrant in the Constitution for such a conclusion. The electors are distinct bodies, charged with particular functions, totally independent of Congress. Their business is not legislation. Their powers are not derived from law, but Constitution. Laws prescribe the time and manner of performing them, but nothing more. Congress may decide, as I have said, whether or not the State exists, because that is legislation. But granting the State, it would seem to be just as rational to say that the electors may decide who are members of Congress as that Congress may decide who are electors.

By analogy, and in the absence of legislation, it would seem that the electors in each State shall decide who are members of their own body. But this mode of settlement, though good in theory, is utterly worthless in practice. The electors in each State are elected by a general ticket. Each party has its set of candidates, and all of either party will be elected or all defeated. In cases of contest, therefore, there will be two bodies meeting in the State and performing their functions separately, each claiming to be the true electors. And when the time of counting shall arrive the President of the Senate will open two papers from the State, and two sets of votes for different candidates will present themselves, each claiming to be the one to be counted.

Here is the true *casus omissus*, but it seems to me to be rather in law than in Constitution. It is only the votes of the electors that are to be counted; the Constitution could go no further than this. It might as well prescribe the manner of ascertaining who are elected members of Congress as to prescribe the manner of ascertaining who are elected electors. Both these are properly left for legislation.

But who shall legislate, the United States or the States? The electors are to be appointed in the manner directed by the legislatures of the States. If Congress had been clothed with the power of directing in what manner the electors should be appointed, nobody would hesitate to affirm that Congress should prescribe the means of ascertaining whether that duty had been properly performed, and hence of settling contested elections of electors. As the case stands, the argument is just as strong that this is left

to the State legislatures. I am, therefore, clearly of the opinion that the Constitution has left the whole matter of devising means to determine who are and who are not electors to the States themselves. If I am right in this, it is to be regretted that no State, as far as I know, has as yet performed this duty, since no man can tell how soon a contest in a single State may be sufficient to change the apparent result of an election, and possibly plunge the country into civil war.

The Constitution contemplates but a single certificate from each State. If two should present themselves, each perfect upon its face, and showing different results, in the absence of State legislation devising means to settle the question, I am not prepared to say that Congress might not determine which is the true one. Neither will I say that that power is not granted to the President of the Senate alone. I see as much warrant in the Constitution for one opinion as the other. This ambiguity only exhibits more strongly the necessity of proper State legislation, that the contingency may be avoided.

Thirdly, the certificates are to be opened by the President of the Senate in the presence of the Senate and House of Representatives, "and the votes shall then be counted." By whom and in what manner, the Constitution does not provide. This, therefore, is left to legislation; and as the States are intrusted with no duties and clothed with no powers in the premises, after the casting of the electoral votes and forwarding the certificates, there is no difficulty in determining that this legislation must emanate from Congress. Congress might empower the judges of the Supreme Court to do this, or it might appoint members of its own body, or any other persons. But it should be done by previously enacted law.

The act of 1792, the only one upon the subject, does not prescribe by whom or in what manner the votes shall be counted, and the twenty-second joint rule attempts to supply the defect. This, I think, is irregular. The two houses may adopt rules for their own government, but the counting of the electoral votes in no way pertains to the government of the two houses. The same objection lies to the concurrent resolution passed a few days ago with respect to the State of Georgia, that it is not law, but merely in effect a joint rule adopted for the particular occasion. This, however, is not material in the present instance. The votes being properly counted as far as they affect the result, nobody is in a position to take advantage of the defect.

A single question only remains: What is the position, what are the powers and duties of the two houses of Congress assembled at the opening of the certificates and the counting of the votes? Much confusion has been caused in the debate upon the resolutions of the gentleman from Massachusetts, by what I conceive to be a misnomer; most of the gentlemen who addressed the House spoke of the persons assembled at the counting of the electoral votes as a joint convention. This is a great mistake. The votes are not to be counted in the presence of the Senators and Representatives, otherwise there might be some warrant for calling the assemblage a joint convention; but "in the presence of the Senate and the House of Representatives." This necessarily requires thorough, complete, and separate organization of each body, each having its own presiding officer, its own sergeant-at-arms, its own secretary or clerk.

I am aware that the opposite opinion may derive some support from the twenty-second joint rule, which says, after providing for the meeting of the two houses, "the President of the Senate shall be their Presiding Officer." But a joint rule cannot change the Constitution; it cannot make one body of what the Constitution makes two distinct ones. As far as the rule attempts to do this it is simply void. I see no difficulty, however, in the two houses agreeing upon a single person to preserve order within the hall. In this sense, and in this only, they may be said to have a single Presiding Officer. But his powers in this respect are limited to the performance of that duty. He can put no question to the two houses. As President of the Senate he can govern his own body according to its rules. As the ministerial officer appointed by the Constitution to open the certificates he can perform that duty and such others pertaining thereto as may be put upon him by previously enacted laws.

How absurd, then, was it for the gentleman from Massachusetts [Mr. Butler] to appeal from what he called the decision of the Chair! How could such an appeal be decided? Not surely by the joint body, for there was no joint body there. Not by the two houses separately, for the President of the Senate could put no question to the House. Besides, the House could only entertain an appeal from the decision of its own presiding officer, the Speaker. I repeat, how absurd was the idea of such an appeal, and what downright folly was it for the same gentleman to propose in the House afterward to censure the President of the Senate for not entertaining the appeal! The House very properly laid the whole subject upon the table by a large vote, though the proposition had been greatly modified and purged of much that was objectionable. We were not willing that even necessary legislation should grow out of so anomalous a proceeding.

What, then, is the position of the Senate and House assembled at the counting of the votes? I answer, simply that of witnesses. They are to see that the business is done according to the Constitution and laws. If occasion requires, they are to separate and take such action as may be necessary. But it is said, are the two houses then assem-

bled powerless to prevent a wrong? Are we at the mercy of a single individual? Suppose the President of the Senate should refuse to open the certificates, or should withhold enough votes from the tellers to change the result of the election? This is hardly a case for conjecture. It did not happen when Mr. Breckinridge was at the same time President of the Senate and conspirator in a projected rebellion. But suppose anybody else should violate the law, let the law punish him and redress the wrong. If the malefactor is Vice-President, impeach and remove him at once; if simply President of the Senate, let the Senate depose him and appoint another.

In conclusion, I would submit the following: 1. Let the provisions of the joint rule for appointing persons to count the electoral votes be enacted into a law; 2. Let no question as to whether an alleged State is a State, and therefore entitled to cast electoral votes, remain unsettled until the day of counting, even though the settlement may not affect the result. Let the status of every State be unmistakably fixed by previous legislation founded upon principles that may give rise to a series of precedents acquiesced in and approved by the community; and 3. Let the legislatures of the several States provide the means for settling cases of contested elections of electors. This could be much more readily done if the electors were elected in separate districts. It is objected, however, that the ruling party in a State may so district the State as to give it an undue advantage. This evil, however, is of limited scope, and experience shows that the attempt to get this advantage very frequently produces exactly the opposite result. Besides, the antagonistic party in other States may do the same thing. Hence it may be fairly supposed that by the balancing of opposite wrongs a general resultant of right may be obtained.

In the Committee of the Whole on the state of the Union, on the resolutions that the House protest against the counting of the vote of Georgia by order of the Vice-President *pro tempore*,

Mr. BROMWELL said:

Mr. CHAIRMAN: The matter upon which I rise to speak to-night is that which recently created so much disturbance in this hall. I wish, before speaking of the more important questions involved, to call attention to the particular matter which occasioned the disorder, a matter which has not been spoken of to any extent before the House. The disturbance which has been spoken of in such animated terms by the press and by Representatives on the floor, and stigmatized by two gentlemen from Ohio as the violence of a mob, or an exhibition of the spirit of hell, arose upon an appeal taken by the gentleman from Massachusetts [Mr. Butler] from the decision of the Chair.

Concerning that appeal I will say that when the convention met we saw a President in the chair and three tellers. How came they there? Those who speak so much about the Constitution should take notice that the Constitution puts no man in the chair and makes no man a teller. By legislation of Congress, and that alone, was there any presiding officer over that convention. Every one has recognized the right of the Congress, from the beginning of the Government up to the present time, to fix the time at which the President of the Senate shall open the votes according to the Constitution, and the time and manner of counting the same. The Constitution has not devolved that duty upon any particular person, but the Congress, seeing the necessity that some provision should be made, has heretofore passed rules on that subject.

During the discussion that has sprung up on this occasion three different views of the nature of the convention have been put forth. Some have insisted that it was a joint convention; others simply that both houses of Congress were present; others that members of the House and of the Senate were here as mere spectators while the Vice-President or President of the Senate was performing his functions.

Now, sir, I wish to say concerning the matter of that appeal and concerning the whole of that question that it is manifest to my mind that if any body of men be assembled together in the name of law, and charged with any functions whatever, they have certain inherent and necessary powers in order that they may first ascertain and know that they are the parties intended; and, secondly, there being an object for which they are convened, whether or not they are doing anything tending to accomplish the same, and whether or not they are doing it in the mode ordained. If they have not these powers they are the merest spectators, entirely supernumerary, and are in no sense a legislative, judicial, or executive body, an assembly wholly destitute of legal functions, and only useful as witnesses to the impotency of the law on an occasion so vital to the interests and existence of the Republic.

By the voice of the Constitution alone, according to the interpretation of some gentlemen here, the Vice-President might have notified both houses of Congress of the time and place when and where it would suit him that they should come and be present and see him count the votes. Under the interpretation of the gentleman from Pennsylvania [Mr. Broomall] the President of the Senate might assemble both houses to witness his performance of counting the votes; and then, if he should choose to lay aside the vote of Pennsylvania, for instance, and say that in his opinion it was informal, that would be an end of it. Manifestly the Constitution contemplated no

such result, but intended that there should be a count by a party responsible at once to the Representatives of the people, who should be present, competent to oversee and direct in the name and by the authority of the people. Who, then, are to count that vote, under the Constitution, aside from your laws? The two houses by themselves, or officers appointed to count for them. For what else are they to be present? Why be assembled? For if the President of the Senate choose to do his work correctly and fairly, he can as well notify the public when he has finished it to his own satisfaction without any witnesses whomsoever, and if he should choose to play the despot and usurper, he could do it clothed with the form of law as well in the presence of the powerless houses of this Congress as by himself, and the whole provision of the Constitution would be utterly a nugatory.

But manifestly when the Constitution says that a count shall be made, having first assembled the houses of Congress, it is intended that the houses of Congress shall count, and they have shown this to be clearly the understanding of Congress by ordering tellers to do in their presence that which would be too inconvenient to be done by the whole body, and further by making the President of the Senate president of the assembly. The Constitution having made him the custodian of the budget of certificates, he is to bring forward those papers and do what? Open them in the presence of both houses. And then when he has done that he has done all that the Constitution requires him to do, and from that moment the whole proceeding falls into the hands of the representatives of the people and of the States. His function under the Constitution is at an end when he breaks the seal; and the Congress has recognized this to be the law by the rule I have mentioned providing tellers. Who counts when a body of men are commanded to be present at a counting and nothing is said as to who shall count? Manifestly it means the body, and Congress has so recognized it by providing laws, and particularly by this twenty-second rule, which prescribes how and in what manner the count shall go forward. By fixing a definite time for the transaction of this business Congress has assumed jurisdiction to legislate on that subject, for Congress thereby takes from the President of the Senate the determination of the time when he would open the certificates, which power was by the Constitution left in the hands of the President of the Senate as much as the power to count. When Congress passed a law or a joint rule which provided that in a certain event the vote of a State should not be counted, they were then legislating on the subject and assuming control of it, and the Senate and the House on the occasion of this count this very week recognized this doctrine, for they transacted business in reference to Louisiana under that rule, and finally they transacted it in reference to Georgia itself under that rule. Take notice, sir, that the Senate left the hall under that rule.

In fact, the Senate went out under one statute and came back under another. They left the hall because the President said that objection being made to counting the vote of Georgia under the rule, the Senate would retire to deliberate upon it. It seems that after they went out they deliberated on the question whether the objection was in order or not. They deliberated on this because of the former joint resolution, till they decided that said resolution did not bind them to deliberate at all; and having decided said resolution not in force concerning Georgia, they came back into this House and announced to the House that the cause for which they went out did not exist, for the reason that a subsequent resolution controlled the case of Georgia; but still acting under the rule they held not to control the case, they then and there by their President announced to this House and to the Senate that the Senate had decided that the objection of the gentleman from Massachusetts was out of order, and therefore he, the President of the Senate, for the reason that the Senate had so decided, held it out of order. Upon that statement by him that the Senate alone determined this question the gentleman from Massachusetts appealed from the Chair. To whom did he appeal? Of course he must have appealed to the body present, for clearly there could be no appeal from the chairman of a joint convention or any other assembly to either of the houses. And yet the Constitution never could have meant that the Vice-President should be an autocrat on that occasion. The Constitution never intended that John C. Breckinridge, then about to become a major-general in the rebel army, might have sat in that seat and declared Abraham Lincoln not elected, by withholding the votes of New York and Pennsylvania and other States on motion of his own, and therefore absolutely overthrowing the Government without a struggle with arms. The men who framed the Constitution never contemplated that; and whatever *casus omissus* there may be in the provisions of that instrument touching this matter, it is manifest that they intended that the body assembled to count should know when it met whether it was the body intended, and whether it was proceeding in order to execute the order of the Constitution.

I know it is said, and perhaps it may be true, that the founders of the Constitution founded a double-headed, a hydra-headed assembly, which, being completely organized as both Senate and House of Representatives, sits at the same time and in the same place for the transaction of business. Manifestly such a body as that cannot do business in any manner. However plausible it may sound that two complete and separate

organizations can sit down in the same hall, everybody knows that as a matter of fact two organizations cannot transact business in the same hall at the same time in any manner that would not reflect utter contempt and disgrace upon the entire proceeding. Would one body be passing upon the objection raised by the gentleman from Massachusetts [Mr. Butler] while the other body was considering and determining a question of order arising out of that objection? Would one presiding officer be recognizing the Senators composing the body to which he belongs, and would the other presiding officer at the same time be recognizing the Representatives composing the other body to which he belongs? Why, sir, a confusion of Babel would be inaugurated by the overweening power of the Constitution.

There can be no doubt that the Constitution intended that the two houses of Congress separately should regulate, by concurrent action, the law touching the mode and manner of counting the electoral votes; and that when assembled together they are so much of a joint convention that they can take notice whether they are there or not; that they can ascertain whether each house is there by roll-call or otherwise; that if the man presiding under the statute sees fit to grasp the whole power and take proprietorship of every rule of order, they can, by a right inherent in every assembly that ever sat, judge whether its own mouth-piece is speaking truly its own voice. How came the President of the Senate to be president of this joint convention? Does the Constitution say that he shall preside? Nay, the Constitution does not say that any man shall preside. Yet the manifest propriety of the officer who takes rank in other respects taking the chair and presiding in the joint convention has caused the law to prescribe that course. And the Senators are by courtesy provided with seats by themselves, when otherwise the members of the two bodies might be mingled together promiscuously.

Did the Constitution contemplate that the members of the Senate should leave the hall of the joint convention and formally proceed to their own place of business every time any member of the joint convention should choose to raise a question of order? Plainly, if that were the case, they might never be able to count a single electoral vote, for as soon as they might return from deciding one question any member could raise another, and out would go the Senate, or perhaps the House be compelled to go, to decide it.

Did the framers of the Constitution ever contemplate the organization of a legal assembly so absurd and preposterous as this joint convention would be should that be the course they must pursue? Sir, such was not their intention. Their intention must have been that, under laws which Congress might frame in their separate bodies for the regulation of this matter, the inherent rights of a body assembled together for the transaction of public business should pertain to them when assembled for the purpose of counting the electoral votes, at least to an extent sufficient to enable those who are the counters on behalf of the people to know that they are counting.

There can be no doubt that the Vice-President or Presiding Officer of the Senate presided over both bodies when assembled in joint convention by the consent and acknowledgment of every member of both houses. They all recognize his duty to act as the Presiding Officer of the joint convention. The Speaker of the House himself commanded the members of the House in so many words to obey the orders of the President of the convention under penalty of arrest by the Sergeant-at-Arms of the House. Then, if the President of the Senate has such authority while sitting in the chair presiding over the joint convention that members of the House on this floor are to be arrested for not obeying his orders, it must be derived from some law. Not being provided for in the Constitution, it must come from some law of Congress. And, clearly, if the laws of Congress can place the President of the Senate over the joint convention with powers of that description, clearly the laws of Congress can go further and clothe the joint convention itself with all the functions that are necessary, and without which all assemblies are but mockeries. That is, if it would be at all necessary to go further than to give a presidency with such powers to a convention in order to show that the body so presided over was a convention having all the inherent powers of such bodies in general.

And now I wish to say a few words in regard to the concurrent resolution which was passed on Monday last in relation to the electoral vote of the State of Georgia, and which controlled, in effect, the counting of her vote. Generally a member feels that an apology is due for his conduct if he is not present when important legislation takes place in the body to which he belongs. But upon this occasion I do think that I may esteem it rather creditable than otherwise that I was not present when such a resolution as that passed this body. It is a kind of drawbridge resolution—that if Georgia be going up stream she may go through, but if she be going down stream she shall not go through. It is a fast-and-loose alternative, unworthy of the representatives of a free people, or of any people that can maintain their freedom. The resolution said in fact to the world that we were afraid to throw out the vote of Georgia and afraid to count it, but that we would append it in this most preposterous manner to the tail-end of the count. This was not simply an act of oppression in case the reso-

tion were wrong, but an act which, whether right or wrong, is, let Georgia be what it may, an act of insult and contumely to the people of that commonwealth, and this whether she be entitled to vote or not. To throw out the vote of a State contrary to law is an act of oppression; but to tie a State on in that manner to a count with an alternative that if she does not count she shall count, but if she counts she shall not count, is making sport not only of the people of such a State, but of the highest functions of government. Hence I am very happy to state I was not present when this resolution was adopted by this House.

In the confusion that prevailed in the joint convention—for I think it is generally admitted that whatever thing was done that particular thing was not in order provided you could get at anything else that was in order—the Senate under the joint rule adopted in 1855 retired from the House to deliberate, and upon deliberating found that the joint resolution did not affect the case, and came back, and under that very resolution decided, and the President of the convention announced the decision, that the gentleman from Massachusetts was out of order. The decision rendered upon the return of the Senate was a decision under the twenty-second joint rule, and not under the concurrent resolution recently passed in reference to Georgia, and which the Senate said governed the case of Georgia. So that the Senate retired under one rule and decided under another, and then came back, and the decision of the Chair was announced under the former.

It is not to be wondered at that the gentleman from Massachusetts, [Mr. Butler,] in such a state of affairs, thought it would not be unreasonable to ask an appeal, for if all these things were in order I do not see why any kind of an appeal or other motion would not be in order also. Yet because, when the members of this House were told that the Senate had decided this matter for the joint convention, including the House, and for the country, there was excitement at the announcement, the House has been designated as a "mob," and we have been told about the "fell" spirit in which this thing was conducted. I, among others, had the honor to call upon the President on that occasion to state by what authority the appeal was not entertained, and thus, I presume, I became one of the "mob" and one of the "fell spirits" that at that time were horrifying the imagination of the gentlemen from Ohio, [Mr. Bingham and Mr. Garfield.] All that was meant by the demonstration made at that time, as far as I understand, was that gentlemen of this House did not want this new doctrine that had come to light in so much confusion thrust down their throats by the gavel of the President of the Senate without at least some explanation on the subject. They were willing to submit to the common judgment, and under the very arguments that have been used against them all around the board, if that very question puzzled the President of the joint convention so that the two houses had to separate and decide it separately according to the theory of those who are in favor of separate action, and that, too, according to this very same rule under which the Senate went out to deliberate, there was then no need that the appeal made by the gentleman from Massachusetts should have caused an uproar in the House, or a conflict between the House and the Senate, or the arrest of members on this floor. According to the theory of gentlemen who take opposite ground from mine, the two houses still retain the power to settle that question by their separate action.

Looking at the state of the law and the rules, it is not to be wondered at that on the day the houses recently met to count and declare the vote for President there should have been considerable excitement and disorder. The only matter of wonder is that there was so little. But if there are under the present rules reasons to apprehend disturbance in case of a counting, when the vote of a State put in question cannot in any way change the result, what must we expect in a case in which the vote of a single State would determine the result? And this very case might have happened on this occasion. A few thousand votes in Pennsylvania and a few other States changed in favor of Seymour and Blair would have made the vote of Georgia decisive. In such a case as that what would have been the scene here; and what would have been the action of our Democratic friends here who now sustain the acts of the President of the Senate? Could the supporters of either candidate for the Presidency have been controlled when they would have seen the result of the great canvass which cost so much time and money, and roused every energy and passion of both parties, finally disposed of in a summary manner, and in a way which the unsuccessful party would be sure to look upon as clear usurpation?

It is idle to argue the danger of such an occasion. Everybody can see that a terrible convulsion must be the result, not because the beaten party would complain of oppression, but because they would see in the mode by which their defeat had been accomplished nothing but absolute usurpation; and although it is possible to hold the American people in some order under great oppression within the forms of law, yet the least attempt at usurpation sets the whole community in a flame. In all cases in which powers are doubtful, as in this, any exercise of them against the interests of any portion of the community is held by them as clear usurpation.

Clearly, then, no presidential election can be peacefully settled under such provisions

of law as we now have in case such a contest as I have supposed should arise concerning the vote of a State that would change the result. Nothing can be gained in this matter by a quarrel between the two houses. Should they censure each other in the most ample manner it could do nothing toward avoiding future danger. It could do nothing toward providing proper security for coming elections.

In my opinion the constitutional provision is too uncertain; it is wholly defective, and the laws we have in aid of it make the matter worse, as was pointed out by the gentlemen from Massachusetts, [Mr. Bontwell and Mr. Butler;] for where the Constitution left it uncertain what might be done, the joint rule comes in and provides that something shall be done wrong. This is manifestly the case in that provision which allows either house alone to forbid the counting of the vote of a State, instead of providing that it should require both houses to prevent it.

In view of this state of things I have offered in this House an amendment to the Constitution providing that Congress may make laws covering the whole subject, and furnish proper officers to count, and also a proper tribunal to determine in all questions of dispute touching the legality of any vote. And I think that it is proper here, as was said by the gentleman from Massachusetts, [Mr. Butler,] to call the attention of Congress and the country to this great defect in the framework of our Government. In fact, the Government is compelled every four years to pass through dangers, such as can only be compared to those of a ship passing through a narrow channel in which are sunken rocks, and no man knows, until she reaches them, how many they are or where they lie or how near to the surface of the waters. No man can tell what States may send up informal certificates, nor when, nor in what way they may be defective, nor what might be the effect of their rejection on the result of an election.

For this reason many members voted against laying on the table the resolution of the gentleman from Massachusetts, [Mr. Butler,] and the substitute of the gentleman from New York, [Mr. Kelsey,] as the substitute provided for future legislation on this very subject. Even if no collision should ever arise under the existing law, yet the law itself is clearly wrong, and holds out temptation to any dominant party in either house to defeat willfully, for partisan purposes, the clear will of the people. In case at any time a decision under this rule should change the result of an election it could not fail to happen that the law would be challenged at once as wholly unconstitutional; and the best answer that could be made in its defense would be that it probably is and probably is not—in either case it is wholly wrong and dangerous.

I wish, sir, to defend the action of members of this House against the aspersions thrown upon them from several quarters, and especially by those members of this House who saw proper to be very active in getting the whole subject out of the way. What could gentlemen expect to happen in such a case? The cause of disturbance came suddenly upon the House. In order that the whole House should submit quietly and with due subordination to whatever the Senate or its President or those who assume leadership in the House might think proper, it would have been necessary to train the members of the House and instruct them until they could understand just what was to be required of them. They should have been informed precisely what would suit the proprietors of the public business, and thus put upon their good behavior, and after that if they proved refractory there would be great propriety in all those who might be offended administering a severe castigation.

But I insist that no pains were taken to put the House in a proper frame of mind, and hence the natural impulses of human nature under such circumstances impelled several members to act in a manner considered very "fell" and hellish, to wit, in a dissatisfied and insubordinate manner.

In saying these things I do not wish to censure the Senate. I would not vote for any resolution to that effect. First, because the House cannot censure the Senate. To censure is to punish, and presupposes some visitatorial, inquisitorial, or supervisory power in the party censuring, and the House has not such power in the least.

Secondly, the Senate did no wrong. What they saw proper to do in their own hall is no business of ours, and in fact they only did just what we did; that is, to vote whether the vote of Georgia should be counted; and in this hall they did nothing but take their seats in a quiet and decorous manner and remain in good order till they departed in good order.

The truth is the House can do nothing but grumble; first, at the President of the Senate for not allowing an appeal, and secondly at the Speaker for compelling obedience to his orders. But such a complaint would in fact only be a complaint against the uncertain and improper condition of the law, and the House can do far better by busying itself with plans to put the law in better condition.

I have nothing further to add but to express the hope that the House will not let this occasion pass without setting on foot some measures for the safety of the country in the future.

IN SENATE, *January 6, 1873.*

PRESIDENTIAL ELECTION IN LOUISIANA.

Mr. SHERMAN. I offer the following resolution, and ask for its present consideration :

Resolved, That the Committee on Privileges and Elections is directed to inquire and report to the Senate whether the recent election of electors for President and Vice-President has been conducted in the States of Louisiana and Arkansas in accordance with the Constitution and laws of the United States, and what contests, if any, have arisen as to who were elected as electors in either of said States, and what measures are necessary to provide for the determination of such contests and to guard against and determine like contests in the future election of electors for President and Vice-President. That for the purpose of speedily executing this resolution the said committee shall have power to send for persons and papers, to take testimony, and at their discretion to send a subcommittee of their own number to either of said States with authority to take testimony; and, if the exigency of this service demands, the said committee may appoint and employ suitable disinterested and unprejudiced persons not resident in either of such States, with authority to take such testimony as may be material in determining any pending contest growing out of the election of electors in either of said States."

The VICE-PRESIDENT. Is there objection to the present consideration of this resolution?

Mr. WEST rose.

The VICE-PRESIDENT. Does the Senator from Louisiana object?

Mr. WEST. Yes, sir.

The VICE-PRESIDENT. The resolution will be placed on the Calendar.

Mr. SHERMAN. I give notice that I shall call it up to-morrow. I move that it be printed.

The motion was agreed to.

Mr. WEST. I deem it due to myself to state that I do not urge objection to the spirit of the resolution at all, but I want further opportunity to consider it and be ready to make some suggestions to-morrow.

IN SENATE, *January 6, 1873.*

Mr. MORTON. I offer the following resolution :

Resolved, That the Committee on Privileges and Elections be instructed to examine and report, at the next session of Congress, upon the best and most practicable mode of electing the President and Vice-President, and providing a tribunal to adjust and decide all contested questions connected therewith, with leave to sit during vacation."

The resolution may lie on the table for the present, and I give notice that I shall ask the indulgence of the Senate on next Monday to take it up and submit some remarks upon it.

The VICE-PRESIDENT. Does the Senator desire the resolution to be printed?

Mr. MORTON. Yes, sir.

The VICE-PRESIDENT. The resolution will be ordered to be printed, and lie on the table.

IN SENATE, *January 7, 1873.*

PRESIDENTIAL ELECTION IN LOUISIANA.

The VICE-PRESIDENT. The first business during the remainder of the morning hour, if there be no further morning business, will be the consideration of the Calendar under what is known as the Anthony rule.

Mr. SHERMAN. I will move to take up the resolution I introduced yesterday.

The VICE-PRESIDENT. That will be in order. The Calendar will come up under the rule unless some other business is taken up by a vote of the Senate.

Mr. SHERMAN. The Senator from Louisiana [Mr. West] I understand has read the resolution and has withdrawn his objection to it.

Mr. ANTHONY. I do not wish to interpose in favor of the Calendar against any business necessary to be transacted.

Mr. SHERMAN. This resolution will take but a moment.

Mr. ANTHONY. Let the Calendar then be laid aside informally.

Mr. SHERMAN. I have no objection to that.

Mr. ANTHONY. I think we should take two more days for the consideration of the Calendar. I hope at some time during this session we shall go through the unobjected cases on the Calendar. We shall thus reach the whole of them and generally afford a great deal of relief to the people entitled to it; and even if the bills reported favorably are rejected, that will be much better than to have them resting on the Calendar and getting out of date and memory, except by those poor fellows who are claiming the relief.

The VICE-PRESIDENT. The Calendar is before the Senate until one o'clock, when the Indian appropriation bill comes up, pending which the Senator from Ohio moves to take up the resolution offered by him yesterday, which was objected to by the Sen-

ator from Louisiana, but which objection is now withdrawn. The Secretary will report the resolution.

The Chief Clerk read the resolution, as follows:

"Resolved, That the Committee on Privileges and Elections is directed to inquire and report to the Senate whether the recent election of electors for President and Vice-President has been conducted in the States of Louisiana and Arkansas in accordance with the Constitution and laws of the United States, and what contests, if any, have arisen as to who were elected as electors in either of said States, and what measures are necessary to provide for the determination of such contests and to guard against and determine like contests in the future election of electors for President and Vice-President. That for the purpose of speedily executing this resolution the said committee shall have power to send for persons and papers, to take testimony, and at their discretion to send a subcommittee of their own number to either of said States with authority to take testimony; and, if the exigency of this service demands, the said committee may appoint and employ suitable disinterested and unprejudiced persons not resident in either of such States, with authority to take such testimony as may be material in determining any pending contest growing out of the election of electors in either of said States."

MR. THURMAN. Mr. President, it is my purpose to vote for this resolution, but before doing so I wish to make some observations, very brief indeed, in regard to it, lest I might seem to be committed to implications that I do not intend to approve. This resolution provides:

"That the Committee on Privileges and Elections is directed to inquire and report to the Senate whether the recent election of electors for President and Vice-President has been conducted in the States of Louisiana and Arkansas in accordance with the Constitution and laws of the United States, and what contests, if any, have arisen as to who were elected as electors in either of said States, and what measures are necessary to provide for the determination of such contests and to guard against and determine like contests in the future election of electors for President and Vice-President."

It then provides the machinery by which the committee may make this investigation. I say I shall vote for this resolution, because there is an urgent necessity for action and for speedy action, and I do not know that any mode has been suggested that is preferable to that provided for by this resolution; that is, any mode that is likely to receive the sanction of Congress in time to be of any service.

But this resolution seems to imply that there is a broader jurisdiction in Congress over the subject of the election of President than I have been accustomed to suppose is vested in Congress. It requires the committee to inquire whether these electors have been elected pursuant to the Constitution and laws of the United States. I know of no power in Congress to pass any law on this subject except a law fixing the time when the electors shall be chosen. The only power vested expressly by the Constitution in Congress is the power to fix that time. The provision is not as it is in regard to the election of Senators and Representatives, that the Congress may by law prescribe the time and manner of election, but it is simply that Congress may fix the time in respect to the election of electors themselves. The constitutional provision is:

"Each State shall appoint, in such manner as the Legislature thereof may direct, a number of electors equal to the whole number of Senators and Representatives to which the State may be entitled in the Congress."

Each State is to do that, and to do it in such manner as the Legislature thereof may direct, and the power of Congress in the premises seems to be limited to this. The third paragraph of the first section of the second article of the Constitution says:

"The Congress may determine the time of choosing the electors and the day on which they shall give their votes, which day shall be the same throughout the United States."

Now if there is to be a contest of the right of persons to hold the office of elector, it seems to have been the contemplation of the framers of the Constitution that that was a matter to be provided for by the States themselves; that each State must determine for itself the election of electors, and determine in such mode as it shall provide any question that may arise between different persons claiming to be elected to that office. No jurisdiction over the subject seems to have been given to Congress; at least none such was in the mind, I should think, of the framers of the Constitution, looking at the provisions of that instrument. And when we come to the provision in regard to the question of votes we find it is in this language:

"The electors shall meet in their respective States and vote by ballot for two persons"—

I am reading now from what was the original Constitution—"of whom one at least shall not be an inhabitant of the same State with themselves. And they shall make a list of all the persons voted for and of the number of votes for each, which list they"—

That is, the electors—

"shall sign and certify, and transmit sealed to the seat of the Government of the United States, directed to the President of the Senate."

The Senate will observe it is to be a sealed return. That means simply that the return is to be sealed up in an envelope, and does not refer to any official seal verifying or authenticating the return:

"The President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates, and the votes shall then be counted."

That is superseded to a certain extent by the twelfth article of the Constitution, which is as follows:

"The electors shall meet in their respective States, and vote by ballot for President and Vice-President, one of whom, at least, shall not be an inhabitant of the same State with themselves; they shall name in their ballots the person voted for as President, and in distinct ballots the person voted for as Vice-President, and they shall make distinct lists of all persons voted for as President, and all persons voted for as Vice-President, and of the number of votes for each, which lists they shall sign and certify, and transmit sealed to the seat of the Government of the United States, directed to the President of the Senate. The President of the Senate shall, in the presence of the Senate and the House of Representatives, open all the certificates and the votes shall then be counted. The person having the greatest number of votes for President shall be the President, if such number be a majority of the whole number of the electors appointed; and if no person have such majority, then from the persons having the highest numbers not exceeding three on the list of those voted for as President, the House of Representatives shall choose immediately by ballot the President."

There is certainly some ambiguity about this provision in the Constitution:

"The President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates, and the votes shall then be counted."

What function the Senate and House of Representatives, in whose presence these certificates are to be opened and the votes counted, are to perform, is not distinctly stated. Indeed it is not distinctly stated by whom the vote shall be counted, whether by the President of the Senate or in some mode provided for by law, or by the action of the two Houses who are there as witnesses to the counting, or whether indeed they are anything more than witnesses, and the whole duty is not devolved upon the President of the Senate.

It does not seem that the difficulty that has arisen was foreseen, that of two returns being made from the same State, as I understand to be the case in the States of Louisiana and Arkansas. I understand at least in the State of Arkansas, if not in Louisiana, there have been two bodies who have cast their votes.

Mr. SHERMAN. In both.

Mr. THURMAN. In both States, each claiming to be the electoral body, one casting its vote for one candidate, another for another candidate, and the returns or certificates of both have been sent here to the President of the Senate. If the Constitution had provided that these returns should be authenticated under the great seal of the State, then it might be that Congress would have nothing to do but look at those returns which are thus authenticated; but the Constitution contains no such provision. These returns come here unattested by any seal whatsoever. They come here attested simply by a certificate signed by certain gentlemen who call themselves electors of President and Vice-President of the United States, and having no authentication; that is, there is none provided by the Constitution, and if any has been given to them otherwise, it is superfluous, and can have no validity, perhaps. They come here in this way, simple certificates, bearing the signature of certain persons claiming to be electors.

Mr. MORTON. I call the Senator's attention to the act of Congress.

Mr. THURMAN. I am aware of that. What act does the Senator refer to?

Mr. MORTON. The act of March 1, 1792, referring to the third section of the act.

Mr. THURMAN. What page?

Mr. MORTON. On page 306 of the Manual.

Mr. THURMAN. "That the executive authorities of each State shall cause three lists of the names of the electors of such State to be made and certified, to be delivered to the electors on or before the said first Wednesday in December, and the said electors shall annex one of the said lists to each of the lists of their votes."

That is all very true. I was not ignorant of that provision; but here what are you to do with cases in which there are two persons each claiming to be governor, and each of whom may comply with that provision of the act of Congress?

I mention this to show the extreme difficulty there is about the subject and the necessity for speedy action upon it, and to show that our power in this matter is extremely restricted. I do not mean, however, to say that we have no power at all. I do not mean to say that such a case as this can come before us without requiring some decision at our hands. How far our power goes I am not now prepared to say; it is a matter that requires the gravest consideration; but I do not wish to be understood as committing myself to any implication that we have power to go into the question of a contest of the seat of these electors. We may be compelled possibly from necessity to determine which of these two sets of electors has the official evidence that entitles their certificates to be received and votes given by them to be counted; but it is a subject full of difficulty, and I do not wish to be committed to any view of it one way or

the other, but I do wish that the evidence may be taken and that we may have it before us, and have it before us in time.

I purposely refrain from saying anything about the very exciting question involved in the elections of Louisiana and Arkansas. I refrain from it because I do not wish to provoke a debate that will delay the passage of the resolution offered by my colleague. I have very firm convictions on that subject, and have very firm convictions that a very grave error has been committed, a very grave wrong has been perpetrated; but I will not speak upon that subject now lest it should provoke a debate here that will consume time that ought not now to be consumed.

Mr. FRELINGHUYSEN. There is no doubt that this is a subject of much importance. If the election of the President for the coming term depended on the votes of Louisiana and Arkansas we should now have much excitement in the country. This is the opportune occasion for Congress to apply a remedy which will prevent future difficulty. There is hardly an official in the United States whose title to his office cannot be judicially questioned except that of an elector. Probably that can be in State courts, but that does not afford the secure relief we need. In all the States, under a *quo warranto*, you may try the right of every incumbent to his office, from governor to coroner. The qualifications of a Senator or Representative are determined by the Senate or by the House, but there seems to be no way provided by Congress, and no way, I believe, that Congress, as the Constitution stands, can provide to try the title of an elector to his office. The tribunal which ought to adjudge and determine this question is, in my opinion, the Supreme Court of the United States, because that tribunal is further removed from political influences than any other, and because its decision would give greater satisfaction to the people. But, sir, I do not think you can confer jurisdiction over this subject to the Supreme Court of the United States. The original jurisdiction of that court is by the Constitution restricted to three subjects, to wit, cases affecting ambassadors, other public ministers, and consuls, and those in which a State is a party. The appellate jurisdiction of the court, as that court has construed its power, extends only to the cases that Congress has given it jurisdiction over.

Whether this be the true construction of the Constitution as to the jurisdiction of that court, I much question. Congress should have been held to possess the power to invest the court by statute with a jurisdiction as extensive as the judicial power reposed by the Constitution in the General Government. Congress would not have abused the power, and such seems the true construction of the Constitution. But the Supreme Court has restricted its jurisdiction by so many adjudications, that they cannot now be expected to enlarge it. The title of one claiming the office of elector cannot, then, be investigated before the Supreme Court.

The Constitution does provide that Congress may create inferior tribunals, and under that power, if there were no other difficulty, we might create a jurisdiction to try these questions, but the difficulty is deeper than that. The difficulty is that an elector is an officer of the State. There was much discussion in the convention that framed the Constitution as to how electors should be appointed, whether by the National Legislature, by the vote of the people, or by the State Legislature, and the result was as stated in article 2 of the Constitution:

"Each State shall appoint, in such manner as the Legislature thereof may direct, a number of electors, equal to the whole number of Senators and Representatives to which the State may be entitled."

The matter is left with the States, and I suppose every State has a statute regulating the manner in which the electors shall discharge their duty. In New Jersey there is a statute which authorizes the electors on the day of their meeting in electoral college, should any of their number not appear by three o'clock in the afternoon, to fill the vacancy. Therefore I do not see that it is for the General Government, as the Constitution now stands, to determine as to the qualification of electors. I take it that the entire control over the manner of appointing electors is one of the reserved rights of the States; that they never surrendered the right of determining who should be these electors. The States possess the right of determining who shall be elected and who has been elected an elector, as entirely as the United States Government possesses the right to decide who shall represent the country in England or be an ambassador at Geneva. That is the view I have of the subject, and therefore I think that a simple amendment to the Constitution to the effect that disputes in reference to electors for President and Vice-President shall be determined by the Supreme Court of the United States, with a provision that Congress shall have power to carry the amendment into effect, would best meet the case. Such an amendment would give the General Government jurisdiction over the qualifications of electors, and would make the Supreme Court the tribunal to adjudicate. Congress would then have the right by proper legislation to provide for summary proceedings to determine all disputes relative to the qualifications of electors, as they should have.

Mr. SHERMAN. I wished in introducing this resolution to avoid any premature debate, nor will I allow myself to be drawn into any discussion of the constitutional questions necessarily raised by this resolution. It is sufficient to know that it is impossible for any Senator to approach the consideration of the subject without fuller and more mature information than we have at present.

The suggestion made by my colleague I would be very willing to meet, as he thought it a serious one, by inserting after the words "laws of the United States" the words "and with the laws of said States," so that this committee may examine whether the constitutional provisions have been complied with under the laws of the United States passed to secure the purity of elections, and also the laws of the States providing for the election of electors, because it is true that the laws of each State must prescribe the mode in which the State shall elect electors. If it will relieve my colleague's mind from any embarrassment or doubt I should be willing to accept such an amendment, but it seems to me entirely premature to enter into the discussion of any constitutional question now. This is merely an inquiry. It is broad, general, and it is as urgent as it is possible to make it.

The VICE-PRESIDENT. Does the Senator make the modification?

Mr. SHERMAN. I only suggest it if my colleague desires it.

Mr. THURMAN. It would be better.

Mr. SHERMAN. Then I move to insert after the words "Constitution and laws of the United States" the words "and with the laws of said States."

The VICE-PRESIDENT. The Senator so modifies the resolution.

Mr. SHERMAN. I hope without further discussion we may have a vote on the question, and that the committee may enter at once on the investigation.

Mr. STEWART. I do not wish to occupy time, but I desire to make a suggestion to my friend from New Jersey as to the duty that is imposed upon the President of the Senate that he shall "in the presence of the Senate and the House of Representatives open all the votes, and the votes shall then be counted in the presence of the two Houses." The tribunal which counts them, it seems, should have an implied power to determine which are the votes. They must do that in the first instance. There would be a great deal of difficulty in fixing the machinery of presidential elections whereby you could have the case ultimately tried before the time when the President will have to be inaugurated. You will find it exceedingly difficult to have anything more than a *prima facie* case made out, such as the persons counting the votes must make. They must decide it at that time under almost any arrangement you can make by amending the Constitution or in any other mode. It will devolve on some administrative tribunal to decide it in the first instance. That is so in a State in the case of an election for governor, and the person who gets the certificate is first inaugurated.

It seems to me that legislation whereby there could be a preliminary investigation for the benefit of those who count the votes and upon which they could act in the first instance might be of advantage for their information; but I think the counting of the vote must be done without a prior judicial investigation. It is so in all the States. It is impossible to have a judicial investigation until the vote is counted and the officer is declared elected. Under the provision of the Constitution as it now stands it seems to me Congress might enact some law whereby all the information might be accumulated in a contested case to enable those who count the votes to declare a direct result. They must declare some result, and perhaps legislation might be had that would do away with the necessity for an amendment to the Constitution. I can hardly conceive of an amendment of the Constitution which will relieve those who count the vote from the responsibility of declaring the result on the best information they can then get. It is hardly practical to provide for a judicial investigation prior to the counting of the votes and the declaration of the result.

Mr. TRUMBULL. Mr. President, I am gratified that a resolution has been introduced on this subject, because I think it one of the gravest importance. I quite agree in that respect with what was said by the Senator from New Jersey. I do not, however, as at present advised, agree that this is an insurmountable difficulty under the Constitution as it exists. It seems to me that the criticism of the Senator from Ohio [Mr. Thurman] upon the language of this resolution and the implication that it might carry is quite correct; that these electors are not appointed and were not intended to be appointed by the General Government; that it was left entirely to the States to appoint electors in such manner as they thought proper. The language of the Constitution is not that the electors are to be elected by the people, but it reads:

"Each State shall appoint, in such manner as the Legislature thereof may direct, a number of electors, equal to the whole number of Senators and Representatives to which the State may be entitled in the Congress."

They need not be chosen by the people. They have in the history of the Government sometimes been appointed by the State Legislature: at other times they have been elected at separate districts in the several States, or in some of the States under an act of the Legislature of the State.

Now they are, I believe, in all the States, by provision of State law, elected by a vote of the people of the State at large. It would doubtless be competent for the Legislature of any State to direct its Governor to appoint the electors. I question very much whether the Government of the United States has any right to go behind the appointment of the electors, and the amendment which the Senator from Ohio has introduced in his resolution does not help it, in my judgment. I doubt our right to inquire how these persons are elected in the States.

It seems to me, although I do not wish to express a positive opinion upon the question at this time, that the intention was to leave this appointment of electors exclusively to the States, and that the only jurisdiction which the Federal Government had was to designate the time when these electors should be appointed; but the manner of their appointment and everything else connected with their selection is to be left to the State, and that the jurisdiction of the United States, of Congress, of the presiding officer of the Senate, who opens the vote, extends no further than to inquire whether these are the electors appointed by that State.

MR. MORTON. Will the Senator allow me to call his attention to the twenty-second joint rule?

MR. TRUMBULL. Yes, sir; I was going to advert to it. This is no new question. It is a question that was discussed in the first Congress that ever met, and as long ago as 1800 a bill passed the Senate and a bill passed the House of Representatives upon this very subject. The bill failed by reason of a disagreement between the two Houses of Congress.

The language of the Constitution, as the Senator from Ohio remarked, is perhaps not very specific. It is that the votes are to be opened by the presiding officer of the Senate, and they shall then be counted. By whom? The Constitution does not say; but we have a construction of the Constitution from the foundation of the Government. The very first time that a President was elected, when many of the men who had framed the Constitution of the United States held seats in Congress, they appointed tellers; they virtually took charge of this counting; and from that day till now the vote has been counted under the direction of the two Houses of Congress.

MR. MORTON. From what time?

MR. TRUMBULL. From the beginning of the Government the two branches of Congress have passed resolutions in regard to this counting of the vote.

MR. MORTON. I should like to ask the Senator whether the vote has ever been counted under the direction of the two Houses of Congress in which they have, either or both Houses, assumed the right to reject a vote until after the passage of the twenty-second joint rule in 1865? The cases of Missouri, in 1821, of Indiana, in 1817, and of Georgia, in 1809, are not cases in point, because in each of those cases the question was whether they were States in the Union and entitled to vote; but so far as the determination of any question of irregularity or of the right of an elector to vote is concerned, I think the Senator is mistaken in saying that Congress ever assumed any jurisdiction over that question until the adoption of the twenty-second joint rule, in 1865.

MR. TRUMBULL. Mr. President, I do not say that there had ever been occasion for Congress to do that, that it had ever excluded a vote, or decided as to whether a vote should be counted or not counted; but they have taken jurisdiction over the subject. That is what I meant to say, and what I believe I did say. It was not supposed when the Constitution was formed that such a question could ever arise, and, fortunately for the history of the country, it is true that such questions have never arisen until quite recently, and I regret exceedingly that any question should arise now. It was supposed that there would be no controversy, that the men selected by the State would be persons about whose selection there would be no question, and the only jurisdiction that Congress would have would be to ascertain whether they were the persons selected by the State.

Now, whether we can go behind that, as the amendment of the Senator from Ohio would seem to indicate, and inquire whether these persons have been elected in the manner provided by the laws of the State, is to me a very doubtful question. We can inquire, when a person presents himself here as a Senator, whether he has been elected by the Legislature of his State; but I very much doubt whether we can enter that Legislature and inquire whether those persons were properly chosen members of the Legislature. We may inquire if a Legislature exists—

MR. THURMAN. Did I understand the Senator to say that I suggested that amendment?

MR. TRUMBULL. I spoke of the amendment which was suggested by the Senator's colleague.

MR. THURMAN. I concur with the Senator about the practice, but I am willing to vote for the resolution nevertheless, in order to get the facts, and without committing myself to any implication of law on the subject.

MR. SHERMAN. If my friend from Illinois will allow me, I made the suggestion of amendment to meet the argument of my colleague, and, as I supposed, to gratify him. If that is in the way, I shall be very glad to withdraw it, because I certainly desired to conciliate my colleague.

MR. TRUMBULL. It is not my intention to vote against the resolution. I am not opposing it. I recognize its importance, and I am gratified that the Senator from Ohio has moved on this subject. I thought it was one that required attention, and would myself have introduced a resolution at an earlier day in the session if I had been clear as to the jurisdiction of the Senate to interfere in the matter, and how we could interfere; so that I am not opposing the resolution. I do not wish, however, to be committed to the implication that might be drawn from the peculiar wording of the resolution authorizing this committee to inquire whether the laws of the States had been

complied with. I do not wish to commit myself to the principle that we have a right to enter a State and canvass the vote for electors, to see whether they were chosen by the proper persons, as provided by the laws of that State, further than to ascertain that they were the authorized electors of the State, and I was comparing that to the election of a Senator to illustrate what I meant.

I have always doubted the authority of the Senate of the United States to inquire into the proper election of a member of a State Legislature or of its constitution. If the Legislature exists and is the recognized Legislature of the State, I question whether Congress has any authority to go behind that and inquire into the constituent members composing that legislative body to determine whether they are rightly there or not. That is for the Legislature of each State to determine for itself; and although it may be true that there may be one or half a dozen members that ought not to have been in that Legislature in our opinion, if the State Legislature under its State organization has organized and is the recognized Legislature of the State, if we find that to be the case, and it has then made the election in pursuance of the Constitution of the United States, I question if we are not bound by the election. If there are two Legislatures, then we must determine which is the proper one. Unquestionably that will present the question.

Some years ago—I do not remember the date, but I understand the Senator from Indiana to say it was in 1865; I do not find the date given in the book before me—the two Houses of Congress agreed upon a rule in regard to canvassing the votes for President and Vice-President. I will read a sentence or two from it. It provides for the appointment of tellers of the two Houses, and then provides:

“If upon the reading of any such certificate by the tellers”—

That is, the certificate of the vote of the electors in any State—

“any question shall arise in regard to counting the votes therein certified, the same having been stated by the presiding officer, the Senate shall thereupon withdraw, and said question shall be submitted to that body for its decision; and the Speaker of the House of Representatives shall, in like manner, submit said question to the House of Representatives for its decision; and no question shall be decided affirmatively, and no vote objected to shall be counted, except by the concurrent votes of the two Houses; which being obtained, the two Houses shall immediately re-assemble, and the presiding officer shall then announce the decision of the question submitted, and upon any such question there shall be no debate in either House; and any other question pertinent to the object for which the two Houses are assembled may be submitted and determined in like manner. At such joint meeting of the two Houses seats shall be provided at follows,” &c.

The VICE-PRESIDENT. The Senator from Illinois will suspend. The morning hour has expired, and the Indian appropriation bill is before the Senate.

Mr. SHERMAN. I hope we shall have this question disposed of now.

The VICE-PRESIDENT. If there be no objection, the Indian appropriation bill will be informally passed over, subject to a demand for the regular order.

Mr. WINDOM. I have no objection.

Mr. TRUMBULL. I will state to the Senator having charge of the appropriation bill that my intention is to occupy only a moment more.

Mr. WINDOM. I do not wish to interfere with the Senator's remarks at all.

Mr. TRUMBULL. The rule proceeds:

“Such joint meeting shall not be dissolved until the electoral votes are all counted and the result declared; and no recess shall be taken unless a question shall have arisen in regard to counting any of such votes, in which case it shall be competent for either House, acting separately, in the manner hereinbefore provided, to direct a recess, not beyond the next day at the hour of one o'clock p. m.”

I read this to show what has been the construction of this clause of the Constitution as to the counting of the electoral votes, and this construction, adopted in a joint rule in 1865, as I understand the date of it to have been, is in conformity with the action of Congress from the beginning of the Government. Although there might be some question, and undoubtedly there is some ambiguity in the language of the Constitution, inasmuch as it is left in that uncertain state, and says that the vote shall then be counted without saying by whom it shall be counted, and inasmuch as Congress has undertaken to supervise this counting by appointing tellers, and finally agreeing upon a rule of the mode of proceeding, I think there has been a settled construction of the Constitution which we may rest upon, and may proceed to count the vote at the recent election as it has been done heretofore.

If there are two sets of electors from a State, that involves the necessity of determining which of those electors are the electors appointed by the Legislature of the State, and I question if that will not be the limit of our inquiry, whether we can go beyond that to determine which is the proper set of electors, and then to see that the certificate is in due form and that the votes were cast at the proper time.

I shall vote for the resolution, Mr. President, with great cheerfulness, because it is a subject, I think, requiring immediate and earnest and candid and fair consideration.

Mr. EDMUNDS. This resolution and this debate have opened the whole question in-

volved in the resolution of the Senator from Indiana [Mr. Morton] which he proposes to discuss on next Monday, and it is quite evident from what has been said by the Senator from Ohio, the Senator from New Jersey, and the Senator from Illinois, that even they are not prepared to take any definite attitude in respect to the use which could be made of this information to be obtained under this resolution when it is got. I am not prepared to vote for this resolution, nor any other, until I can see with some reasonable clearness that it would be within our power to make use of the information, when we have obtained it, touching this question of the election of electors. It is undoubtedly a very difficult and troublesome question, and we ought not to act upon it or to enter into a complete debate upon it until we have had time to reflect upon it; and certainly, so far as I am concerned, until I have had an opportunity to hear the Senator from Indiana, who, I understand, has been investigating the matter for a considerable period of time, and whose investigation and views on the subject will be of great interest to us all. I hope, therefore, that this resolution will go over until Monday, when we shall have had an opportunity to reflect upon the subject, have the resolution in print before us, and hear the Senator from Indiana.

The VICE-PRESIDENT. The Senator from Vermont can demand the regular order, which will bring up the Indian appropriation bill.

Mr. SHERMAN. I intend to submit a motion to postpone the appropriation bill, for the purpose of disposing of this resolution. I trust the Senator from Vermont will not insist on the position he has taken. As a matter of course, we expect to hear the subject discussed in many ways. The Senator from Indiana has already the floor for Monday next, to discuss the question of the necessary modifications of the Constitution of the United States to guard against the evils of disputed presidential elections. But here is a matter of fact, of inquiry. It is a question as to who are the electors from two of the States, and that can only be proven by testimony, and it requires time to take testimony. Louisiana and Arkansas are distant States. It will require at least a week to send proper persons there—a subcommittee of the Committee on Privileges and Elections or others—to take this testimony. The consumption of one week, the delay of one week, may prevent the taking of the requisite testimony to enable us to decide the question that will be presented to the joint convention when we meet to count the vote of the electors.

Now, sir, the passage of this resolution will not interfere in the least with the full consideration of this question. Indeed, the passage of this resolution will give the Committee on Privileges and Elections jurisdiction of the subject. The resolution already pending, introduced by the Senator from Indiana, will enable him to make his remarks, to give us his views on the subject and the benefit of his experience. We cannot comply with the joint rule of the two Houses without the very information sought to be obtained by this resolution. It is impossible for either the Senate or the House to act in pursuance of the twenty-second joint rule without this information. If we therefore delay the taking of testimony, as a matter of course we will postpone and probably defeat the opportunity of deciding the question according to that rule with deliberation and propriety.

I regretted, therefore, when this resolution was introduced, that my colleague discussed any constitutional question, because it is not necessary to discuss the constitutional question on a resolution simply directing the making of an inquiry. As a matter of course, a subject so delicate as this will enable the Senate, composed as it is of able lawyers, to discuss the question at great length; and if you were to postpone the taking of this testimony until the question involved in a disputed presidential election could be fully decided by the Senate of the United States, you would never have the testimony at the time fixed by the Constitution and laws for the opening of the electoral votes.

I trust, therefore that, postponing ordinary business, we will dispose of this resolution and let the Committee on Privileges and Elections take charge of the whole subject, and certainly in due time we shall have a report from them giving us information to act upon, and it will not in the slightest degree abate the interest with which we shall hear from the Senator from Indiana.

I will state further that I did not introduce this resolution without consulting the Senator from Indiana, showing him the resolution and talking with him about it beforehand, and receiving his opinion that it was important to have the information sought for by it in order to enable the committee to decide and act on the very important question presented in this disputed election of electors.

I trust that the resolution will be acted upon now, and I will move that the Indian bill be postponed with a view to continue the consideration of this resolution in the hope that we may have a vote upon it.

The VICE-PRESIDENT. The Indian appropriation bill being before the Senate as the regular order, the Senator from Ohio moves to postpone its consideration for the purpose of continuing the consideration of the resolution offered by him.

Mr. WINDOM. Why cannot the appropriation bill be informally passed over?

Mr. SHERMAN. I have no objection to that. I do not wish to say a word further on the subject.

Mr. WINDOM. I do not wish to interfere with the discussion of the resolution, and

am content to let the Indian appropriation bill be passed over informally until this resolution is disposed of.

THE VICE-PRESIDENT. The appropriation bill has been informally passed over, but it is subject, under the rule, to a demand for the regular order by any Senator. It may still remain in that condition, as the Senator from Minnesota prefers it should, by general consent. Does the Senator from Ohio withdraw his motion?

MR. SHERMAN. Yes, sir.

MR. EDMUNDS. It might be a good way in this body altogether to have all debates take place after we have passed on propositions which we were afterward to debate, because then, if we convinced ourselves that we had made a mistake, we should not be obliged to apologize to our constituents for having made it intelligently upon discussion.

There is no denying the fact that the passage or rejection of this resolution involves a determination of a certain right in the Senate and in the House of Representatives over this subject of the election of President—a jurisdiction, as the Senator from Illinois has styled it. Now, what is that jurisdiction? Where are you to go? Both the Senator from Ohio and the Senator from Illinois, and I believe the Senator from New Jersey—I was called out while he was speaking—maintain that we have no right to go behind the election of the elector, behind his certificate. If that is true, then there is no use of sending down to Louisiana to ascertain what is the certificate of these gentlemen. Those certificates on both sides are in your possession. They are subject to investigation and inquiry here on the spot, and when you have yourselves looked at the State seal and verified the signature of the governor it is a question of law, according to the idea of these gentlemen, which certificate represents the sovereign and conclusive evidence that the State sends you as to what she has done. The Senator from Illinois does not admit by any means that we can go behind the record evidence of who are electors, and inquire whether the people have been certified, who got the majority of votes, and there is the difficulty. Hence it seems to me desirable—although I do not make any opposition in this matter by any means—that we should take a little time to reflect on this subject, and to know precisely what is the scope of what this committee is to do, what its power under the Constitution is, as has been suggested, and what use can be made of information it obtains when you get it.

The Senator from Indiana maintains, as I believe, that this twenty-second joint rule is one that does not comport with the Constitution, and that it infringes upon the rights of the States and the rights of the people through the States in the election of President and Vice-President, as provided by the Constitution. I do not think we should undertake to get this information instantly and in haste go into an inquiry as to how many people voted for one set of electors and how many for the other, instead of confining ourselves to the validity of the document which has been sent to the Vice-President on the one side and the other, as to which bears the great seal of the State, who was the proper repository of the great seal, whether the signatures be genuine if there be any dispute about it. I suppose there is none of that kind, but merely a question that arises on the general political situation. But, as I say, I did not rise to discuss this question—I only rose to say that it appears to me to be wise to treat this resolution just as we do others of great importance, and get all the light we honestly can before we act upon it.

MR. TRUMBULL. The Senator from Vermont did not quite understand me if he understood me to say that we could not go behind the certificate. I think where there are two bodies claiming to be electors from a State we must necessarily have the right to inquire which is the proper electoral college of that State; but I question whether we could go so far as to go behind the election. We might inquire as to whether the organized electoral college which sends the vote here is the one organized under the authority of the Legislature of the State, and there being here two sets of electors, as I understand, we must necessarily inquire into the organization of those electoral colleges.

MR. EDMUNDS. What do you mean by "organization?" To find out which has got the most votes?

MR. TRUMBULL. Which has got the most votes, not by inquiring into the right of parties to vote, and, perhaps, not as to the number of votes. I am not prepared to say how far we can go; but certainly we can go far enough. Some inquiry is necessary to determine which of these is the electoral college of the State according to the forms adopted in that State to express its choice for President and Vice-President of the United States. We can go that far.

MR. CONKLING. As we are to vote now it seems on this resolution, I venture to say a word about it, only, perhaps, to show my want of appreciation of the gravity and scope of the questions it involves.

I always dissent with diffidence from any suggestion made by the Senator from Vermont, yet it seems to me we leap before we come to the stile when we discuss at this time all the ultimate powers of the Senate or of Congress touching the recognition of presidential electors, as if those powers were in some definite sense involved in the

passage of this resolution. It seems to me the resolution as introduced by the Senator from Ohio, not improved, I think, by the amendment he has proposed, may be adopted and voted for by every Senator who has expressed his views on the subject without his vote shedding any light upon his impressions or convictions of these questions of ultimate power, and without forecasting in any way how they should be decided.

Let me see whether I am right. The Constitution ordains that—

“Each State shall appoint, in such manner as the Legislature thereof may direct, a number of electors, equal to the whole number of Senators and Representatives to which the State may be entitled in the Congress; but no Senator or Representative, or person holding an office of trust or profit under the United States, shall be appointed an elector.”

And again:

“The Congress may determine the time of choosing the electors, and the day on which they shall give their votes; which day shall be the same throughout the United States.”

These provisions show that the two Houses may exercise jurisdiction over the matter of choosing electors in some regards; but I will presently dismiss these particular delegations of power to Congress for the purpose of what I am going to say. Did the Constitution stand with the naked provision that the States may appoint electors in such manner as they establish, I could hardly discover impropriety in this resolution. What does it propose? To inquire whether in certain States the Constitution has, in this respect, been executed, and whether it has been executed according to its own requirements and the requirements of the laws of the United States; that is all. Keeping before us for the moment the express delegations of authority to Congress, may we not inquire whether the electors appointed are persons holding offices of trust or profit under the United States? May we not inquire whether they were elected on the day specified? May we not inquire whether they were chosen at the place required? Undoubtedly we may. These to be sure are exceptions named by the Constitution. But if we dismiss these particular exceptions there are still broader exceptions yet in the Constitution giving to Congress topics of inquiry and ground for action. The States are undoubtedly to appoint electors, and to appoint in such manner as the Legislature may direct. This is clear.

Unquestionably South Carolina had a right, and exercised it for years, to appoint electors through her Legislature. It has been said that the governor might be commissioned to appoint them in a State. Very likely. It so happens, however, that in the States in question the direction is that the electors be chosen at a popular election, and in no other way, and that they be chosen by the same voters who at the same election are entitled to vote for other officers. Who are, or rather, in the two States in question, who were these voters? The Constitution of the United States says that no State shall exclude from the right to participate in this very choice (because it becomes this choice when the State has said that electors shall be chosen by force of that election) any man by reason of his race or color. Suppose we are informed that in some State where one race of men predominate they have all been excluded from this choice, the State having previously said that electors in that State are to be chosen only by this popular election. Can we not inquire—and I adopt the most narrow limit of inquiry defined in the phraseology of any Senator who has participated in this debate—whether these men are in law and in truth electors or not?

Suppose it turns out that in the State of Louisiana one hundred and fifty thousand qualified citizens voted for certain electors, and that all their votes were excluded from the count, and that twenty thousand only voted for other electors, can we not inquire whether in truth these men who had a constituency of but twenty thousand behind them are the electors claiming to have been appointed by Louisiana in the way she has “directed” and prescribed? If we can, then I submit the question degenerates into the verbal mode of stating it. One Senator says we have a right to inquire whether the claimants are the electors appointed by Louisiana. Take it so; how are we going to find out? Suppose it turns out that there has been no election at all; suppose the whole election went down, trodden out under the hoof of brute violence; suppose military power or a mob rode over the election, and there were no ballots or ballot-boxes at all, and certificates come here, may we not inquire whether those certified were in truth appointed by Louisiana? After we have inquired, what use or how many uses we may make ultimately of the information it seems to me premature now to consider; the information may be of little value, if you please, yet surely we can suppose plenty of uses to be made of it within the admitted scope of the Constitution.

These uses would warrant the inquiry; but if no uses would render it worth while to inquire, still even the worthlessness of the result would not prove that we usurp power, or violate the Constitution, or prey upon the States by obtaining the information.

But I go further than to maintain the naked power of Congress to inquire. I insist that we can utilize the result of the inquiry, and employ the facts in our action upon counting or refusing to count electoral votes for President or Vice-President.

I see no reason to doubt that any State having provided a popular election as the

mode and the only mode of appointing electors, and it being alleged that no such election had been held, or that the election was a mere mockery or mob, violative not only of the laws of Louisiana, but in violation of the supreme law of the United States, we are within the scope of our power in sending a committee to find whether the allegations be fiction or fact. In both views I feel at liberty to vote for this resolution, not only without committing myself upon all the ultimate questions to be raised, but without seeing the pertinency of these questions in respect of our power to adopt this resolution as it stands.

To ascertain and make record of the facts, I will vote for the resolution. This alone will be wholesome; and I will vote for it also for the use we may make of the facts in counting electoral votes and in determining any other proceeding which may come within our province.

Mr. President, I wish to say one word more. The honorable Senator from Ohio farthest from me [Mr. Thurman] deprecated a debate on the merits of the Louisiana doings, and said he should abstain from all allusion to them; and straightway he proceeded to declare that he believed a "great wrong"—we all observed the emphasis with which he pronounced the words—had been done in Louisiana. I venture to say to the honorable Senator that even if he and I agreed, as perhaps we might in relation to some recent occurrences in Louisiana, we should probably differ widely in regard to the responsibility and blame to be attached to the "wrong" which has been there committed. I have no right to ascribe to him any view of the subject, but I have the right to know that in some of the journals of the country the doings in Louisiana have been discussed as if a great wrong is imputable to persons and officials who, in my humble judgment, are as innocent as the Senator from Ohio or myself. However, like that Senator, I do not wish to bring on a discussion of the part played by the national or State authorities now. Let us have the facts, and then we may go sure-footed into the conflict of opinion which prevails, and then I will not shrink from saying whatever the truth may demand.

The VICE-PRESIDENT. The question is on the adoption of the resolution.

The resolution was adopted.

PRESIDENTIAL ELECTIONS.

Mr. FRELINGHUYSEN asked, and by unanimous consent obtained, leave to introduce a joint resolution (S. R. No. 10) submitting to the Legislatures of the several States a proposition to amend the Constitution of the United States; which was read twice by its title.

Mr. FRELINGHUYSEN. I ask to have the resolution read at length and referred to the Committee on the Judiciary.

The Chief Clerk read the resolution, as follows:

"Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, (two-thirds of both Houses concurring,) That the following article be proposed to the Legislatures of the several States as an amendment to the Constitution of the United States, which, when ratified by three-fourths of said Legislatures, shall be valid, to all intents and purposes, as a part of the said Constitution, namely:

"ARTICLE XVI.

"SECTION 1. Disputes arising with regard to the persons chosen as electors of President and Vice-President in any State shall be decided by the Supreme Court of the United States.

"SEC. 2. Congress shall have power to enforce this article by appropriate legislation."

The resolution was referred to the Committee on the Judiciary.

IN SENATE, January 17, 1873.

The VICE-PRESIDENT. The Calendar, under the Anthony rule, being under consideration, the Senator from Indiana has obtained consent of the Senate to speak on the following resolution, which will be reported by the Secretary.

The Chief Clerk read the resolution, as follows:

"Resolved, That the Committee on Privileges and Elections be instructed to examine and report, at the next session of Congress, upon the best and most practicable mode of electing the President and Vice-President, and providing a tribunal to adjust and decide all contested questions connected therewith, with leave to sit during vacation."

Mr. MORTON. Mr. President, the Constitution provides that the President and Vice-President shall be chosen by electors to be appointed by the State. It declares that—

"Each State shall appoint, in such manner as the legislature thereof may direct, a number of electors, equal to the whole number of Senators and Representatives to which the State may be entitled in the Congress."

The appointment of these electors is thus placed absolutely and wholly with the legislatures of the several States. They may be chosen by the legislature, or the legislature may provide that they shall be elected by the people of the State at large,

or in districts as are members of Congress, which was the case formerly in many States; and it is no doubt competent for the legislature to authorize the governor or the supreme court of the State or any other agent of its will to appoint these electors.

This power is conferred upon the legislatures of the States by the Constitution of the United States, and cannot be taken from them or modified by their State constitutions any more than can their power to elect Senators of the United States. Whatever provisions may be made by statute or by the State constitution to choose electors by the people, there is no doubt of the right of the legislature to resume the power at any time, for it can neither be taken away nor abdicated. In the early presidential elections the electors were chosen in many States by the legislatures, and as late as 1824, in Delaware, Georgia, South Carolina, Louisiana, New York, and Vermont they were chosen by the legislatures, and South Carolina continued this practice up to the war of the rebellion.

It will thus be seen that the mode of choosing the electors is placed entirely beyond the power and jurisdiction of the national Government, and whatever disorders, irregularities, or failures in the appointment of electors may occur in any of the States, they are entirely without remedy or redress upon the part of the Government of the United States. All of the States now by the enactments of their legislatures provide that the electors shall be chosen at large by the qualified voters of the State; but in no State, I believe, is there any legal provision made for the settlement of any contest that may arise in regard to such election. Though the election of electors may have been marked by the most monstrous and palpable frauds, entirely subverting the will of the people, or though a large portion of the people may have been prevented from voting or controlled in their action by violence and disorder, yet, so far as I know, there is not in any State any provision for settling such a contest and setting aside fraudulent returns. Every State provides by law for contesting the elections for governor and other State officers and members of the legislature, but no provision is made for contesting the election of electors; and whatever returns shall be made up, although produced in whole or in part by fraud or violence, must stand and the vote be counted upon them if returned in time.

There is imminent danger of revolution to the nation whenever the result of a presidential election is to be determined by the vote of a State in which the choice of electors has been irregular or is alleged to have been carried by fraud or violence, and where there is no method of having these questions examined and settled in advance—where the choice of President depends upon the election in a State which has been publicly characterized by fraud or violence, and in which one party is alleged to have triumphed and secured the certificates of election by chicanery or the fraudulent interposition of courts. Such a President would in advance be shorn of his moral power and authority in his office, would be looked upon as a usurper, and the consequences that would result from such a state of things no man can predict. But it may be compared to what has so often occurred in history, where the successor to the crown in a monarchy was believed by a large part of the nation to be illegitimate, or not to be rightfully entitled thereto under the laws or usages of the nation. We have seen how in all ages there have been numerous bloody and destructive revolutions arising from such causes, and the conviction on the part of the people that the reigning monarch was not entitled lawfully to the crown. It is the part of wisdom in a monarchy to avoid such contingencies, if possible, by settling definitely the rightful descent of the crown; and in republics there ought to be such machinery of government provided that it would seem to be impossible that any man should ever reach the presidential chair who was not legitimately chosen thereto."

The Constitution provides that Congress may determine the time of choosing the electors and the day on which they shall meet in the several States and cast their votes, which day shall be the same throughout the United States. It further provides that "the electors shall meet in their respective States, and vote by ballot for President and Vice-President, one of whom at least shall not be an inhabitant of the same State with themselves. They shall name in their ballots the person voted for as President, and in distinct ballots the person voted for as Vice-President, and they shall make distinct lists of all persons voted for as President, and of all persons voted for as Vice-President, and of the number of votes for each, which lists they shall sign and certify, and transmit sealed to the seat of the Government of the United States, directed to the President of the Senate. The President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates, and the votes shall then be counted."

The Constitution provides that the President of the Senate shall be the depository of the electoral votes of the States, and that he "shall, in the presence of the Senate and House of Representatives, open all the certificates, and the votes shall then be counted." It has generally been conceded that this means that the two houses shall be present in their separate characters, and not as a joint convention; that they cannot act and vote as one body; that the two bodies cannot deliberate and act as separate bodies in each other's presence; that they are simply brought together to witness

the result of the opening and counting of the vote as reported by the President of the Senate. The fact that tellers have been generally appointed by the two houses in no wise affects the question, for they are mere facilities to actually count and make record of such votes as the Vice-President hands to them for that purpose.

Such had been the understanding and practice, apparently without question, until 1857. When the electoral votes were counted that year in the presence of the two Houses an objection was made by a member of the Senate to receiving and counting the vote of Wisconsin, because the record showed that the electors in that State had not met and cast their votes on the day prescribed by law, and upon which the electors in all the other States voted. The objection, it would seem, should have been fatal, for the Constitution expressly declares that the electors shall meet and vote upon the same day in all the States, and the history of this clause shows that great importance was attached to it by the framers. But the President of the Senate, Mr. Mason, declared that the objection was out of order, and that nothing was in order but to open and count the electoral votes returned, and the vote of Wisconsin was counted, after which he stated the result of the vote, and declared James Buchanan and John C. Breckinridge elected President and Vice-President of the United States. Motions were then made to correct the count and exclude the vote of Wisconsin, all of which he decided out of order, and that the business having been accomplished for which the two Houses had assembled, he declared the meeting dissolved, and at the head of the Senate returned to the Senate Chamber.

Upon the retirement of the Senate an elaborate debate took place in the House, in which a variety of opinions was expressed, but the better one seemed to be that the two houses had no jurisdiction over the matter of counting the electoral votes, either jointly or separately, and that the decision of the President of the Senate was final. So the matter was dropped. The Senate, upon re-assembling in its chamber, began the consideration of the subject, and after a long debate, with about the same result, it was dropped.

It seemed to be a necessary conclusion from these discussions that it was a *casus omissus* in the Constitution, and that the power of the President of the Senate to count the vote resulted, *ex necessitate rei*, from the failure of the Constitution to give to the two houses any jurisdiction over it; but they were to be present at the counting as solemn witnesses of its accuracy and result. In that case the vote of Wisconsin was not important, because Messrs. Buchanan and Breckinridge were elected whether it was received or not; but if it had so happened that the election depended on the vote of Wisconsin; that by counting it Frémont and Dayton would have been elected, or by rejecting it Buchanan and Breckinridge would have been elected, the question being left to the decision of the President of the Senate, Mr. Mason, of Virginia, he would have had the result of the election in his own hands. His decision either way might have resulted in civil war or revolution. Had he rejected the vote and elected Mr. Buchanan he would undoubtedly have been supported by his party and sustained by the letter of the Constitution; while, on the other hand, it would have been insisted that that provision of the Constitution was merely directory; that the vote of Wisconsin was not forfeited because it was cast one day after the time fixed by law, as the failure to vote at the proper time was occasioned by a snow-storm which prevented the assembling of the electors, and that Mr. Buchanan was therefore fraudulently elected; and the danger of a revolution would have been imminent.

But suppose that when the objection was made to counting the vote of Wisconsin it had been entertained, and the decision of it referred to the concurrent vote of the two Houses taken separately, as now provided by the twenty-second joint rule? The Senate was then strongly democratic and the House republican. The Senate would in all probability have decided that the vote of Wisconsin should be rejected, and the House that it should be received. Their failure to agree would have resulted in the contingency I have supposed, in throwing the election of the President into the House of Representatives, in which Maryland, carried by Mr. Fillmore and which had been carried by the know-nothings in the election of members of Congress in 1854, would under the twenty-second joint rule have held the balance of power, and Mr. Fillmore, with but one vote in the House to begin with, would very probably have been elected President.

Upon the hypothesis that the President of the Senate has the power to open and count the electoral votes, and that the two Houses are to be present merely as witnesses, and have no jurisdiction over the subject either jointly or separately, everybody must perceive that it is a vast and dangerous power to repose in the hands of one man, especially when he may be ardently devoted to the fortunes of a great party, or when he may be personally interested sitting as a judge in his own case; for it has happened six times in the history of our Government that the President of the Senate has opened and counted the votes for himself, either for President or Vice-President. In 1797 John Adams, as Vice-President, opened the votes for himself and declared himself elected President. In 1801 Jefferson, as President of the Senate, opened and counted the votes for himself when he and Burr were the candidates for President. In 1821 Vice-Presi-

dent Tompkins, as President of the Senate, opened and counted the votes for himself, he being a candidate for re-election; and in 1837 Mr. Van Buren, then Vice-President, counted the votes for himself as President and declared himself elected. In 1841 Richard M. Johnson, then Vice-President, opened and counted the votes for his re-election as against Mr. Tyler, the opposing candidate; and in 1861 Mr. Breckinridge, then President of the Senate, opened and counted the votes for himself as a candidate for the Presidency.

Clearly the framers of the Constitution did not contemplate that the President of the Senate in opening and counting the vote for President and Vice-President should exercise any discretionary or judicial powers in determining between the votes of two sets of electors, or upon the sufficiency or validity of the record of the votes of the electors in any State; but that he should perform a merely ministerial act, of which the two Houses were to be witnesses and to make record. But the exercise of these high powers may devolve upon him *ex necessitate rei*, and whatever decision he may make between the two sets of electors or upon the sufficiency and validity of the record of the votes—whether on the evidence of the right of the electors to cast votes or whether they have been cast in the manner prescribed by the Constitution—his decision is final.

There are said to be two sets of electoral votes at this time in the hands of the Vice-President from the State of Arkansas and two from the State of Louisiana; and whichever of these sets he decides is the proper electoral vote and brings forward, opens, and causes to be counted, must be so received; and from his action there is no appeal. The action of the two Houses in 1821 in regard to counting the vote of Missouri is no exception to this view of the power of the President of the Senate, for the question in that case was not as to any irregularity in regard to the electoral vote of Missouri, but whether Missouri was at that time a State in the Union and entitled to participate in the presidential election at all, which was also the question in the election in 1817 in regard to Indiana, and in 1869 in regard to Georgia.

The President of the Senate may, indeed, be impeached for high crimes and misdemeanors should he grossly violate his duty and thus fraudulently count or reject electoral votes; but that would not amend the record which had been made, undo the wrong, help the presidential candidate who may have been cheated out of the office, nor protect the nation from disorder and civil war.

If it should happen, upon the recurrence of any one of the cases I have been considering, that the decision of the President of the Senate should determine the result and give the Presidency to the candidate who would otherwise have been defeated, or throw the election into the House of Representatives where the candidate who had been rejected by the people should be elected by the vote of the States, all can understand the imminent peril in which the nation would be placed.

In 1801, when Mr. Jefferson, as President of the Senate, counted the vote as between himself and Aaron Burr for President, it turned out to be a tie-vote, and had there then been a question or contest in regard to a single vote such as exists to-day in regard to several, he might have decided himself elected and the nation would have been without redress. Such a temptation, springing lion-like upon a man of less patriotism and weaker virtue, backed by a great party in a season of high excitement, might have proved fatal to the peace of the nation.

I now come to the consideration of the twenty-second joint rule of the two houses, adopted in 1865, in regard to the counting of the electoral vote. This rule was undoubtedly the result of a conviction in Congress of the necessity of providing some method for avoiding the dangers I have been discussing; but it was certainly adopted without much consideration, and with a view apparently of furnishing an additional safeguard against receiving electoral votes from States that had been in rebellion. But it is general in its character, is applicable to all the States, and will continue in operation until it is amended or repealed.

It is, in my judgment, the most dangerous contrivance to the peace of the nation that has ever been invented by Congress—a torpedo planted in the straits with which the ship of state may at some time come into fatal collision. This rule provides, among other things, that when the vote shall be counted in the presence of the two Houses—

“If, upon the reading of any certificate, any question shall arise in regard to counting the votes therein certified, the same having been stated by the presiding officer, the Senate shall thereupon withdraw, and said question shall be submitted to that body for its decision; and the Speaker of the House of Representatives shall, in like manner, submit said question to the House of Representatives for its decision; and no question shall be decided affirmatively, and no vote objected to shall be counted, except by the concurrent votes of the two houses; which being obtained, the two houses shall immediately re-assemble, and the presiding officer shall then announce the decision of the question submitted, and upon any such question there shall be no debate in either house; and any other question pertinent to the object for which the two houses are assembled may be submitted and determined in like manner.”

By this rule it is provided that whenever an electoral vote is objected to the Senate

shall retire to its Chamber, and each house shall separately consider the objection, and the vote shall not be counted unless the two houses concur to that effect. If the two houses disagree the vote of the State is lost. This may result in a tie or in the election of the candidate who would otherwise have been defeated, or in preventing either of the candidates from having a majority of all the votes, and thus throwing the election into the House of Representatives. Each house is to decide the question without debate, in a summary manner, without investigation and without adjournment. Here is a powerful temptation to the House of Representatives, by non-concurrence, to throw the election into its own body, and thus perhaps secure the election of a candidate who may have been overwhelmingly beaten at the polls. The two houses may be under the control of different parties, as in 1857, led by politicians, ambitious, exasperated, and thirsting for power, who are thus enabled by a mere non-concurrence to defeat an election by the people and seize the administration of the Government into the hands of their party.

"Lead us not into temptation" is a part of the Lord's Prayer, and here is a mortal temptation spread in the pathway of a defeated party by which they may snatch victory from the jaws of defeat at the very last step in the tedious process of electing a President. The substance of this rule is, that in the eleventh hour, in the last stage of the proceedings for the choice of the Chief Magistrate, a formal objection made to the electoral votes of a State suspends the count and makes the right of the people of that State to a voice in the election to depend upon the affirmative concurrent vote of the two houses, which, in the exigency of parties, may not be obtained, however small the merit of the objection.

To me the proposition seems very plain that the Constitution confers upon Congress no power, whether by statute or joint rule, to make the right of the people of a State to participate in the presidential election to depend upon such a contingency. If the rule were reversed, and provided that the vote of a State should be counted unless the two houses concurred in its rejection, it would be far more reasonable and far less dangerous. It would be much more logical to require the concurrent action of the two houses to reject the vote of a State in favor of which the presumptions of the law should lie than to make its admission depend upon the concurrence of the two houses, as if the presumptions of the law were against its fairness and legality. Logically, it would seem that the objection made to receiving the vote of a State to be valid ought to be sustained by the vote of the two houses, but under this rule the objection is assumed to be good unless overcome affirmatively by the vote of the two houses, thus expressly placing it in the power of one house to reject the vote of a State.

The rule is an invitation to partisans to make captious and factious objections. It makes the concurrent action of the two houses necessary where it should not be; and to sum up its perilous absurdity, its "monstrous illogic," its dangerous unconstitutionality, it places it in the power of a defeated party, which may happen to have a majority in either house, to defeat an election by the people, and to take the chances of anarchy, or of a victory, by throwing the election into the House of Representatives.

But it may be said that neither house would take the responsibility of refusing to concur in counting the vote of a State, unless the objection to it were well founded. This is not the history of parties or of parliamentary proceedings. It is not the history of parties that they will voluntarily surrender an advantage, though tainted with odium and injustice, or that their representatives in the legislature will; for it is a law of parties to obtain all the power possible, and to yield no advantage except upon compulsion or for compensation.

But this extraordinary provision by which either house is empowered to reject the vote of a State in the election of President is created by a joint rule of the two houses. The Constitution provides that "each house may determine the rules of its own proceedings;" that is, the mode of conducting its business and doing those things which, by the Constitution and laws, it has a right to do. But surely this clause does not give the two houses the power by a joint rule to enable either house to disfranchise States by rejecting their electoral votes. The provisions of this rule to have any validity must be embraced in a law duly enacted, which has been submitted to the President for his approval; and, even as a law, it would be the most fearful enactment on the statute-book, conferring as it does upon either house the power to block the wheels of Government and plunge the nation into anarchy. It was the purpose of the framers of the Constitution to make the executive and legislative branches so far independent of each other that the existence of the one would not depend upon the consent or action of the other; but here is a rule, a mere parliamentary rule, which gives to either house a fatal negative upon the election of a President by the people. A power so vast and dangerous certainly cannot be created as a mere rule of proceeding.

The proposition that Congress has power to sit as a canvassing board upon the electoral votes of the States, admitting or rejecting them for reasons of its own, subverts the whole theory by which their appointment was conferred upon the States; makes Congress the judge of the election and qualifications of President and Vice-President, and by the operation of the twenty-second joint rule gives that power to each house sepa-

ately as in case of its own members. There is no such express power given to Congress in the Constitution, nor is it necessary to carry out any express power therein given, and its exercise would be in direct conflict with the known purpose of the framers to make the executive and legislative departments as nearly independent of each other as possible.

The act of 1792, which is still in force, provides that the electors shall meet in each State and cast their votes on the first Wednesday in December, and that they shall be chosen within thirty-four days before that time, leaving no room between the two periods for a contest as to their election before any tribunal, and making it impossible that Congress should in any way pass upon the regularity or rightfulness of their election. When they had cast their votes on the first Wednesday of December, they were *functus officio*, and could never meet again, either to correct a mistake or for any other purpose whatever. It is obvious that it was not contemplated by the framers of the Constitution that, after the electors had met and cast their votes and had become *functus officio*, there was any tribunal that could inquire into the rightfulness or regularity of their election and set aside their votes. The framers of the Constitution seem not to have anticipated the possibility of two sets of electors, each claiming to cast the vote of a State, or of irregularities or frauds in the choice of electors, which would warrant the rejection of their votes. It was clearly a *casus omissus*, and one of the imperfections of a new scheme of Government which could not in fact have been perfect unless its framers had been infallible.

It is to be observed that the members of the convention in 1787 started out with the idea that the President and Vice-President could not be safely chosen by the people of the United States. The theory of democratic government was then so imperfectly understood that it was not deemed safe to trust the mass of the people with the election of the Chief Magistrate; and when they finally agreed to vest the election in electors chosen for the express purpose, it was deemed a great stride toward popular government.

It was objected to leaving the election of President to the mass of the people as one community that it would result in consolidation, that the smaller States would be swallowed up by the larger. It was further objected that in such an election the slave States would be shorn of their power, because their slaves could not vote and their masters could not vote for them. The idea of interposing an electoral body between the Chief Magistracy and the people had come down from ancient times and had its origin in aristocratic forms of government where the nobility elected the sovereign or chief magistrate.

The first plan in the convention of 1787 was that Congress should elect the President, and when the idea of an electoral college was first discussed it was proposed that the electors themselves should be appointed by Congress, but it was afterward determined to leave the choice of electors to the legislatures of the several States, in order to make the executive independent of the legislative and preserve the power of the States, which was as near as they were willing to bring the presidential election to the people.

The theory of the electoral college was that a body of men should be chosen for the express purpose of electing a President and Vice-President, who would be distinguished by their eminent ability and wisdom, who would be independent of popular passion, who would not be influenced by tumult, cabal, or intrigue, and that in the choice of the President they would be left perfectly free to exercise their judgment in the selection of the proper person. And in order to secure more perfectly the independence of the electors the Constitution provides that they shall vote by ballot in the electoral college, so that it might not be known to each other or the country how they voted. In short, the idea was that a small body of select men could be more safely intrusted with the election of President and Vice-President than the whole body of the people. The idea of intermediate electoral bodies was then working in the minds of the *doctrinaires* and revolutionists of France, and received its full development in the celebrated constitution projected by the Abbé Sieyès, which was adopted and had a short life.

Now that democracy is better understood, and popular government has been more thoroughly tested, we have learned that large electoral bodies can be more safely trusted than small ones; that while it may be possible to corrupt small bodies it is impossible to corrupt large ones, and that the danger of tumult, which was ever present in the minds of the framers of the Constitution, arises chiefly from the exclusion of the masses from power and conferring it upon a few.

That the candidates for electors should be pledged in advance to vote for particular persons was not only not contemplated by the framers of the Constitution, but was expressly excluded by their theory. They were to be independent, not influenced by previous commitments or engagements, so that when they came together they could deliberate with perfect freedom for the best interests of the Republic. How completely this theory has been overturned in practice for more than seventy years I need not recite. For more than seventy years the electors have been pledged in advance to

vote for particular persons for President and Vice-President. They themselves have been nominated as candidates for electors upon express pledges or understandings, which, although not binding in law, have been effectually binding upon them in public opinion, inasmuch that an elector who would violate the understanding upon which he was nominated and vote for the opposite candidate would be rendered infamous and visited with every form of indignation that society could invent.

So powerful have been these obligations that I believe scarce an instance is known where electors have violated these pledges.

The more complicated machinery is, whether in politics or in the arts, the more liable it is to get out of order. In the complex system of electing a President which we now have, contingencies may arise which cannot be foreseen which may lead to civil war and disaster. The simpler the machinery of government the more easily is it understood and the less liable to accident.

Not only has the result been that the electors are not left free to select a President and Vice-President, they being in all instances pledged in advance, but it has unquestionably been a blessing that this has been so, for experience has demonstrated that small bodies of men intrusted with such vast powers as the choice of the Chief Magistrate of the Republic are liable to the arts of corruption, cabal, and intrigue, while the great body of the people cannot be reached in that way.

Mr. Benton once declared that "the only effectual mode of preserving our Government from the corruptions which have undermined the liberty of so many nations is to confide the election of our Chief Magistrate to those who are farthest removed from the influence of his patronage, that is, to the whole body of American citizens." His patronage would be ample to reach every elector in every State, but it cannot reach the whole body of the people. This danger has in effect been avoided by pledging the electors in advance to vote for particular persons; but this pledge in advance defeats the very purpose for which the electoral college was created, and converts it into a body of agents who are to execute their powers according to strict instructions given before their appointment.

The electoral colleges have turned out to be wholly useless. Every reason given for their original establishment has absolutely failed in practice. But while they are powerless for good, they may be potent for evil. In their election errors may easily be committed, and in very many instances have been. While nobody would mistake the name of Grant or Greeley, changes in the name on the long list of electors may occur from errors in printing or fraud sufficient to reverse the vote of a State.

One great objection to the present electoral system is that it absolutely circumscribes the power and the rights of the individual voter. He cannot now vote for a man of his choice for President, but must vote for electors. There may be two sets of electors representing two different parties before the people, but he may not be in favor of would be impossible for him alone in the State which he lives to put candidates for either, and would prefer to cast his vote for a third; yet he has no power to do it. It electors in the field who would vote for the man of his choice. That can only be done by an organized party, which may have no considerable vote in the State in which his lives, though it may be strong in other States. As an illustration: in 1856, thousands of men in the Southern States were absolutely deprived of the right of voting for President and Vice-President, because no electoral tickets for Frémont and Dayton had there been put in the field.

In effect, the electoral system absolutely deprives the voter of his power to vote for men of his choice for President and Vice-President unless there are enough of his way of thinking in the same State to meet in convention and nominate electors to represent their views. Such a system can scarcely be called free or republican. No system deserves that name which does not enable the individual voter to cast his vote for the men of his choice, whether anybody else in the same State votes for them or not. The electoral system makes the convention or caucus indispensable in all cases and everywhere, for the individual voter cannot give effect to his vote, or give to it moral or political significance, unless there are others who will act in concert, that is, in convention, with him in the nomination of candidates for electors.

The present requirement of the Constitution that electors shall meet on the same day in their respective States and cast their votes is liable to accident and interruption, as in Wisconsin in 1857.

I would prefer that the President should be elected by the people as one community, giving the election to the man who received the highest number of votes, without regard to State lines or municipal divisions. Under the present system it is entirely possible that the President may be elected by a comparatively small minority of all the votes of the nation. He may carry enough States to give him a majority of the electoral votes by an aggregate majority not exceeding 50,000 votes, and his opponent may carry the remaining States by such majorities as to give him perhaps half a million majority of the whole vote of the people. The present mode of choosing the President is, though not generally so called, an election by States. It is now generally agreed that we are a nation; that, however subdivided into States, we are in the

largest sense one people. There should be some department of the Government which represents the whole nation. The Senators are chosen by the State legislatures, and represent the States in their municipal character. The Representatives are chosen by the people voting in districts; so that, while the House collectively represents the people of the United States, yet the members individually represent but a State or a small division of a State.

But it may happen, and has happened, that a minority of the people shall elect a majority of the House of Representatives, because the majority of members may be elected by comparatively small majorities in their districts, and the minority elected by large majorities in their districts; so that, in point of fact, the majority of the House of Representatives may be elected by the minority of the people. In my opinion, the President should be elected by the people of the United States as one community, so that the national character should be fully represented in one department of the Government.

Mr. Dickerson of New Jersey, declared in this body fifty years ago:

"The President should be elected by a majority and not a minority of the people, and no one should hold that office who has not with him the physical strength of the country. If he have it all is safe, for the power that has created can protect and defend; if he have it not his holding the office is an outrage upon the principles of our Government, and is unsafe both for himself and for the country. A strong majority will not patiently submit to a weak minority, who, taking advantage of the faults in our Constitution, have succeeded in placing their man in the presidential chair. The Chief Magistrate of the Union should be an officer strictly national. He should be pre-eminently the man of the people."

Is it true that in electing a President by a vote of the people of the United States as one community we should thereby substantially impair the power of the people of the small States? The present system had its origin in the idea of preserving as nearly as possible the equality of the States in the election of the President, and this for the protection of the small States. But let us look at the question from a distance of ninety-five years and with a population of over forty millions. Under the present apportionment the electoral votes of ten States out of thirty-seven may elect a President, and as, under the practical working of our institutions, the vote of each State is cast solidly, it is the same as if the people of these ten States had voted unanimously for the same man, a thing which will be likely never to happen. In the election of a President by all the people as one community the votes of all the States would be more or less divided; but especially would the votes of the large States be divided, and thus the relative power of the small States would be increased, and especially as compared with their present mode of voting by electors.

It is true there would be an apparent diminution of power in the small States by the loss of the votes of the two electors-at-large, who are added to the electoral ticket of a State to represent the Senators, which could not be preserved in the vote of the nation as one community; but this is more than counterbalanced by the division of the power of the large States, whose votes given solidly are now a preponderating power that utterly overwhelms the small States in the presidential election in the electoral colleges. The comparative or proportional weight of the small States would be immediately and largely increased.

The dangers of sectionalism are greatly enhanced by the present mode of voting. If a majority of the people in each State in a particular section of the Union are in favor of a particular measure or policy which is or seems to be in hostility to the rest of the Union, that majority in each State will cast the vote of that section solid in favor of a presidential candidate who represents that measure or policy; but if the election of President was by the popular vote, there would then be a minority in each of the New England States voting on the other side, whose votes would be counted in the general result.

In whatever way the question may be viewed, the election of a President by the States, casting their votes solidly as States, tends to weaken the national idea, to keep alive the notion that the several States are independent sovereignties, confederated together for particular purposes; or, in other words, that we are a confederacy of nations struggling with each other as individuals for the ascendancy. Under the present system the States vote and act as individuals, and, as among natural persons, each acting for himself, the strong, the wealthy, and the powerful acquire undue influence and power over their weaker neighbors, thus increasing the natural disparity between them. Accordingly, we have seen for seventy years in the political history of this country how parties have courted and directed their blandishments to the people of the large States, comparatively neglecting the small ones.

But I submit to the inevitable, and assume that the smaller States will not consent to an amendment by which the President would be elected by the people of the United States as one community. Yet I believe they can have no objection to such a change as will bring the election of the President directly to the people of the several States, each State to be divided into as many districts as it has Senators and Representatives,

each district to have one vote in the election of President and Vice-President, and the vote of that district to be counted in favor of the candidates for President and Vice-President who receive the largest number of votes in it. This will still give to each State the same number of votes it now has in the election of President and Vice-President, the votes, however, to be given directly for the candidates by the people without the intervention of electors.

The proposed plan, of having the election directly by the people voting in districts, is greatly in favor of giving due weight to the small States; for under the present system the vote of each State is cast solidly for a single candidate for President, so that it has happened, and may happen again, that the solid vote of one of the large States, which may be determined within itself by a small majority of the popular vote, will be decisive of the election, as in the case of New York in 1845, when the small vote of five thousand, drawn off by Mr. Birney, resulted in giving the whole electoral vote of that State to Mr. Polk, and elected him over Mr. Clay; whereas if the vote of the people had been given by districts New York would have been divided, perhaps nearly equally, so that it might give but one or two votes to the general majority for the President.

In this argument I have said nothing as yet concerning the intrinsic injustice, under the present system, of requiring the vote of a State to be cast solidly. In the great State of New York one party may have a majority over the other of but one thousand, which carries with it the vote of the whole State, the one thousand thus in effect silencing the voice and suppressing the wishes of more than two million people. This result preserves the power and autonomy of the State as a municipal body, which is unnecessary and pernicious in the election of a President; but it is destructive of the principle of representation, impairs the nationality of the presidential election, and makes it more completely an election by the States. Under the working of the present system the election of President is made more completely an election by States than was ever intended by the framers of the Constitution. As before stated, they intended that the electoral colleges should be free deliberative bodies, the members of which, after full consideration, were to cast their votes for whom they pleased; so that the electoral vote of a State might be divided up between three or four persons. But in practice it has turned out that the electors are pledged in advance to vote for particular persons for President and Vice-President, and the whole set of electors pledged to vote for the same persons are elected; so that the vote of each State is given *in solido*, and the President is in effect elected by the States.

But if the President was elected by the votes of the people in districts, a part of the districts in a State might vote for one person and a part for another, so that the election would have less of a State character and be more national. The framers of the Constitution, intending that the electoral colleges should be deliberative bodies, of course did not expect them to vote solidly for President, but to divide up as deliberative bodies are apt to do; and therefore, in dividing up the vote of the people of the State by having the President elected by districts, we are but carrying out their notions.

It is somewhat curious to note in this connection that while the doctrine of State sovereignty has been generally insisted upon as a protection to the smaller States, yet this particular feature of it has been preserved and strengthened by the large States at the expense of the small ones. As before stated, the electors were at first generally chosen by districts in States that did not choose them by their legislatures, but this practice was broken up, more particularly by the action of Virginia and Massachusetts, at a time when they were the two leading States, because it tended to divide and destroy their power in the presidential election. When their votes were to be cast solidly, the vote of the whole State being thrown as a unit, it is obvious that they were of greater consideration than under a system which might divide them up between the contending candidates. We have seen in recent elections with what anxiety the result has been looked for, in New York and Pennsylvania for example, because their votes being cast *in solido* would be likely to determine the result; but if the votes of those States might have been divided up by the people voting directly for President in districts, the case would have been quite different.

I do not wish it to be understood that the proposition to elect the President by a direct vote of the people in districts is new with me. So far from that it was proposed and advocated in this body more than fifty years ago, and has passed the Senate in the form of a proposed amendment to the Constitution not less than four times by the requisite two-thirds vote. It has received the support of many of the ablest men of the nation in generations that have passed away, and every succeeding presidential election has demonstrated its wisdom and utility as compared with the present system.

The Constitution further provides that when the vote is counted in the presence of the two houses:—

“The person having the greatest number of votes for President shall be the President, if such number be a majority of the whole number of electors appointed; and if no person have such majority, then from the persons having the highest numbers not

exceeding three on the list of those voted for as President, the House of Representatives shall choose immediately by ballot the President. But in choosing the President, the votes shall be taken by States, the representation from each State having one vote; a quorum for this purpose shall consist of a member or members from two-thirds of the States, and a majority of all the States shall be necessary to a choice."

That this provision for electing a President is fraught with danger to the nation will scarcely be denied by any.

It is matter of history that the election of Mr. Jefferson by the House of Representatives in 1801 came near making shipwreck of the Government and involving the nation in civil war. Nothing prevented that result but the patriotism of several members of the House who voted against their principles and their party for Mr. Jefferson to relieve the nation from the great peril in which it was placed. Again, in 1825, when Mr. Adams was elected by the House, the proceedings became odious to the nation, and drew upon all parties concerned an unpopularity from which they never recovered.

The objections to this constitutional provision for the election of a President need only to be stated, not argued.

First, its manifest injustice. In such an election each State is to have but one vote. Nevada with its forty-two thousand population has an equal vote with New York, having one hundred and four times as great a population. It is a mockery to call such an election just, fair, or republican.

Again, this plan of election furnishes the grandest opportunities for corruption, cabal, and intrigue. Where the delegation of a State is equally divided, it is in the power of one venal member by the change of his vote to control the vote of the State. Such charges were rife in both the election of Mr. Jefferson and that of Mr. Adams, though as I believe without foundation; but certain it is that the great and patriotic Clay never recovered from the charge that as a member of the House he cast his vote and influence for Mr. Adams, and afterward became his Secretary of State.

But I will be asked, What is the remedy? I answer that I would be glad if some method could be devised by which the nation could escape the danger of having the House of Representatives to elect a President in any case; but if such is to be the resort in case no candidate for the President gets a majority of all the votes, I would have both houses of Congress to meet in joint convention, and each Senator and Representative to have one vote. This would be in exact harmony with the principles upon which the election is now to be made by the people of the several States. Under the new system which I propose, that the people of the several States shall vote directly for President, each State is to have as many districts and as many votes as it has Senators and Representatives in Congress; and why the same rule should not be preserved when the election is thrown into Congress it is hard to perceive. If each State is to be allowed as many votes by the people, or the electors, as it has Senators and Representatives in Congress, why should it not be allowed the same number of votes when the election is thrown into Congress? It would still preserve in Congress the same apportionment of power among the States that exists when the election takes place by electors. It would avert the monstrous injustice of giving the State of Nevada the same power in the election of the President as has the State of New York. By this change Nevada would have 3 votes and New York 37, which is their present relative strength in the electoral colleges.

There would be no more danger to the small States by this apportionment of power between them and the large ones, if the election of President should be thrown into Congress, than there is by the same apportionment of power now existing in the electoral colleges.

In the election of a President in the House of Representatives under the present apportionment, each State having one vote, forty-five members out of the two hundred and ninety-two may make the election, as follows: Delaware, Nebraska, Nevada, and Oregon have each one member, and four members would cast the votes of those four States; Rhode Island and Florida have each two, and four members would cast the votes of those States; Minnesota, New Hampshire, West Virginia, Vermont, and Kansas have each three members, and two votes in each, or ten members in all five would cast the votes of those five States; Arkansas, California, and Connecticut have four members each, and three in each, or nine in all, may cast their votes; Maine and South Carolina have each five members, three of whom in each, or six in both, may cast their two votes; Maryland, Mississippi, and Texas have each six members, and four in each, or twelve in all, may cast the vote of those three States. This makes nineteen States, or a majority of the States in the Union, and forty-five members may cast their votes, and elect a President of the United States against the wishes of the other two hundred and forty-seven members of the House of Representatives.

Again, these nineteen States have an aggregate population by the census of 1870 of a fraction over eight millions of people, while the remaining eighteen States have an aggregate population of about thirty millions. So that nineteen States, having scarce more than one-fifth of the entire population of the United States, may elect a President in the House of Representatives against the wishes of the other four-fifths. And

this by courtesy has been called republican government. Compared with it the rotten borough system was a mild and very small bagatelle.

Such a combination and result as above exhibited may not be likely to occur; but they are possible under the present system of electing a President in the House of Representatives by a majority of States: and no system admitting such possibilities should be tolerated. In 1825 it did happen that Mr. Adams was elected in the House over General Jackson, who had received a larger proportional majority of the popular vote than has any President elected since that time, and who had also a large plurality of the electoral vote.

There is always danger to a country in an injustice in its institutions, and the danger increases as the injustice is aggravated.

It is certainly something of a strain upon our Constitution that the small States have an equal representation with the large States in the Senate; yet I know of nobody seeking to change it. But when the smallest State is made equal to the largest in the choice of the President of the United States, the gross inequality becomes offensive, and must become dangerous to the country whenever the power is exercised. Surely every patriot who looks forward with anxiety to the future peace and perpetuity of the Republic must earnestly pray that it may never again be exposed to the trial of electing a President by the House of Representatives under the present provision of the Constitution; and most of all should the small States ask to be delivered from the exercise of a power so grossly unequal and offensive.

The object I have in view to-day is not so much to advise and propose remedies as it is to point out to the Senate and to the country dangers that lie in the pathway of the nation, contingencies, some of them not remote, but near and probable, which threaten the country with revolution and the Government with destruction, and to urge that the path of duty is the path of safety; that now, in a time of peace and political calm throughout the nation, we should address ourselves to the removal of these perilous obstructions that were hidden to the eyes of our fathers, but have been brought to our knowledge by observation and experience.

And to sum up in recapitulation, I would say that if the system of electoral colleges is to be continued, some means should be devised by which the election of these electors in the States may be contested, so that if it has been controlled by fraud or violence, or if there be two sets of electors, each claiming the right to cast the vote of the State, there may be some machinery or tribunal provided by which fraudulent returns could be set aside or corrected, and the contending claims of different sets of electors be settled in advance of the time when the vote is to be finally counted, and by which the President of the Senate may no longer be left to exercise the dangerous powers that seem to be placed in his hands by the Constitution, nor the two Houses of Congress by the operation of the twenty-second joint rule. Patriotic men of all parties must rejoice that General Grant has been re-elected by so large a majority that the electoral votes of Louisiana and Arkansas are unimportant to the result, for without intending here to express any opinion in regard to those votes, I must be permitted to say that they are surrounded by such circumstances and attended with so much doubt in the public mind that the peace of the nation would be imperiled if the result of the presidential election was to be determined by them.

The plan of dispensing with the electoral colleges and electing the President directly by the vote of the people of the whole country, as one community, or by dividing the States up into districts, seems to me to be a remedy for many of the evils and dangers to which I have referred; but even then some tribunal should be appointed to settle contested and doubtful results in districts or at the disputed polls, and this tribunal should be removed as far as possible from the control of excited parties. This naturally suggests the Supreme Court of the United States, or the circuit and district judges of the courts of the United States, for such tribunal. Whatever tribunal might be created would require much consideration in regard to details and method of operation, into which it is not important that I should now attempt to enter.

The injustice and danger of another election of President by the House of Representatives, voting by States, are so glaring that it seems to me Congress should never rest until it has constitutionally presented to the several States for their adoption some plan by which it may hereafter be avoided.

I have therefore proposed that a committee shall take the whole subject into consideration, with leave to sit during vacation and report to the next session of Congress the result of their deliberations, and to bring forward such measures as may be deemed necessary, whether in the form of statutes or amendments to the Constitution of the United States.

The VICE-PRESIDENT. The question is upon agreeing to the resolution.

Mr. TRUMBULL. Mr. President, I have one suggestion to make in regard to the resolution offered by the Senator from Indiana. It provides that a committee be appointed to sit during the recess. The Senator from Indiana will of course remember that this Congress expires on the 4th of March and that a committee appointed now could not be continued beyond that time. The members of Congress change and a committee cannot be appointed now to sit during the recess, for it is not a recess after the 4th of

March. It strikes me there would be a difficulty in appointing a committee in that way.

As I am on my feet and as this subject will probably pass from the consideration of the Senate and perhaps may not be brought up for discussion again during the present session, I will say a word or two, lest by silence my consent might seem to be given to some of the positions assumed by the Senator from Indiana in his very able speech, which I am glad that he has made. With much that he has said I entirely concur. In the apprehensions that he has expressed in regard to the dangers that may arise from an election of President under our present system I entirely concur; but he has laid down some positions which do not have my acquiescence.

In the first place, I do not agree with the Senator from Indiana as to the power of the presiding officer of the Senate over the electoral vote. The Constitution of the United States directs that the President of the Senate shall open the votes in the presence of the two houses, and then says, "and the votes shall then be counted." That is not such language, it seems to me, as the framers of the Constitution would have used, who were very precise and particular in every phrase in all the instrument, if they had intended that the President of the Senate should determine as to the validity of those votes. The language then would be, not that the President of the Senate shall open the votes, but that he shall open and count the votes in the presence of the two houses. That is not it; but the language is that he shall open the votes. I have the very words here, and it is important to have the exact language:

"The President of the Senate shall, in the presence of the Senate and the House of Representatives, open all the certificates and the votes shall then be counted."

Showing that it was not intended, as is claimed, that he should count the votes, but leaving it perhaps somewhat ambiguous as to how the votes should be counted.

I think we may learn what was intended by the language used, by the practice which was adopted. The practice at the first presidential election, which has been followed from that day to this, was for the two houses of Congress to exercise some control over this counting of votes. The Senator from Indiana says that the fact that the houses appointed tellers to count these votes has no significance; they were mere clerks. But it has significance. If this subject was entirely under the control of the President of the Senate he would have appointed the tellers, if tellers as a matter of convenience were necessary. But at the start each house, before it assembled in joint convention for the purpose of counting these votes or for the purpose of seeing them counted, if you please, took action without consulting the President of the Senate and appointed for themselves these tellers with certain duties to perform. This is inconsistent with the idea that the opening and counting of the vote were to be left exclusively in the hands of the President of the Senate.

I was called out of the chamber during a portion of the argument of the Senator from Indiana, but I understood him to say that the control of this whole subject was in the President of the Senate. I think there is a conclusive answer to that in the history of the early legislation of the country. I have already adverted to the fact that each House took action on the subject. But they went further. In 1800 a bill passed the Senate of the United States, was considered and amended in the House, returned to the Senate, and the Senate concurred in the House amendments with an amendment which was subsequently disagreed to, and the bill failed. But that bill which passed both houses of Congress by decided majorities, after long debate, participated in by the very men who made the Constitution of the United States, and who were then holding seats in Congress, provided the machinery for disposing of a contested question in regard to a presidential election.

Somebody must decide this question, and where could this decision better be left than with the two houses of Congress? The Senator from Indiana says that is dangerous; that under a joint rule, which has been adopted one house may reject the vote of a State. That is true; but under the other theory the power is left to the single person who happens to be President of the Senate, who may not be the Vice-President of the United States, and often is not, for it is not the Vice-President that is to open the certificates, but it is the President of the Senate, whoever he may happen to be; and since I have had the honor of holding a seat here, the votes for President and Vice-President have twice been opened by the President of the Senate who was not the Vice-President of the United States. So that the Senate may elect a person who would have this vast power, if it is to be reposed and is reposed by the Constitution of the United States in that officer. The Vice-President need but retire and allow the President of the Senate to be chosen by a partisan majority, if you please, in this body, and that officer can reject or count the votes of States as he may think proper. That would be a more dangerous power than any that is to be anticipated by allowing the two houses of Congress to control the question. I think it is safer that the vote should be counted under the direction of the two houses of Congress than to leave it to a single person who may happen at the time to be President of the Senate; and I think that is the fair construction of the Constitution.

A word as to the mode of electing the President. The Senator from Indiana advocates a change of the Constitution of the United States so that the President shall be

elected by a popular vote of the whole people without regard to State lines, and says that the election now is virtually an election by States. That is true; and so framers of the Constitution intended it should be. It is possible that it would be better to change the character of our Government and make it one consolidated Government with all power at the center; but, sir, the framers of the Constitution of the United States did not think so. I do not think so. I believe that liberty can only be preserved to any people by a division of the power of the Government. It is by reason of this division of power, first between the National and the State governments, and then a division of the powers of the national Government into legislative, executive, and judicial departments, that we are to preserve the Government; and when you vest all power in the hands of one set of men, you establish a despotism; and it makes no difference whether you have one body or many. It is only by the division of powers that you can preserve liberty.

Our Government is not and was not intended to be a pure democracy. It is a republic and not a democracy. It was not intended that the majority should have all the power in this country, and it will be a change of the Government when it shall be established upon that principle, and will very soon, I apprehend, run into a despotism. Governments, in fact, are for the protection of the weak, and constitutions are for the protection of minorities; and our Government is formed with wonderful wisdom by the division of powers among the States, and by dividing those powers among the different departments of Government.

I am not, therefore, Mr. President, prepared at this time to give my assent to the proposition that it would be better to elect the President of the United States by the whole people as one body, and although the Senator avers that our manner now of electing the President weakens the national idea, I think that was intended. We know that Presidents have been elected without having a majority of the popular vote. Mr. Lincoln was elected in 1860 with a large majority of the popular vote against him, but still he was elected according to the constitutional form, in the mode appointed by the Constitution. The people are represented in the other House of Congress; the States are represented here; and the President is elected by a combination of the two—the popular vote as represented in the House, and the States as represented in this body.

Now, it may be well to dispense with the electoral college. I think possibly it would be an improvement. I see no use of these electors under the present practice when the electors are committed in advance, before they are chosen, to vote in a particular way; but still it would not relieve us of the difficulty in determining for whom the people of a State voted. You may have the same trouble in regard to frauds at an election or as to the result in a State without electors as when the votes are cast for electors. So we do not really get rid of that difficulty.

My object is not to enter upon any discussion of this subject, and I should not have risen at all but to throw out these suggestions, as to the points in which I differ in some respects from the Senator from Indiana. I have no objection at all to the adoption of this resolution; but its practicability in appointing a committee to sit during the recess is a question that I think ought to be decided by the body.

Mr. SHERMAN. I suggest to the Senator from Indiana that there is some practical difficulty about the resolution in the view presented by the Senator from Illinois. I think the object would be better accomplished by sending the resolution to the Committee on Privileges and Elections. Our committees expire with the session as a matter of course, and I do not think Congress has the power to create a joint committee to continue after the term for which the Congress is elected. I simply submit it to the Senator from Indiana.

* * * * *

Mr. CONKLING. As I understand it, the motion is to refer the resolution itself to the Committee on Privileges and Elections?

Mr. SHERMAN. Yes, sir.

The motion was agreed to.

ELECTION FOR THE TWENTY-SECOND TERM—1873.

ULYSSES S. GRANT, President.

HENRY WILSON, Vice-President.

IN SENATE, *February 10, 1873.*

Mr. Sherman submitted the following resolution; which was considered and agreed to:

“Resolved, That the Vice-President be authorized to appoint the teller on the part of the Senate, provided for in the twenty-second joint rule of the two Houses, to receive and count the votes for President and Vice-President of the United States.”

The Vice-President appointed Mr. Sherman the teller on the part of the Senate.

ELECTORAL VOTE OF LOUISIANA.

Mr. MORTON. I am instructed by the Committee on Privileges and Elections to make a report in regard to the electoral vote of Louisiana. It is accompanied by a short addendum by the Senator from Illinois, [Mr. Trumbull,] and another by myself. I ask to have it laid on the table and printed.

The VICE-PRESIDENT. Does the report conclude with any resolution?

Mr. MORTON. No, sir.

The report was ordered to lie on the table and be printed. It is as follows:

"On the 7th of January, 1873, the Senate adopted the following resolution:

"Resolved, That the Committee on Privileges and Elections is directed to inquire and report to the Senate whether the recent election for electors for President and Vice-President has been conducted in the States of Louisiana and Arkansas in accordance with the Constitution and laws of the United States, and the laws of said States, and what contests, if any, have arisen as to who was elected as electors in either of said States, and what measures are necessary to provide for the determination of such contests, and to guard against and determine like contests in the future election of electors for President and Vice-President.

"That for the purpose of speedily executing this resolution, the said committee shall have power to send for persons and papers, to take testimony, and, at their discretion, to send a subcommittee of their own number to either of said States, with authority to take testimony; and, if the exigency of this service demands, the said committee may appoint and employ suitable disinterested and unprejudiced persons, not residents in either of such States, with authority to take such testimony as may be material in determining any pending contest growing out of the election of electors in either of said States."

"In obedience to the instruction contained in the foregoing resolution, the Committee on Privileges and Election have had under consideration so much of the resolution as relates to the election of electors in the State of Louisiana, and beg leave to submit the following preliminary report:

"The act of the Legislature of Louisiana of March, 1870, for the regulation of elections in that State, provides, among other things, that the governor shall have the power to appoint officers known as supervisors of registration in each parish in the State, and that these supervisors of registration shall have authority to appoint commissioners of election (who in other States are called inspectors and judges) under whose direction and authority the voting shall actually take place; that the supervisors of registration shall also control and direct the registration of the voters in each parish, fixing the places for registering and the places for voting; that, after the election has taken place, the commissioners of election shall bring the boxes containing the votes to a certain point in the parish, where, under the supervision and direction of the supervisor of registration, the votes shall be counted; and, when that is accomplished, the supervisor of registration shall make out a statement of the result of the election at the various voting-places in the parish, of which triplicate copies shall be made, and also triplicate copies of the tally-sheets, and a statement of the vote at each poll in the parish, to be signed by the commissioner of election; and that the supervisor of registration shall seal up one copy of all these papers, and inclose it to the governor of the State by mail; then seal up another copy, and send it to the governor by the next most speedy mode of conveyance; and shall himself retain the third copy. The law then provides that the governor, lieutenant-governor, secretary of state, and John Lynch, and T. C. Anderson, by name, shall constitute the returning or canvassing board; that the governor of the State shall, within ten days after the election, open the sealed packages from the various parishes, sent to him by the supervisors of registration, in the presence of the other members of the board, and the vote shall then be counted by the board for presidential electors, State officers, and members of the Legislature, and the result ascertained; that one copy of the result or finding of the board shall be filed in the office of the secretary of state, and another shall be published in the official journal of the State.

"Governor Warmoth, Lieutenant-Governor Pinchback, and F. J. Herron, acting secretary of state, were members of this returning board, *ex officio*; and a majority of the members convened, within ten days, in the city of New Orleans, to enter upon the duty of counting the votes. Pinchback and Anderson having been candidates for Congress, were, by another provision of the law, made ineligible, and were declared, by resolution, to be no longer members of the board, and controversy arose in regard to filling their places. It is not necessary to enter into the details of this controversy further than to state that Governor Warmoth attempted to control the vacancies thus created on this board, by removing F. J. Herron, acting secretary of state, and placing in his stead Jack Wharton; and after he had done so, claimed that he and Wharton, by their votes, had elected F. H. Hatch and Durant Da Ponte to fill the vacancies of Pinchback and Anderson; while, on the other hand, it was claimed that Lynch and Herron, while yet acting secretary of state, had elected James Longstreet and Jacob Hawkins to fill these vacancies.

"In a proceeding commenced in the circuit court of the United States for the district of Louisiana, on the 15th of November, Judge Durell granted a preliminary injunction restraining the Wharton board from opening the official returns and counting the votes, from acting as a returning board, making any returns, or proclamation of any finding, until further order of the court, which continued in force until the decision of the case on the 6th of December.

"The election for presidential electors, members of Congress, State officers, and members of the Legislature was held in Louisiana on the 4th of December, and the returns of the election in the various parishes were sent to the governor by the supervisors of registration, as required by law. The governor refused to act with the board known as the 'Lynch board,' or to open and lay before that board the returns of the election from the various parishes; but opened them and prepared to make the count before what is known as the 'Wharton board,' which was then enjoined from further proceedings by Judge Durell. The official returns, which had been sent to the governor, were by him withheld from the Lynch returning board, and never at any time came into possession or under the examination of that board. The Legislature of Louisiana, at its session in the winter of 1872, passed an act abolishing the returning or canvassing board, as created by the act of 1870, and authorizing the State senate to elect a returning board, to have the same powers as the former, and making other changes in the mode of conducting the elections; and, on the 20th of November, 1872, the governor, who had not signed this act, but kept it in his possession during the pendency of these proceedings in the circuit court of the United States, and also proceedings of a like character commenced in the eighth district court of the State, signed the bill and published it as a law.

"On the 21st day of November, 1872, Governor Warmoth, assuming that the Lynch board had been abolished by the act which he had signed on the 20th of November, and claiming the authority to appoint a returning board under the clause of the constitution which gave him power to fill vacancies, proceeded to appoint De Feriet and others as a returning board, and placed in their hands the official returns of the election, to be by them counted, to ascertain and declare who were elected State officers and members of the Legislature. Before the official returns were thus placed in the hands of that board they had been opened by the governor and examined by a deputy secretary of state named Woodward, acting under Jack Wharton, who at that time assumed to be secretary of state under the appointment by Governor Warmoth when he removed F. J. Herron, as before stated, and by O. A. Bragdon, the governor's private secretary, who had been elected assistant secretary of the Wharton board. Messrs. Woodward and Bragdon, according to the testimony, looked over the returns to ascertain who had been elected electors for President and Vice-President, and made a statement to the governor of the result of their examination; and the governor, on the morning of the 4th of December, the day fixed by the act of Congress when the electors in the several States shall meet and cast their votes, issued a paper, in which he declared that T. C. Manning, G. A. Weed, A. F. Herron, H. J. Campbell, L. Bush, A. Thomas, A. H. Leonard, and L. V. Reeves had been elected electors, and placed a copy of the said paper in the possession of each of said persons; and, afterward, on the same day, they assembled in the city of New Orleans, and, as electors, voted for President and Vice-President. It clearly appears from the testimony that the official returns of the State were never examined and counted for presidential electors by any persons except Messrs. Woodward and Bragdon, and up to this time never have been examined and counted by the Lynch board or any person having authority whatever to make such examination and count. While we have no doubt that the returns sent to Governor Warmoth from various parishes by the supervisors of registration will, upon their face, show that the aforesaid persons named as electors, and whom we shall designate as the 'Greeley electors,' received a majority of the votes, that fact has never been ascertained by any competent authority, and the action of Governor Warmoth depended entirely upon the unauthorized statements of Messrs. Woodward and Bragdon, who, at that time, had no right to look into the returns at all. In this matter there is no pretense that the law was complied with, and the Lynch board were never at any time permitted to see them.

"The third section of the act of Congress of 1792 declares what shall be the official evidence of the election of electors, and provides that 'the executive authority of each State shall cause three lists of the names of the electors of such State to be made and certified, to be delivered to the electors on or before the first Wednesday in December, and the said electors shall annex one of the said lists to each of their votes.' The certificate of the secretary of state is not required, and the certificate of the governor, as provided for in this section, seems to be the only evidence contemplated by the law of the election of electors and their right to cast the electoral vote of the State. If Congress chooses to go behind the governor's certificate, and inquire who has been chosen as electors, it is not violating any principle of the right of the States to prescribe what shall be the evidence of the election of electors, but it is simply going behind the evidence as prescribed by an act of Congress; and, thus going behind the certificate of

the governor, we find that the official returns of the election of electors, from the various parishes of Louisiana, had never been counted by anybody having authority to count them.

"Some two or three days preceding the 4th of December the Lynch board officially declared that M. F. Bonzano, J. Lanabere, C. H. Halstead, L. C. Croudanez, A. R. Johnson, Milton Morris, J. Taylor, and John Ray, whom we shall designate as the 'Grant electors,' had received a majority of all the votes in the State for electors of President and Vice-President; and the secretary of state *de jure*, Mr. Bovee, not then in possession of the office of secretary of state or the State seal, but who had been decided by the supreme court of the State a few days before to be the lawful secretary, made a certificate of election to the persons so declared chosen as electors, and on the 4th of December they met and cast their votes for President and Vice-President, according to the requirements of the act of Congress. They did not on that day, however, seal up their vote, but kept it open for several days, until Mr. Bovee, the secretary of state, got possession of the State seal so as to attach it to their certificates of election. The secretary of state had no right, under the law, to make any certificate upon the subject, unless for the information of the governor, and his certificate constitutes no legal evidence of the election of the persons therein named. The Lynch board, in making the count and declaration as to the election of electors, did so without having before them any of the official returns of the election as made out by the officers of the election, under the laws of the State, and had no legal evidence before them at all upon which they could count the votes, but their count was made upon documents, affidavits, and statements, *ex parte* in their character, having no legal validity, and which could not, in the nature of things, form the basis of an accurate and reliable declaration of the result of the election.

"On the 15th day of November, after the Lynch board had been organized by the election of Longstreet and Hawkins to fill the vacancies of Pinchback and Anderson, Longstreet, on the behalf of said board, and designating himself as 'deputy supervisor,' demanded of Governor Warmoth that he should bring the official returns of the election before said board to be counted. This demand Governor Warmoth declined to comply with, in the following letter:

"STATE OF LOUISIANA, EXECUTIVE DEPARTMENT,

"New Orleans, November 15, 1872.

"SIR: In reply to your letter, just received, informing me that you have instructions to see that all election statements of the election of November 4 in this State are properly and promptly placed in the possession of said board, and asking that I place the same in the possession of Special Deputy Marshal W. F. Loan, in order that he may deliver the same to Mr. John Lynch, president of the board, I have to say that I do not recognize your authority as deputy supervisor to make such demand, nor have I any knowledge of the existence of any such body as that presided over by Mr. John Lynch. The election returns received by me as president of the State board of canvassers are, and will remain, in the possession of myself as president of the State board of canvassers, in accordance with the law of the State, and I alone am authorized to hold and open them.

"Very respectfully, your obedient servant,

"H. C. WARMOTH,

"Governor of Louisiana.

"General JAMES LONGSTREET,

"Deputy United States Supervisor."

"It is claimed on behalf of this board that, by the demand upon Governor Warmoth that he should produce before them the official returns of the elections, and his refusal to do so, a foundation was laid for the introduction of secondary evidence to prove the contents and character of said official returns, upon which secondary evidence the count might be made. Without entering into the discussion of the legal question whether a sufficient foundation had thus been laid for the introduction of secondary evidence as to the character of the returns, it is sufficient to say that if such foundation had been laid it could only justify the introduction of secondary evidence to prove the actual character and contents of the returns, and the testimony before the committee shows that the evidence which the Lynch returning board had before them went to contradict the face of the returns, to show fraud, and what the vote should have been, and that in making their count the board did not rely so much upon evidence as to what the official returns showed, but upon evidence which in many cases contradicted and denied their correctness. Among other evidences the Lynch board counted some five thousand affidavits as votes for presidential electors, State officers, and members of the Legislature. These affidavits purported to have been made by persons, mostly persons of color, who had been denied the right of registration, and whose votes had been refused at the polls. In many of them it was stated that these rights had been denied them because of race, color, or previous condition of servitude, and many

of them contained no such statements. It is urged that these affidavits might be counted as votes under the provisions of the act of Congress of 1870, to enforce the fifteenth amendment of the Constitution. A brief examination of that act will show that this claim is unfounded. By the third section of that act it is provided that, where a person has offered to register or to perform any act required by law preliminary to voting, from the performance of which he has been wrongfully hindered by any officer or person in authority, the offer to register or to perform the preliminary act shall be taken as a performance, and, upon proof thereof, such person shall have a right to vote just as if such preliminary act had been performed. But there is no provision in the law that if any person has been refused the right to vote and has performed such preliminary act, or offered to perform the same, as provided in the third section, his offer to vote shall be taken and counted as a vote. In the twenty-third section of the act it is provided that if any person has been defeated in obtaining an office by reason of such denial to any person or persons of the right to vote, on account of race, color, or previous condition of servitude, such person may bring a suit in the courts of the United States to recover the office; but the section expressly provides that its benefits shall not extend to candidates for the State Legislature, for Congress, or for electors for President and Vice-President. The section clearly contemplates a suit in court, to which the person who, it is claimed, has been fraudulently elected shall be made a party, and that upon legal proof that the plaintiff has been deprived of his election by the exclusion of persons from voting on account of race, color, or previous condition of servitude, he shall be entitled to recover the office.

"The statute of Louisiana authorizes the supervisors of registration in the parishes or the commissioners of election to make affidavit in regard to any violence, tumult, fraud, or bribery, by which a fair election has been prevented, which shall be forwarded to the returning board, along with the returns, and upon which the returning board may reject the vote of a poll in making the count; and if the evidence of the officers of the election is not sufficient to satisfy the minds of the returning board in regard to the matters charged, they are authorized to send for persons and papers and take further testimony upon the matter; but they have no authority to make such investigation unless the foundation is first laid by the sworn statements of the officers of the election as before mentioned. The Lynch board, in making their count without having the sworn statements of the officers of the election to give them jurisdiction to investigate, receive affidavits, the statements of supervisors of election appointed under the act of Congress, letters and verbal statements upon which they assumed the authority, in some cases, to reject the entire vote of parishes, and in many instances to throw out the vote of particular polls and wards, and in others to estimate and fix the vote at about what they supposed it ought to be from their knowledge of the political status of the parish or locality. The evidence submitted to the board, and which has been described to the committee, undoubtedly produced the conviction in their minds that the election had been an organized fraud. Governor Warmoth, under the act of 1870, had the whole machinery of the election in his own hands. He had the appointment of the supervisors of registration in the different parishes, and they the appointment of commissioners of election, and those officers, with but few exceptions, were appointed from the ranks of those who were opposed to the republican party, and we think from the informal evidence before the returning board and from what this committee has learned in the course of this investigation, there is little doubt that those advantages were used to the utmost, and every means resorted to in order to secure the triumph of the party with which Governor Warmoth was acting. Great difficulties were thrown in the way of registration; republicans in many parishes were put to great inconvenience to find the registrar, and in many instances were unable to do so; places of registering and of voting in many parishes were fixed at points remote from the centers of population, often without notice of the place being given; false registration papers, double voting, stuffing ballot-boxes, and other frauds and irregularities were charged in a majority of the parishes, and there is not much room to doubt that the Lynch returning board were of the opinion that, upon a fair election, the republican party would have carried the State, and had been cheated and hindered in every way possible by the power that controlled the machinery of the election. But, notwithstanding all this, the Lynch returning board, with the sort of evidence which was before them, had no power under the law of the State to investigate these charges of fraud and injury or to act upon their convictions of wrongs that had been suffered.

"The election of the Greeley electors was certified to by the governor of the State, but the official returns of the election have not been counted by the returning board created by the laws of Louisiana for that purpose; and the persons who, in fact, made the examination and count had no legal authority to do so. The election of the Grant electors is certified by the Lynch returning board, but that board did not have the official returns before them, and their election is not certified by the governor of the State as required by the act of Congress. The committee are of the opinion that neither the Senate of the United States nor both Houses jointly have the power under the Con-

stitution to canvass the returns of an election and count the votes to determine who have been elected presidential electors, but that the mode and manner of choosing electors are left exclusively to the States. And if by the law of the State they are to be elected by the people, the method of counting the vote and ascertaining the result can only be regulated by the law of the State. Whether it is competent for the two Houses, under the twenty-second joint rule, (in regard to the constitutionality of which the committee here give no opinion,) to go behind the certificate of the governor of the State to inquire whether the votes for electors have ever been counted by the legal returning board created by the law of the State, or whether, in making such count, the board had before them the official returns, the committee offer no suggestions, but present only a statement of the facts as they understand them.

"As to the other questions upon which the committee are instructed to report, touching the existence of a legal State government in Louisiana and the admission of a Senator from that State, they are not now prepared to report.

"Addendum by Mr. Morton.

"A majority of the committee were of opinion that no reference should be made in the report to the decision of the supreme court of Louisiana as to which was the legal returning board, upon the ground that the decision was made subsequent to the 4th of December, when the electors were to cast their votes for President and Vice-President; but it seems to me that the history of the whole matter would not be complete, and the Senate would not be placed in possession of all the material facts, without a statement of the character of that decision, and that the fact that it was made after the casting of the vote by the electors would furnish no sufficient reason why it should not be referred to in the report. Decisions of courts of last resort are made at the end of causes, and not at the beginning, and are held to relate back and establish the rights of the parties throughout the whole controversy.

"On the 14th day of November, 1872, a proceeding was commenced in the eighth district court of Louisiana by the attorney-general, on the information of the returning officers of elections, to enjoin what was called the Wharton board from canvassing the official returns and making any finding thereon, and requiring the returns to be placed in the hands of the Lynch board. And to this suit Governor Warmoth, Hatch, Da Ponte, and Wharton were made parties. This case was appealed to the supreme court of the State, and by that court decided on the — of January, 1873. The court held that the board consisting of Lynch, Longstreet, and Hawkins, together with Governor Warmoth and Mr. Boyce, who was the secretary of state who had been suspended by Governor Warmoth when he first appointed Herron, and who had been restored by a decision of the supreme court, constituted the legal returning board, and that Da Ponte, Wharton, and Hatch had no authority whatever.

"O. P. MORTON.

"Addendum by Mr. Trumbull.

"My understanding of the evidence is that Governor Warmoth some months before the election had removed Boyce from the office of secretary of state and appointed Herron in his place; that on the morning of November 14 he removed Herron as a defaulter, and in his place appointed Wharton, who qualified and took possession of the office of secretary of state prior to noon, the hour to which the returning board stood adjourned from a preliminary meeting held the day previous; that after the meeting of the board on the 14th, and the vacancies in it had been filled by Warmoth and Wharton, by the appointment of Hatch and Da Ponte, Bragdon was appointed assistant secretary of the board. Governor Warmoth opened the official returns in their presence, and the assistant secretary commenced their tabulation, but before completing it the Wharton board was enjoined from further proceeding by the United States district judge, Durell.

"Bragdon, who was private secretary of the governor, as well as assistant secretary of the Wharton board, and in whose possession the returns remained, assisted by Woodward, who was then assistant secretary of state under Wharton, as he had previously been under Herron, continued the tabulation of the returns for electors till it was completed, when Governor Warmoth gave a statement of the result to the electors who were elected according to the official returns.

"I also dissent from the following passages in the foregoing report, to wit:

"The evidence submitted to the [Lynch] board, and which has been described to the committee, undoubtedly produced the conviction in their minds that the election had been an organized fraud.

"There is not much room to doubt that the Lynch returning board were of the opinion that, upon a fair election, the republican party would have carried the State, and had been cheated and hindered in every way possible by the power that controlled the machinery of the election."

"The fact that the Lynch board undertook to count in the republican candidates as

elected without the semblance of an official return before them, and in some instances upon spurious, forged, and false affidavits, as the evidence before the committee shows, affords no evidence to my mind that they supposed a fair election had not been held.

"LYMAN TRUMBULL."

IN THE HOUSE OF REPRESENTATIVES, *February 10, 1873.*

The SPEAKER. The Senate has sent to the House a notification of its appointment of a teller on the part of the Senate to count the electoral votes. It is the duty of the Speaker to nominate two Representatives to perform the same duty on the part of the House. The Chair nominates Mr. Henry L. Dawes, a Representative from the State of Massachusetts, and Mr. James B. Beck, a Representative from the State of Kentucky.

IN THE HOUSE OF REPRESENTATIVES, *February 12, 1873.*

COUNTING OF ELECTORAL VOTE.

Mr. DAWES. I offer the following resolution:

"Resolved, That the Clerk inform the Senate that this House is now ready to receive that body, for the purpose of proceeding to open and count the votes of the electors of the several States for President and Vice-President of the United States."

Mr. BINGHAM. Is not the hour fixed by the rule at one o'clock?

Mr. DAWES. The hour at which the proceedings should commence is fixed by the rule. But it will take a little time to make the preliminary arrangements.

The resolution was adopted.

Mr. DAWES moved to reconsider the vote by which the resolution was adopted; and also moved that the motion to reconsider be laid on the table.

The latter motion was agreed to.

IN SENATE, *February 12, 1873.*

Mr. McPHERSON, the Clerk of the House of Representatives, appeared at the bar of the Senate, and delivered the following message:

Mr. President, I am directed to inform the Senate that the House of Representatives is now ready to receive the Senate, for the purpose of proceeding to open and count the votes of the electors of the several States for President and Vice-President of the United States.

The VICE-PRESIDENT. A message has just come from the House of Representatives, announcing that they are in readiness for the entrance of the Senate, to count the electoral votes.

Mr. SHERMAN. The hour fixed by the joint rule is one o'clock, and according to the precedent four years ago, when a similar message was received at about the same time, the Senate waited until the hour of one o'clock, which is the hour fixed by the joint rule.

The VICE-PRESIDENT. If there be no objection, the Chair will submit the message of the House at about five minutes before one o'clock, so as to enable the Senate to arrive in the Hall of the House of Representatives at one o'clock. The Senator from Indiana will resume.

Mr. PRATT resumed and concluded his remarks.

The VICE-PRESIDENT. The Chair submits a message received from the House of Representatives, which will be reported by the Secretary.

The Chief Clerk read as follows:

"IN THE HOUSE OF REPRESENTATIVES, *February 12, 1873.*

"Resolved, That the Clerk inform the Senate that this House is now ready to receive that body, for the purpose of proceeding to open and count the votes of electors of the several States for President and Vice-President of the United States."

Mr. SHERMAN. I move that the Senate proceed to the Hall of the House of Representatives.

The motion was agreed to.

The VICE-PRESIDENT. The Senate, preceded by the Sergeant-at-Arms, will now repair to the Hall of the House of Representatives.

The Senate thereupon proceeded to the Hall of the House of Representatives.

IN THE PRESENCE OF THE SENATE AND HOUSE OF REPRESENTATIVES,

February, 12, 1873.

COUNTING THE ELECTORAL VOTES.

At one o'clock p. m. the Doorkeeper announced the Senate of the United States.

The Senate entered the Hall, preceded by its Sergeant-at-Arms and headed by the Vice-President and the Secretary of the Senate, the members and officers of the House

rising to receive them. The Senators took the seats set apart for them in the eastern section of the Hall.

The Vice-President took his seat as the presiding officer of the joint convention of the two Houses, the Speaker occupying a chair on the left of the Vice-President.

Senator SHERMAN, of Ohio, the teller appointed on the part of the Senate, and Messrs. Dawes, of Massachusetts, and Beck, of Kentucky, the two tellers appointed on the part of the House, took their seats at the Clerk's desk, at which the Secretary of the Senate and Clerk of the House also occupied seats.

THE VICE-PRESIDENT. The Senate and House of Representatives having met under the provisions of the Constitution for the purpose of opening, determining, and declaring the votes cast for President and Vice-President of the United States for the term of four years commencing on the 4th of March next, and it being my duty, in the presence of both Houses thus convened, to open the votes, I now proceed to discharge that duty.

The Vice-President then proceeded to open and hand to the tellers the votes of the several States for President and Vice-President of the United States, commencing with the State of Maine.

Senator SHERMAN (one of the tellers) read in full the certificate of the vote of the State of Maine, giving seven votes for Ulysses S. Grant, of Illinois, for President of the United States, and seven votes for Henry Wilson, of Massachusetts, for Vice-President of the United States.

Senator TRUMBULL. I think the governor's certificate should be read as the evidence of the election of the electors.

THE VICE-PRESIDENT. The tellers will report the certificate.

Senator SHERMAN (as one of the tellers) read the certificate of the governor of Maine.

Senator TRUMBULL. I would inquire if that certificate bears the signature of the executive of the State of Maine?

Senator SHERMAN. The signature of Sydney Perham, as governor, is in the center of the paper, under the great seal of the State.

Senator TRUMBULL. It is not material where it is, if the signature of the executive is there.

THE VICE-PRESIDENT. The Chair will state that upon several occasions of the counting of the electoral vote, after the first certificate had been read in full, the reading in full of the subsequent certificates has been dispensed with by general consent, unless some Senator or Representative in a particular case called for the reading of the entire certificate. If no person objects, therefore, the tellers will report the material part of the subsequent certificates, subject, however, to the demand of any Senator or Representative that the document shall be read in full.

Senator TRUMBULL. I desire that the certificate of the executive to the election of the electors should be once read in each case. I wish to take up no unnecessary time, but I think it important, as some question may possibly arise on that subject, that the certificate of the executive should be read.

THE VICE-PRESIDENT. That point will be regarded as made, and the tellers will take notice of it accordingly.

Mr. DAWES (one of the tellers) read the certificate of the Governor of New Hampshire as to the election of electors of President and Vice-President of the United States, and announced the electoral votes of the State for those two officers.

Senator HAMLIN. I beg to suggest to the Senator from Illinois [Mr. Trumbull] whether it will not answer his purpose entirely if the tellers should announce the fact that the certificates of election of electors are signed by the governor and countersigned by the secretary of state. That method of proceeding will be an economy of time, and at the same time it will reach the result which the Senator wishes to accomplish.

Senator TRUMBULL. Mr. President, it will be entirely satisfactory to me if the tellers will examine the papers in each case and see whether the proper certificate of the executive of the State accompanies the list of votes, and will announce that fact with reference to each certificate. Where there is any variation they will, of course, bring it to the notice of the joint convention. It should be understood, of course, that the reading of the certificate in full may be demanded in any case.

THE VICE-PRESIDENT. If there be no objection the tellers will merely state the fact in regard to the attestation of the governor, subject to a demand by any Senator or Representative for the reading of the certificate in full.

The tellers proceeded to announce the electoral votes of the several States, it being mentioned in each case that the certificate of the election of the electors was signed by the governor and countersigned by the secretary of state. When the State of Georgia was reached,

Mr. BECK, of Kentucky, (one of the tellers,) announced the electoral vote for President as follows:

"B. Gratz Brown, of Missouri, six votes; Horace Greeley, of New York, three votes; Charles J. Jenkins, of Georgia, two votes."

The vote for Vice-President was announced, as follows :

"B. Gratz Brown, of Missouri, five votes ; Alfred H. Colquitt, of Georgia, five votes ; Nathaniel P. Banks, of Massachusetts, one vote."

[Laughter.]

Mr. HOAR. I desire to make the point that the three votes reported by the tellers as having been cast for Horace Greeley, of New York, cannot be counted, because the person for whom they purport to have been cast was dead at the time of the assembling of the electors in that State.

The VICE-PRESIDENT. The gentleman from Massachusetts [Mr. Hoar] having made the point which has been stated by him, the Chair will read from the twenty-second joint rule of the two Houses :

"If, upon the reading of any such certificate by the tellers, any question shall arise in regard to counting the votes therein certified, the same having been stated by the presiding officer, the Senate shall thereupon withdraw, and said question shall be submitted to that body for its decision ; and the Speaker of the House of Representatives shall in like manner submit said question to the House of Representatives for its decision ; and no question shall be decided affirmatively, and no vote objected to shall be counted, except by the concurrent votes of the two Houses, which being obtained, the two Houses shall immediately reassemble, and the presiding officer shall then announce the decision of the question submitted ; and upon any such question there shall be no debate in either House. And any other question pertinent to the object for which the two Houses are assembled may be submitted and determined in like manner."

On previous occasions, since this rule has been in operation, it has been required that an objection to the counting of any vote should be in writing, so that it might be submitted to both Houses for their decision in their separate Chambers. The gentleman from Massachusetts will submit his point in writing ; and the Chair will have it stated from the Clerk's desk.

Senator CONKLING. While the gentleman from Massachusetts is reducing his point to writing, I suggest to the Chair that either by the point being withheld for the present, (this particular return being laid aside,) or otherwise, we can avoid the necessity of separating at this moment. Gentlemen know that a separation, to deliberate upon another point or two, is quite likely to occur ; and I suggest that if this question can be passed over in one form or another for the moment, we can complete the reading of all the returns upon which there is no question ; and then upon the two or three questions which may remain for decision, one single separation of the joint convention and one coming together will suffice.

The VICE-PRESIDENT. If there is no objection, the gentleman from Massachusetts will be understood as reserving the point which he has made, to be presented at the close of the counting, or whenever the two Houses may be required under the rule to meet in their respective Chambers. Will that suit the gentleman from Massachusetts

Mr. HOAR. I have no objection.

The VICE-PRESIDENT. It will be understood as so reserved.

The tellers resumed the reading of the certificates. When the vote of the State of Mississippi was announced,

Mr. Senator SHERMAN (one of the tellers) said : As the form in this case is somewhat different from the others, I will read the certificate of the Governor :

"On this Wednesday, the 4th day of December, 1872, at the city of Jackson, in the State of Mississippi, the electors thereof assembled for the purpose of voting for President and Vice-President of the United States ; and they accordingly voted with the following result, to-wit :

"For President of the United States, Ulysses S. Grant, of Illinois, eight votes.

"For Vice-President of the United States, Henry Wilson, of Massachusetts, eight votes."

The tellers call attention to the fact that the electors do not certify that they voted by ballot.

Senator TRUMBULL. I observed that. I think this is a question of sufficient importance to receive the consideration of the two Houses. I object to the vote of Mississippi being counted for the reason that it does not appear that the electors voted by ballot. I will reduce the objection to writing and let it lie until the two Houses separate upon other questions, if it be agreeable to the convention.

The VICE-PRESIDENT. The Senator from Illinois [Mr. Trumbull] objects to counting the vote of the electors of the State of Mississippi, on the ground there is no certificate they voted by ballot, but for the present he reserves that point.

Senator TRUMBULL. At the suggestion of a Senator who thinks it would be a bad precedent when an objection is raised to pass it over and go through with the vote in a matter of such grave importance as this, I will present the question now.

Senator SHERMAN, (one of the tellers.) The tellers direct me to read another paper from the State of Mississippi.

Senator TRUMBULL. If there are any other papers I should like to hear them all read.

Senator SHERMAN (one of the tellers) then read a certificate stating that the electors of the State of Mississippi had assembled for the purpose of giving their votes for President and Vice-President of the United States, and that A. T. Morgan, one of the electors, not being present, they had duly appointed J. J. Spellman to fill said vacancy under the revised code of the State of Mississippi of 1871, to which was appended the great seal of the State of Mississippi and the signature of James Lynch, secretary of state of Mississippi.

The VICE-PRESIDENT. If the gentleman from Massachusetts has reduced to writing the point which he made it will be now presented to the convention.

Mr. HOAR. I have reduced it to writing, and will send it up to the Clerk's desk.

The VICE-PRESIDENT. Under the twenty-second joint rule the presiding officer now submits to the Senate and House of Representatives in joint convention the objection of the gentleman from Massachusetts, [Mr. Hoar.] It will be reported.

The Secretary of the Senate read as follows:

"Mr. Hoar objects, the votes reported by the tellers as having been cast by the electors of the State of Georgia for Horace Greeley, of New York, cannot legally be counted, because said Horace Greeley, for whom they appear to have been cast, was dead at the time said electors assembled to cast their votes and was not a person within the meaning of the Constitution, this being a historical fact of which the two Houses may take notice."

The VICE-PRESIDENT. Two copies will be made of this objection, one for the Senate and one for the House of Representatives, to be submitted to each House after the Senate repairs to its Chamber.

The Senator from Illinois [Mr. Trumbull] makes the following point, which the presiding officer now submits to the two bodies in joint convention.

The Secretary of the Senate read as follows:

"Mr. Trumbull objects to counting the votes cast for President and Vice-President by the electors in the State of Mississippi, for the reason it does not appear from the certificates of said electors that they voted by ballot."

Senator TRUMBULL. I should like to have read again the certificate of the governor of Mississippi, both the original and supplemental papers.

The VICE-PRESIDENT. That will be done.

Senator TRUMBULL. It is suggested by my colleague it would be well, as these papers cannot be before both Houses when we separate, that for the information of both Houses the papers be read in full at this time.

The VICE-PRESIDENT. The Chair will state in this case as in all other cases there are two copies in possession of the presiding officer, one sent by mail and one brought by messenger. In this case they appear to be the same.

The papers were again read.

The VICE-PRESIDENT. The presiding officer will state that in the duplicate copies sent by messenger the governor's certificate does not appear to have been included; but the substantial point made by the Senator from Illinois [Mr. Trumbull] lies against both papers, that they do not state the electors voted by ballot.

Mr. POTTER. Mr. President, I desire to inquire, because we could not understand here as reported by the tellers, whether the supplemental certificate, as I may call it, from the State of Mississippi in respect of the elector elected to supply and take the place of the elector who is absent, is signed by the governor or not?

The VICE-PRESIDENT. It is signed by the secretary of state only.

Mr. POTTER. Then, Mr. President, I desire to object to one vote of the State of Mississippi, because the certificate declaring that J. J. Spellman was appointed an elector in the stead of A. T. Morgan, absent, by the electoral college of that State, in accordance with the laws of that State, is not signed by the governor of that State.

The VICE-PRESIDENT. It has been suggested that perhaps it may not be exactly correct, under the Constitution, for the President of the Senate to leave in possession of the House any official document in his possession pertaining to the electoral vote. But as the tellers have reported in every instance that besides the document which was delivered to the Vice-President by messenger a duplicate came by mail, unless there is objection the Chair will leave in the possession of the House of Representatives, for reference and consultation by its members, the document which was transmitted to him by mail, retaining in his official possession the document which was transmitted by messenger. The gentleman from New York [Mr. Potter] desires to modify his objection.

Mr. POTTER. At the suggestion of a member of the House who has seen the certificate of the State of Mississippi to which I have referred, I ask leave to make an addition to the objection I have offered.

The VICE-PRESIDENT. The objection of the gentleman from New York [Mr. Potter] will be read as modified:

The Clerk read as follows:

"Mr. Potter objects to one vote of the State of Mississippi, because the certificate declaring that J. J. Spellman was appointed an elector in the stead of A. T. Morgan,

absent, by the electoral college of that State, in accordance with the laws of that State, is not signed by the governor of that State.

"And further that the certificate of the secretary of state read does not certify anything of his own knowledge, but only states he has been so notified as he certifies."

The VICE-PRESIDENT. Three questions having arisen in regard to the counting of the votes for President and Vice-President, the Senate will now withdraw to their Chamber.

The Senate accordingly retired.

IN THE HOUSE OF REPRESENTATIVES, *February 12, 1873.*

The SPEAKER, having called the House to order, said: In the joint convention for counting the electoral votes an objection was made by the gentleman from Massachusetts [Mr. Hoar] against counting the return from the State of Georgia. The Clerk will read the objection.

The Clerk read as follows:

"Mr. Hoar objects that the votes reported by the tellers as having been cast by the electors of the State of Georgia for Horace Greeley, of New York, cannot lawfully be counted, because said Horace Greeley, for whom they appear to have been cast, was dead at the time said electors assembled and cast their votes, and so not a person within the meaning of the Constitution, this being a historic fact of which the two Houses may properly take notice.

Mr. HOAR. I offer the following resolution:

The Clerk read as follows:

"Resolved, That the votes reported by the tellers as having been cast by the electors of the State of Georgia for Horace Greeley for President of the United States ought not to be counted."

Mr. HOAR. I desire to make an inquiry of the Chair. Is it in order, under the joint rule, to ask that there may be read an extract from the Constitution of the United States?

Mr. BANKS. Certainly it is.

The SPEAKER. The Chair doubts whether it would be. All debate is absolutely prohibited; and whether that would be in the nature of debate would be a grave point.

Mr. BANKS. Under what rule?

The SPEAKER. The Chair will direct the reading of the rule.

Mr. FARNSWORTH. It appears to me that the Chair can direct the reading of any portion of the Constitution as well as he can the reading of a rule.

The SPEAKER. The Chair will not object, if the point is not raised. The Chair directs the paragraph of the twenty-second joint rule which bears upon this question to be read.

The Clerk read as follows:

"If, upon the reading of any such certificate by the tellers, any question shall arise in regard to counting the votes therein certified, the same having been stated by the presiding officer, the Senate shall thereupon withdraw, and said question shall be submitted to that body for its decision; and the Speaker of the House of Representatives shall, in like manner, submit said question to the House of Representatives for its decision. And no question shall be decided affirmatively, and no vote objected to shall be counted, except by the concurrent votes of the two Houses; which being obtained, the two Houses shall immediately re-assemble, and the presiding officer shall then announce the decision of the question submitted; and upon any such question there shall be no debate in either House. And any other question pertinent to the object for which the two Houses are assembled may be submitted and determined in like manner."

Mr. COGHLAN. Should not this be a concurrent resolution?

Several MEMBERS. No!

Mr. NIBLACK, of Indiana. I hope the gentleman from Massachusetts [Mr. Hoar] will yield to a suggestion for an amendment. I would suggest the insertion after "ought not" of the words "in the opinion of this House." I think we cannot act finally, and, if we simply express our opinion, perhaps it would be more decorous to the Senate.

Mr. HOAR. I have no objection to that modification.

Mr. FARNSWORTH. I desire to offer an amendment to the resolution.

Mr. HOAR. I was about myself to suggest a further modification by adding after the name of "Horace Greeley" the words "he having deceased before the vote was cast."

The SPEAKER. The Chair thinks that modification is necessary, because the resolution should state on its face the reason why the vote should not be counted. The resolution will be returned to the gentleman so that he may modify it exactly in accordance with his suggestion.

Mr. LOWE. I desire to make a parliamentary inquiry, and it is whether the question

to be submitted to the House is not simply on the point of order made in the joint convention?

The SPEAKER. It is no point of order in the sense of a point on which the Chair can rule.

Mr. LOWE. Do we not act directly on the matter presented to the joint convention?

The SPEAKER. The Chair thinks that this is the proper mode of disposing of the case.

The Clerk then read the resolution as modified by Mr. Hoar, as follows:

Resolved, That in the judgment of the House of Representatives the votes reported by the tellers as having been cast by the electors of the State of Georgia for Horace Greeley, of New York, for President of the United States, ought not to be counted, the said Horace Greeley having died before the said votes were east."

Mr. MACINTYRE. I desire to move to amend the resolution by striking out the word "not" before the words "to be counted."

The SPEAKER. The gentleman attains the same object by voting against the resolution.

Mr. BANKS. I rise to a point of order; and it is that we have no power to decide on the eligibility of any man voted for for President.

Mr. BINGHAM. Is debate in order?

The SPEAKER. It is not. That is a reason for not voting for the resolution. But the joint rule forbidding debate on these questions is one of the highest political necessities, for if debate was allowed on such questions it might be in the power of one branch of Congress to postpone indefinitely the counting of the electoral votes.

Mr. BANKS. I insist on the point of order that the House has no power to decide questions of the eligibility of candidates voted for for the Presidency.

The SPEAKER. The gentleman does not submit that as a question for the Chair to decide?

Mr. BANKS. I submit it to the House.

The SPEAKER. It is a question for the House to determine in voting upon the resolution. It is not a question which is within the purview of the Chair to determine.

Mr. WILLARD. I ask for the yeas and nays on the resolution.

The yeas and nays were ordered.

The question was taken; and it was decided in the affirmative—yeas 101, nays 99, not voting 40; as follows:

YEAS—Messrs. Ames, Averill, Barber, Barry, Beatty, Biggs, Bingham, Bird, James G. Blair, Braxton, Bright, Buckley, Buffinton, Bunnell, Burchard, Burdett, Roderick R. Butler, Clarke, Coburn, Coghlan, Comingo, Critcher, Davis, Dawes, Dickey, DuBois, Dunnell, Eames, Elliott, Esty, Wilder D. Foster, Garfield, Hale, Harmer, Harper, George E. Harris, John B. Hawley, Joseph R. Hawley, Hay, Hays, Gerry W. Hazelton, John W. Hazelton, Herndon, Hoar, Hooper, Houghton, Kelley, Kerr, Ketcham, Killinger, Lampont, Lansing, Leach, McCrary, McGrew, McHenry, McKee, Merriam, Merriek, Monroe, Moore, Leonard Myers, Negley, Orr, Packard, Packer, Palmer, Isaac C. Parker, Peck, Pease, Peters, Porter, Rainey, Randall, Ritchie, Ellis H. Roberts, Robinson, Rusk, Sargent, Sessions, Sherwood, Shoemaker, H. Boardman Smith, Sprague, Starkweather, Sypher, Taffe, Washington Townsend, Turner, Twichell, Tyner, Upson, Voorhees, Waddell, Wakeman, Waldron, Wallace, Wheeler, Williams of Indiana, Jeremiah M. Wilson, and John T. Wilson—101.

NAYS—Messrs. Acker, Adams, Ambler, Archer, Arthur, Banks, Barnum, James B. Beck, Bell, Bales, Caldwell, Carroll, Cobb, Conger, Conner, Cotton, Crebs, Crocker, Crossland, Donnan, Dox, Duke, Eldredge, Ely, Finkelnburg, Charles Foster, Henry D. Foster, Garrett, Getz, Giddings, Golladay, Griffith, Haldeman, Hancock, Handley, Hanks, John T. Harris, Hereford, Hibbard, Holman, Kellogg, Kendall, Kinsella, Lamison, Lowe, Lynch, MacIntyre, Manson, Marshall, Maynard, McClelland, McCormick, McJunkin, McKinney, Mitchell, Morgan, Morphis, Silas L. Niblack, William E. Niblack, Hosea W. Parker, Pendleton, Perry, Poland, Potter, Price, Prindle, Read, Edward Y. Rice, William R. Roberts, Sion H. Rogers, Rosevelt, Sawyer, Seofield, Sheldon, Shellabarger, Shober, Slater, Slocum, John A. Smith, Speer, Stevens, Stevenson, Storm, Stoughton, Stowell, St. John, Sutherland, Terry, Thomas, Van Trump, Vaughan, Warren, Wells, Whiteley, Willard, Williams of New York, Winchester, Wood, and Young—99.

NOT VOTING—Messrs. Erasmus W. Beck, Bigby, Austin Blair, Boarman, Brooks, Benjamin F. Butler, Campbell, Cox, Creely, Darrall, Dodds, Duell, Farnsworth, Farwell, Forker, Frye, Goodrich, Halsey, Hambleton, Havens, Hill, King, Lewis, McNeely, Benjamin F. Meyers, Morey, Platt, John M. Rice, John Rogers, Seeley, Shanks, Sloss, Worthington C. Smith, Snapp, Snyder, Swann, Dwight Townsend, Tuthill, Waiden, and Whitthorne—40.

So the resolution was agreed to.

Mr. HOAR moved to reconsider the vote by which the resolution was adopted; and also moved that the motion to reconsider be laid on the table.

The latter motion was agreed to.

Mr. KERR. I offer the following resolution :

Resolved, That in the opinion of this House the votes cast for Horace Greeley, of New York, for President of the United States, by the electors should be counted by the tellers as blank votes."

The SPEAKER. The Chair thinks the House, by its resolution just adopted, has disposed of the question raised in the joint convention.

Mr. KERR. Would it not be in order for the House to vote on the resolution I have presented?

The SPEAKER. The Chair does not see how it would be. There was no notice given in joint convention of the point contained in the resolution of the gentleman. The point of order raised in convention has been read to the House, and the House has taken resolution thereon.

Mr. KERR. I desire to make a parliamentary inquiry. Does the Chair rule my resolution out of order by reason of anything contained in the joint rule of the two Houses, or is it by reason of something in the rules of the House?

The SPEAKER. For this reason : the point of order that comes from the joint convention was read to the House, and the House, by a vote of 101 to 99, has disposed of that point. There is, therefore, nothing before the House upon which the gentleman can base his resolution.

Mr. KERR. I beg to submit one other consideration. I agree that the House has disposed of the question of the duty of the tellers to the extent of forbidding them to count those votes for Horace Greeley. But has the House gone so far as my resolution now proposes to go, to declare that it shall be the affirmative duty of the tellers to inform the joint convention how many blank votes have been cast, and to reckon the votes cast for Horace Greeley as such blank votes?

The SPEAKER. If the House is to pass upon that as a separate question, it must come to the House from the joint convention of the two branches.

Mr. ELDERIDGE. The House has already declared by resolution that the votes cast for Horace Greeley were void votes. The gentleman from Indiana [Mr. Kerr] now asks the House to pass a resolution declaring that the votes cast for Horace Greeley were not only void votes but that they were cast for Mr. Blank; which is an absurdity.

The SPEAKER.. There is no question before the House.

Mr. KERR. Allow me to say—

The SPEAKER. The Chair does not intend unnecessarily to deprive the gentleman from Indiana [Mr. Kerr] of the right of discussing a point of order. But the rule of the two Houses is very absolute, and in the general judgment very necessary, that no debate shall be allowed under the circumstances. This is in the nature of debate. And if the debate can exist lawfully under the rules for ten minutes, it may extend for ten hours, and for ten weeks. Therefore, it is the duty of the Chair, a duty more incumbent upon him because it is prescribed by the joint rule than if prescribed by a rule of the House, to adhere absolutely to the spirit and letter of the rule.

COUNTING THE ELECTORAL VOTES.

The SPEAKER. The Clerk will now read the point certified to the House from the joint convention, and which was raised by Mr. Trumbull, a Senator from the State of Illinois.

The Clerk read as follows:

"Mr. Trumbull objects to counting the votes cast for President and Vice-President by the electors in the State of Mississippi, for the reason that it does not appear from the certificate of said electors that they voted by ballot."

Mr. DAWES. I submit the following resolution :

Resolved, That in the judgment of this House the eight votes reported by the tellers as cast by electors in and for the State of Mississippi ought to be counted as reported by them."

Mr. AMBLER. Does not the question now presented involve also the point raised in joint convention by the gentleman from New York, [Mr. Potter?]

The SPEAKER. No matter whether it does or not, the Chair cannot take note of that.

Mr. AMBLER. I move to amend the resolution by striking out "eight" and inserting "seven."

The SPEAKER. The Chair did not suppose a division would be called or an amendment offered on this resolution. The gentleman from Massachusetts [Mr. Dawes] is entitled to be recognized to try the sense of the House upon ordering the previous question. The gentleman will state whether he yields for an amendment.

Mr. AMBLER. I think the question presented by my amendment should be submitted to the House.

Mr. POTTER. The Constitution provides that these votes of the electors shall be cast by ballot.

Mr. GARFIELD, of Ohio. It does not say that they shall so certify.

Mr. DAWES. I call the previous question on my resolution.

The previous question was seconded and the main question ordered.

The question being taken on agreeing to the resolution, there were—ayes 101, noes 33
Mr. W. R. ROBERTS. I call for the yeas and nays.

Mr. RANDALL. Let us have the yeas and nays. This is a very important question. The yeas and nays were not ordered.

So the resolution of Mr. Dawes was adopted.

The SPEAKER. The Clerk will read the objection made in the joint convention by Mr. Potter, a Representative from the State of New York.

The Clerk read as follows:

"Mr. Potter objects to the counting of one vote of the State of Mississippi, because the certificate declaring that J. J. Spellman was appointed an elector in the stead of A. T. Morgan, absent, by the electoral college of that State, in accordance with the laws of that State, is not signed by the governor of the state; and further, that the certificate of the secretary of state read does not certify anything of his own knowledge, but only states he has been so notified, as he certifies."

Mr. BANKS. I offer a resolution upon that point.

The SPEAKER. The Chair will be compelled to recognize the gentleman [Mr. Potter] who raised the point in the joint convention.

Mr. ELDRIDGE. I raise a point of order. My point is that the House has just passed a resolution that the eight votes of Mississippi are to be counted; and that this proposition is incompatible with the resolution just adopted.

The SPEAKER. That is not a point of order. It is a matter for the House, not the Chair, to decide.

Mr. POTTER submitted the following resolution:

"Resolved, That as one of the eight votes certified by the electoral college of the State of Mississippi as cast for Ulysses S. Grant as President appears not to have been cast by A. T. Morgan, who appears by the certificate of the executive of that State to have been an elector of that State, but by James J. Spellman, and there being no certificate from the executive authority of that State certifying the appointment of said James J. Spellman as an elector of such State, that one of the electoral votes be rejected, and seven electoral votes only be counted for that State."

Mr. BANKS. I offer the following resolution as a substitute for the resolution just read:

"Resolved, That the electors of the State of Mississippi, having been appointed in the manner directed by the Legislature of that State, were legally elected, and the vote of the State as cast by them should be counted, and that the certificate of the governor of that State of the electoral vote cast and the certificate of the secretary of state of that State in regard to the choice of electors are in compliance with the Constitution and laws of the United States."

Mr. POTTER. In this connection I ask to have read an extract from the statute of 1792.

Mr. BANKS. I object to the reading of the statute.

Mr. RANDALL. Is it not in order to ask for the reading of the certificate of the electoral college of Mississippi, together with the governor's certificate relating thereto?

The SPEAKER. The Chair thinks that the point embraced in the resolution of the gentleman from Massachusetts [Mr. Banks] was disposed of under the point raised by the Senator from Illinois [Mr. Trumbull] and the resolution of his colleague, [Mr. Dawes,] just adopted by the House. The House has passed a resolution declaring that the electoral vote of Mississippi should be counted.

Mr. BINGHAM. The eight votes.

The SPEAKER. The eight votes—

Mr. BANKS. If the Chair will allow me, I wish to say the House has already decided that those votes should be counted so far as concerns the objection that the certificate does not specify the votes of the electors to have been cast by ballot. Now the gentleman from New York [Mr. Potter] raises another point, that one of these votes should not be counted because it was not in compliance with the laws of the State. My resolution proposes that they shall all be counted because the electors were chosen in compliance with the laws of the State.

Mr. RANDALL. I want to get at a history of the facts.

Mr. DICKEY. I object to this House embarking on any question of history. [Laughter.]

Mr. ELDRIDGE. I would like to make a parliamentary inquiry. If the House should now decide that this one electoral vote ought not to be counted, what would be the effect of such action, standing by the side of the resolution the House has already adopted that the whole eight votes shall be counted?

The SPEAKER. The Chair is not placed here to tell the effect of what the House may do.

Mr. ELDRIDGE. I submit, then, as a point of order to be decided by the Chair, that the House has already determined to count the eight votes of Mississippi.

The SPEAKER. The Chair cannot entertain that as a point of order. As the reading of the papers, which has been called for, is not in the nature of debate, the Chair directs the Clerk to read the certificate of the electors of the State of Mississippi.

The Clerk read as follows:

STATE OF MISSISSIPPI, EXECUTIVE DEPARTMENT,
Jackson, Miss., December 4, 1872.

"At the election held in the State of Mississippi on the first Tuesday in November, A. D. 1872, the following persons were elected by a majority of the legal voters of the said State as electors for President and Vice-President of the United States: H. C. Carter, W. H. Gibbs, W. F. Simonton, James Hill, A. K. Davis, A. F. Morgan, W. H. Harney, S. J. Ireland.

"In testimony whereof I have hereunto set my hand and caused the great seal of the State of Mississippi to be affixed at the city of Jackson, this 4th day of December, A. D. 1872.

[L. S.] "R. C. POWERS, *Governor.*

"By the governor:

"JAMES LYNCH, *Secretary.*"

"STATE OF MISSISSIPPI, EXECUTIVE DEPARTMENT,
Jackson, Miss., December 4, 1872.

"This is to certify that on this 4th day of December, A. D. 1872, I was notified by the college of electors of the State of Mississippi that at a meeting then being held by them for the purpose of giving their votes for President and Vice-President of the United States, A. F. Morgan, one of the electors, not being present, they duly appointed J. J. Spellman to fill the said vacancy, the said appointment being made in accordance with section three hundred and eighty-two, Revised Code, 1871, of the State of Mississippi.

"In testimony whereof, I have hereunto set my hand and fixed the great seal of the State this 4th day of December, 1872.

[L. S.] "JAMES LYNCH, *Secretary.*"

"On this Wednesday, the 4th day of December, A. D. 1872, at the city of Jackson, in the State of Mississippi, the electors therefor assembled for the purpose of voting for President and Vice-President of the United States, and they accordingly voted, with the following result, to wit:

"For President of the United States, Ulysses S. Grant, of Illinois, eight votes.

"For Vice-President of the United States, Henry Wilson, eight votes.

"HANNIBAL C. CARTER

"W. H. GIBBS.

"W. F. SIMONTON.

"JAMES HILL.

"A. K. DAVIS.

"JAMES J. SPELLMAN.

"WM. H. HARNEY.

"SAM'L J. IRELAND."

Mr. CONGER. I ask that the point of order raised in joint convention by the gentleman from New York [Mr. Potter] be again read.

The Clerk then read the objection made by Mr. Potter, of New York, in the joint convention, the resolution offered by him in the House, and also the substitute moved by Mr. Banks, of Massachusetts.

Mr. ELDERIDGE. The House has already determined to count the eight votes of Mississippi, and I make the point this resolution is incompatible with the action of the House.

Mr. DICKEY. I object to debate.

Mr. BANKS. I will modify my substitute for the resolution of the gentleman from New York by inserting the words "as provided by the Constitution of the United States."

Mr. DICKEY. I object to debate on either side of the House.

Mr. BANKS. I demand the previous question.

Mr. DUKE. If it be in order, I ask to have read the law of Mississippi referred to in the certificate read by the Clerk.

Mr. DICKEY. The law of Mississippi is in the nature of debate, and I object to debate.

The SPEAKER. The confusion in the House is so great that the Chair will be obliged to call gentlemen by name.

The previous question was seconded and the main question ordered.

The question first recurred on the substitute of Mr. Banks for the resolution of Mr. Potter.

The House divided; and there were—ayes 109, noes 33.

So the substitute was agreed to.

The resolution, as amended, was then adopted.

Mr. BANKS moved to reconsider the vote by which the substitute was adopted; and also moved that the motion to reconsider be laid on the table.

The latter motion was agreed to.

Mr. GARFIELD, of Ohio. Mr. Speaker, I submit the following resolution.

The Clerk read as follows:

"*Resolved*, That the Clerk of the House be directed to inform the Senate that the House of Representatives has acted on the question submitted this day by the joint convention of the two Houses in reference to counting the votes for President and Vice-President of the United States."

Mr. BANKS. I move to amend by inserting copies of the resolution adopted by the House.

Mr. GARFIELD, of Ohio. Should not that be done in joint meeting?

Mr. BINGHAM. Let them have an opportunity to concur under the twenty-second rule.

The SPEAKER. The Chair has directed the Clerk to communicate to the Senate copies of the resolutions adopted by the House.

Mr. GARFIELD, of Ohio. I have no objection to amending my resolution in that respect.

Mr. HOAR. Should not the resolution read in pursuance of the joint rule?

Mr. GARFIELD, of Ohio. I have no objection to that.

The SPEAKER. The Clerk will communicate to the Senate copies of the resolutions adopted by the House.

The resolution, as modified, was adopted.

Mr. GARFIELD, of Ohio, moved to reconsider the vote by which the resolution, as modified, was adopted; and also moved that the motion to reconsider be laid on the table.

The latter motion was agreed to.

And then, on motion of Mr. RANDALL, (at three o'clock and ten minutes p. m.,) the House took a recess for fifteen minutes.

The recess having expired, the House re-assembled at three o'clock and twenty-five minutes p. m.

MESSAGE FROM THE SENATE.

A message from the Senate, by Mr. SYMPSON, one of its clerks, informed the House that the Senate had passed the following resolutions:

"*Resolved*, That the electoral votes of Georgia cast for Horace Greeley be counted.

"*Resolved*, That the vote cast by James J. Spellman, one of the electors for the State of Mississippi, be counted.

"*Resolved*, That the electoral vote of the State of Mississippi be counted."

The message further announced that the Senate is ready again to meet the House, that the counting of the electoral votes may be proceeded with.

COUNTING OF ELECTORAL VOTE.

Mr. DAWES. I offer the following resolution:

"*Resolved*, That a message be sent to the Senate, to inform that body that the House is ready to receive the Senate, to proceed again with the counting of the electoral votes."

The resolution was agreed to.

Mr. DAWES moved to reconsider the vote by which the resolution was adopted; and also moved that the motion to reconsider be laid on the table.

The latter motion was agreed to.

IN SENATE, February 12, 1873.

The Senate returned to its Chamber at eight minutes past two o'clock p. m.

The VICE-PRESIDENT. Upon the counting of the votes for President and Vice-President, in the presence of the two Houses, three questions arose and were stated by the presiding officer, and the Senate has returned to its Chamber, under the twenty-second joint rule, for the purpose of deciding them. The Secretary will report the first objection. The twenty-second joint rule will be found on page 178 of McDonald's Digest.

The Secretary read as follows:

"Mr. Hoar objects that the votes reported by the tellers as having been cast by the electors of the State of Georgia for Horace Greeley, of New York, cannot lawfully be counted because said Horace Greeley, for whom they appear to have been cast, was dead at the time said electors assembled to cast their votes, and was not a "person" within the meaning of the Constitution, this being an historic fact of which the two Houses may properly take notice."

The VICE-PRESIDENT. The Secretary will report from the certificate of the electors of the State of Georgia the substantial part bearing upon this question.

The Secretary read as follows:

"That the said electors, being assembled as above mentioned, and all present, proceeded to vote by ballot for a President of the United States for the term of four years from the 4th day of March, 1873. When all the ballots were cast and the votes counted, it appeared that Benjamin Gratz Brown, of the State of Missouri, had received 6 votes; Horace Greeley, of the State of New York, 3 votes; and Charles J. Jenkins, of the State of Georgia, 2 votes; 11 votes in all being given by the electoral college."

The VICE-PRESIDENT. This question is now submitted to the Senate for its decision, which, under the twenty-second joint rule, must be without debate. The Secretary will report the part of the twenty-second joint rule bearing on this question.

The Secretary read as follows:

"If, upon the reading of any such certificate by the tellers, any question shall arise in regard to counting the votes therein certified, the same having been stated by the presiding officer, the Senate shall thereupon withdraw, and said question shall be submitted to that body for its decision; and the Speaker of the House of Representatives shall, in like manner, submit said question to the House of Representatives for its decision; and no question shall be decided affirmatively, and no vote objected to shall be counted, except by the concurrent votes of the two Houses; which being obtained, the two Houses shall immediately re-assemble, and the presiding officer shall then announce the decision of the question submitted, and upon any such question there shall be no debate in either House; and any other question pertinent to the object for which the two Houses are assembled may be submitted and determined in like manner."

Mr. ALCORN. I ask leave to offer a resolution, which I will submit in writing.

The VICE-PRESIDENT. This question is submitted to the Senate for its decision. The usage has been that it should be in writing, as the precise terms of the decision must be communicated to the other House.

Mr. EDMUNDS. I understood the Senator from Mississippi was to offer a resolution. I was about to offer one.

Mr. ALCORN. I beg pardon, Mr. President; is the objection of the member from Massachusetts now up?

The VICE-PRESIDENT. The first question submitted is that in regard to the votes cast by the electors of the State of Georgia for Mr. Greeley.

Mr. EDMUNDS. On that subject I offer the following resolution:

"Resolved, That the electoral votes of Georgia cast for Horace Greeley be not counted."

The VICE-PRESIDENT. Is the Senate ready for the question?

Mr. THURMAN. I have an amendment to offer to that resolution.

Mr. BOREMAN. I wish to make an inquiry: whether this resolution is subject to debate?

The VICE-PRESIDENT. It is not, under the twenty-second joint rule.

Mr. STEWART. Is it in order to call for the reading of that section of the Constitution under which the votes are counted?

The VICE-PRESIDENT. The Chair thinks it is.

Mr. STEWART. I should like to hear that read.

The VICE-PRESIDENT. The Secretary will report the first part of the twelfth article of amendment to the Constitution of the United States.

The Secretary read as follows:

"The electors shall meet in their respective States, and vote by ballot for President and Vice-President, one of whom, at least, shall not be an inhabitant of the same State with themselves; they shall name in their ballots the person voted for as President, and in distinct ballots the person voted for as Vice-President, and they shall make distinct lists of all persons voted for as President and of all persons voted for as Vice-President, and of the number of votes for each, which lists they shall sign and certify and transmit sealed to the seat of the Government of the United States, directed to the President of the Senate. The President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates, and the votes shall then be counted: the person having the greatest number of votes for President shall be the President, if such number be a majority of the whole number of electors appointed; and if no person have such majority, then from the persons having the highest numbers not exceeding three on the list of those voted for as President, the House of Representatives shall choose immediately by ballot the President."

Mr. THURMAN. I ask that the resolution be read again.

The VICE-PRESIDENT. The resolution proposed by the Senator from Vermont will be reported.

The Chief Clerk read the resolution, as follows:

"Resolved, That the electoral votes of Georgia cast for Horace Greeley be not counted."

Mr. THURMAN. I move to amend the resolution by striking out the word "not."

Mr. EDMUNDS. On that amendment I ask for the yeas and nays, only because it is a matter of importance.

Mr. SCOTT. Is it in order to offer an amendment to the amendment?

The VICE-PRESIDENT. It is; but the question must first be taken upon ordering the yeas and nays.

The yeas and nays were ordered.

Mr. SCOTT. I have drawn what I propose as an amendment to the amendment:

"That the votes for Horace Greeley are entitled to be counted, postponing the question of the legal effect of votes cast for a man who shall appear to have been dead when they were cast, until the whole vote shall come to be counted."

The VICE-PRESIDENT. That would be a substitute—

Mr. EDMUNDS. I make the point of order that that does not comply with the joint rule, which requires us to decide whether the vote shall be counted or not.

The VICE-PRESIDENT. The Chair was about to state that in the form presented by the Senator from Pennsylvania his proposition would be a substitute for the resolution; and therefore the first question according to parliamentary law would be on the amendment of the Senator from Ohio to perfect the resolution. But the Chair sustains the point made by the Senator from Vermont that this is not a decision of the question. When the two branches meet in their respective Chambers, they must, in the language of the rule, decide the question submitted. The question now is on the amendment of the Senator from Ohio to strike out the word "not," upon which the yeas and nays have been ordered.

Mr. CONKLING. I should like to ask a question of the Chair. Suppose the amendment be lost, or otherwise, I presume it will be in order, of course, afterward to amend the resolution by adding something to it?

The VICE-PRESIDENT. Certainly. The Secretary will call the roll on the amendment of the Senator from Ohio striking out the word "not."

The question being taken by yeas and nays, resulted—yeas 47, nays 18; as follows:

YEAS—Messrs. Alcorn, Anthony, Bayard, Blair, Carpenter, Casserly, Clayton, Cole, Conkling, Cooper, Corbett, Cragin, Davis, Fenton, Ferry of Michigan, Flanagan, Frelinghuysen, Gilbert, Goldthwaite, Hamilton of Maryland, Harlan, Hitchcock, Johnston, Kelly, Lewis, Logan, Machen, Morrill of Maine, Norwood, Patterson, Pool, Ransom, Rice, Sanlisbury, Sawyer, Schurz, Scott, Sherman, Sprague, Stevenson, Stewart, Stockton, Thurman, Tipton, Trumbull, Vickers, and Wright—47.

NAYS—Messrs. Ames, Boreman, Buckingham, Caldwell, Chandler, Edmunds, Ferry of Connecticut, Hamilton of Texas, Hamlin, Hill, Howe, Morrill of Vermont, Morton, Nye, Pratt, Robertson, West, and Windom—18.

ABSENT—Messrs. Brownlow, Cameron, Osborn, Pomeroy, Ramsey, Spencer, Sumner, and Wilson—8.

The VICE-PRESIDENT. The amendment is agreed to, and the word "not" is stricken out. The question now is on the resolution as amended.

Mr. CONKLING. I move to amend the resolution by adding a few words. I will read the resolution as it is, and as it would be if my amendment were adopted.

"Resolved, That the electoral votes of Georgia cast for Horace Greeley be counted."

So the resolution stands now. I propose to add the words—

"The function of the joint convention being ministerial merely, and this question being independent of the question of the effect of the votes or of the count."

I offer these additional words as an amendment

The VICE-PRESIDENT. The Senator from New York moves to amend by adding to the resolution words which will be read.

The CHIEF CLERK. The proposed amendment is to add to the resolution the following:

"The function of the joint convention being ministerial merely, and this question being independent of the question of the effect of the votes or of the count."

Mr. SHERMAN. I hope the Senator from New York will withdraw that. It requires us to vote on a question of great difficulty without debate. The precise function of the joint convention is one of the most delicate and difficult questions in our system.

Mr. CONKLING. I think if my friend will attend to the resolution he will not ask me to withdraw the amendment on that ground. I have no right to debate it; but I ask him to attend to the resolution so far as to see that the design of the words—and if they are not well chosen I hope he will improve them—is to restrict and restrain the decision of this body to that single point, so as not to have the vagueness of the resolution imply that we intend to say anything as to the effect of the count after it is made.

Mr. ANTHONY. Is there any joint convention? Is there any such body as a joint convention? Has it any functions at all?

The VICE-PRESIDENT. The Chair thinks that is in the nature of debate.

Mr. ANTHONY. I do not know but that it is.

The VICE-PRESIDENT. If it was a parliamentary question for the Chair it would not be debate; but it is a constitutional question that the Senator from Rhode Island is presenting, and such an inquiry is in the nature of debate.

Mr. STEWART. I would suggest an amendment—

Mr. CONKLING. If my friend will allow me, in consequence of the remark of the Senator from Ohio, I will modify my amendment as I will now read it:

"The function of the joint convention in counting votes being ministerial merely, and this question being independent of the question of the effect of the votes or of the count."

I think that will relieve it of the objection made by the Senator from Ohio.

Mr. MORRIS. I suggest to the Senator from New York to strike out the words "joint convention" and insert "the two Houses."

Mr. CONKLING. I accept the amendment.

The VICE-PRESIDENT. The amendment is modified so as to say, "two Houses" instead of "joint convention."

Mr. STEWART. I move a substitute, to come in after the other words, to this effect: "Be counted for the purpose of ascertaining the whole number of electors appointed."

The VICE-PRESIDENT. Will the Senator from Nevada state whether he offers an amendment to the resolution or an amendment to the amendment of the Senator from New York?

Mr. MORTON. The votes may as well be counted for Greeley as counted blank, so far as the whole number is concerned.

Mr. STEWART. I withdraw the proposition for the present.

The VICE-PRESIDENT. The question is on the amendment of the Senator from New York.

Mr. CARPENTER. Let it be read.

The VICE-PRESIDENT. The amendment will be read as modified.

The amendment was read, as follows:

"The function of the two Houses in counting the votes being ministerial merely, and this question being independent of the question of the effect of the votes or of the count."

Mr. BAYARD. I raise a point of order on that amendment. The proposition does not affect in any way or change the substance of the resolution, and constitutes a mere recital of a legal proposition, and therefore is not an amendment. It does not change or affect in any way the substance of the resolution.

The VICE-PRESIDENT. The Senator from Delaware submits the point of order which he has stated, and the Chair submits it to the Senate for its decision.

Mr. HAMLIN. It is a matter of taste, not of order.

The VICE-PRESIDENT. The Senator from Delaware objecting to the reception of this amendment, the question is, will the Senate receive it as an amendment under the twenty-second joint rule?

The question being put, a division was called for; and there were—yeas 25, noes 32.

Mr. CONKLING. I ask for the yeas and nays.

The yeas and nays were ordered.

Mr. CONKLING. Now will the Chair be kind enough to state the question to the Senate?

The VICE-PRESIDENT. The Senator from New York having moved an amendment to add to the resolution what has been reported, the Senator from Delaware makes the point of order that it is not in order under the twenty-second joint rule as an amendment, it being matter of argument rather than a decision of the question. The Chair submits that question to the Senate, and the yeas and nays have been ordered upon it, whether the Senate will receive it as an amendment under the twenty-second joint rule.

Mr. CARPENTER. After which the question will be upon agreeing to the amendment?

The VICE-PRESIDENT. The first question will be on receiving the amendment.

Mr. CARPENTER. But afterward? We do not vote on the amendment now.

The VICE-PRESIDENT. The first question is, whether the amendment can be received under the twenty-second joint rule?

Mr. FERRY, of Michigan. I ask that the resolution be read as it will stand if amended.

The Chief Clerk read as follows:

"*Resolved*, That the electoral votes of Georgia cast for Horace Greeley be counted, the function of the two Houses in counting the votes being ministerial merely, and this question being independent of the question of the effect of the votes or of the count."

Mr. BAYARD. Is it in order for me to restate the grounds of my point of order?

The VICE-PRESIDENT. The Chair thinks not, unless the Senator says that the Chair has stated it incorrectly. The Senator stated it himself and the Chair repeated it.

Mr. BAYARD. Will the Chair be kind enough to state what he supposes to be the grounds of my point of order?

The VICE-PRESIDENT. The stenographer who took down the Senator's words has gone out of the Chamber. If there be no objection, the Senator from Delaware will state his point of order specifically.

Mr. HAMLIN. Will the Chair permit another Senator to state the reasons why this amendment is in order?

The VICE-PRESIDENT. The Chair thinks that would not be in order.

Mr. HAMLIN. Then I object.

The VICE-PRESIDENT. The Senator from Maine objects. The point of order has been stated. The Secretary will call the roll.

The question being taken by yeas and nays, resulted—yeas 30, nays 32; as follows:

YEAS—Messrs. Alcorn, Boreman, Caldwell, Carpenter, Chandler, Clayton, Conkling, Corbett, Cragin, Ferry of Michigan, Flanagan, Frelinghuysen, Gilbert, Hamlin, Hitch-

cock, Howe, Lewis, Morrill of Maine, Morrill of Vermont, Morton, Patterson, Pratt, Ramsey, Sawyer, Scott, Sherman, Stewart, West, Windom, and Wright—30.

YAYS—Messrs. Ames, Anthony, Bayard, Blair, Casserly, Cole, Cooper, Davis, Edmunds, Fenton, Ferry of Connecticut, Goldthwaite, Hamilton of Maryland, Hamilton of Texas, Harlan, Hill, Johnston, Kelly, Logan, Machen, Norwood, Pool, Rice, Robertson, Saulsbury, Schurz, Sprague, Stevenson, Stockton, Tipton, Trumbull, and Vickers—32.

ABSENT—Messrs. Brownlow, Buckingham, Cameron, Nye, Osborn, Pomeroy, Ransom, Spencer, Sumner, Thurman, and Wilson—11.

THE VICE-PRESIDENT. Upon the question submitted by the Senator from Delaware, whether the Senate shall receive this amendment under the twenty-second joint rule, the yeas are 30 and the nays are 32. So the Senate decline to receive the amendment under the twenty-second joint rule.

MR. CONKLING. As that amendment has been lost on a question of order, I will offer the same idea in another form, not wishing of course to antagonize the view of the Senate. Therefore I move to amend the resolution by inserting after the words "resolved, that" the words "the function of the two Houses in respect of the count of votes being ministerial and independent of the question of the effect of the vote;" and I will remark, if I am in order, that I have changed the phraseology about counting the votes. As some Senator suggested to me that the amendment which I offered applied to the two Houses counting rather than to witness the count of votes, I now adopt the phraseology "the function of the two Houses in respect of the count of votes being ministerial and independent of the question of the effect of the votes."

THE VICE-PRESIDENT. The Senator from New York moves an amendment which he has stated from his seat.

MR. BAYARD. I ask that that amendment be reported by the Clerk.

THE VICE-PRESIDENT. It will be read.

THE CHIEF CLERK. The amendment is to insert after the word "that" in the first line of the resolution these words: "the function of the two Houses in respect of the count of the votes being ministerial merely, and this question being independent of the question of the effect of the votes."

THE VICE-PRESIDENT. The question is on agreeing to this amendment.

MR. BAYARD. I raise the point of order that we have just voted upon this amendment and therefore it is not in order to offer it again.

THE VICE-PRESIDENT. The Senator from Delaware makes the point of order that the Senate has just voted upon this amendment. Is that the point?

MR. BAYARD. I wish it understood also that I raise the same point of order in respect to the present amendment that I did upon the one the Senate has just voted on.

THE VICE-PRESIDENT. And the Senator from Delaware makes the same point of order against this amendment that he made against the previous amendment. The Chair will submit the question to the Senate. The Chair states that in doing this he does it as he believes it to be his duty, because it is well known that there has been a wide difference of opinion as to the clause of the Constitution in regard to the counting of the votes. Its language is, "The President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates, and the votes shall then be counted;" and the question in dispute has been whether they shall be counted by the two Houses or whether they shall be counted by the presiding officer. The twenty-second joint rule remitted this question distinctly to the two Houses of Congress, and they thereby expressed their opinion that the President of the Senate has simply one duty to perform, to open the certificates. Therefore, these questions arising incidentally, the Chair prefers to submit them to the Senate; and he submits this question also as he did the previous one. The question is, will the Senate agree to receive the last amendment offered by the Senator from New York?

MR. CONKLING. As it will take but a moment, I ask that the resolution as it will stand if amended may be read, in order that the Senate may see the difference between the amendment I offered before and the one I now offer.

THE VICE-PRESIDENT. The resolution will be read as it will stand if the amendment shall be agreed to, the question still being on receiving the amendment under the twenty-second joint rule.

The Chief Clerk read as follows:

"Resolved, That the function of the two Houses in respect of the count of votes being ministerial, and independent of the question of the effect of the vote, the electoral votes of Georgia cast for Horace Greeley be counted."

THE VICE-PRESIDENT. The amendment is that part which comes in before the words "the electoral votes of Georgia cast for Horace Greeley be counted." The question is, Will the Senate receive this as an amendment to the pending resolution, under the twenty-second joint rule?

THE VICE-PRESIDENT put the question, and declared that it appeared to be decided in the negative.

MR. CONKLING. I think we had better have the yeas and nays.

The yeas and nays were ordered; and being taken, resulted—yeas 28, nays 32; as follows:

YEAS—Messrs. Boreman, Caldwell, Carpenter, Chandler, Clayton, Conkling, Corbett, Cragin, Ferry of Michigan, Flanagan, Frelinghuysen, Gilbert, Hamlin, Hitchcock, Howe, Lewis, Morrill of Maine, Morton, Nye, Patterson, Pratt, Ramsey, Sawyer, Sherman, Stewart, West, Windom, and Wright—28.

NAYS—Messrs. Alcorn, Anthony, Bayard, Blair, Buckingham, Casserly, Cole, Cooper, Davis, Edmunds, Fenton, Ferry of Connecticut, Hamilton of Maryland, Hamilton of Texas, Harlan, Hill, Johnston, Kelly, Machen, Norwood, Pool, Ransom, Rice, Robertson, Sanlisbury, Schurz, Sprague, Stevenson, Stockton, Tipton, Trumbull, and Vickers—32.

ABSENT—Messrs. Ames, Brownlow, Cameron, Goldthwaite, Logan, Morrill of Vermont, Osborn, Pomeroy, Scott, Spencer, Sumner, Thurman, and Wilson—13.

The VICE-PRESIDENT. On the question will the Senate receive this amendment under the twenty-second joint rule, the yeas are 28 and the nays are 32. The nays have it. The amendment is not received. The question recurs on the resolution as amended, which will be again reported.

The Chief Clerk read the resolution, as follows:

Resolved, That the electoral vote of Georgia cast for Horace Greeley be counted."

Mr. CONKLING and Mr. MORTON called for the yeas and nays on the adoption of the resolution.

The yeas and nays were ordered; and being taken, resulted—yeas 44, nays 19; as follows:

YEAS—Messrs. Alcorn, Anthony, Bayard, Blair, Carpenter, Casserly, Clayton, Cole, Cooper, Corbett, Cragin, Davis, Fenton, Ferry of Michigan, Flanagan, Frelinghuysen, Goldthwaite, Hamilton of Maryland, Harlan, Hitchcock, Johnston, Kelly, Lewis, Logan, Machen, Morrill of Maine, Norwood, Patterson, Pool, Ransom, Rice, Sanlisbury, Schurz, Scott, Sherman, Sprague, Stevenson, Stewart, Stockton, Thurman, Tipton, Trumbull, Vickers, and Wright—44.

NAYS—Messrs. Ames, Boreman, Buckingham, Caldwell, Chandler, Conkling, Edmunds, Ferry of Connecticut, Gilbert, Hamilton of Texas, Hamlin, Hill, Howe, Morrill of Vermont, Morton, Nye, Pratt, Ramsey, and West—19.

ABSENT—Messrs. Brownlow, Cameron, Osborn, Pomeroy, Robertson, Sawyer, Spencer, Sumner, Wilson, and Windom—10.

The VICE-PRESIDENT. The resolution, as amended, is agreed to.

Mr. TRUMBULL. May I inquire whether that was a concurrent resolution?

The VICE-PRESIDENT. There has to be concurrent action of the two Houses. It has been ruled previously that it does not require to be in terms a concurrent resolution; but it requires the concurrent action of the two Houses affirmatively to count votes which are objected to.

Mr. TRUMBULL. Would not that be the proper form?

The VICE-PRESIDENT. The point was discussed, as far as it could be under the rule prohibiting debate, four years ago, and it was decided that such a resolution should not be a concurrent resolution, because the two Houses might differ, and the twenty-second joint rule provided for that difference effecting a certain result. The action of the Senate, however, will be communicated to the House of Representatives. The Secretary will now report the objection made by the Senator from Illinois in the presence of the two Houses.

The Secretary read as follows:

"Mr. TRUMBULL objects to counting the votes cast for President and Vice-President by the electors in the State of Mississippi, for the reason that it does not appear from the certificate of said electors that they voted by ballot."

Mr. TRUMBULL. I submit a resolution which—

The VICE-PRESIDENT. The Chair will first submit the paper that bears on this particular question.

The Secretary read the following certificate:

"On this Wednesday, the 4th day of December, at the city of Jackson, in the State of Mississippi, the electors therefor assembled for the purpose of voting for President and Vice-President of the United States, and they accordingly voted, with the following result," &c.

Mr. TRUMBULL. I offer a resolution.

The VICE-PRESIDENT. Now the Senator from Illinois moves a resolution, which will be read.

The Secretary read the resolution, as follows:

Resolved, That the electoral vote of the State of Mississippi be counted."

Mr. MORTON. I should like to have the objection reported.

The VICE-PRESIDENT. The objection will now be reported.

Mr. TRUMBULL. It was reported.

The SECRETARY. "Mr. Trumbull objects to counting the votes cast for President and

Vice-President by the electors in the State of Mississippi, for the reason that it does not appear from the certificate of said electors that they voted by ballot."

Mr. TRUMBULL. Upon reflection, I think we must count the vote.

The VICE-PRESIDENT. The question is on the resolution of the Senator from Illinois.

Mr. THURMAN. There were two points reserved as to Mississippi; one made by a member of the House of Representatives.

The VICE-PRESIDENT. That is the third objection, which will be considered after this one shall be decided.

Mr. THURMAN. Then this resolution ought to be that the vote of Mississippi shall be counted, notwithstanding it does not appear that it was given by ballot, so as to show what point is decided.

Mr. MORTON. The other objection I think ought to come first.

Mr. CONKLING. I must make a point of order on the Senator from Ohio making such a suggestion.

The VICE-PRESIDENT. Will the Senator from Ohio submit his proposition in writing?

Mr. THURMAN. The resolution embraces the whole vote of Mississippi.

Mr. EDMUNDS. We cannot have debate.

The VICE-PRESIDENT. This seems to be in the nature of debate.

Mr. MORTON. I suggest that the resolution is out of order, inasmuch as it covers both objections. The objections should be taken separately.

Mr. THURMAN. I am perfectly content to vote for the resolution as it is.

Mr. HAMLIN. Will the Secretary report the resolution again?

The Secretary read Mr. Trumbull's resolution.

Mr. HAMLIN. I move to amend that resolution by adding at the end thereof the words "in full," which will meet both cases.

Mr. EDMUNDS. Say "all the electoral votes."

Mr. HAMLIN. I will amend it, at the suggestion of the Senator from Vermont, so as to read as the decision of the Senate that all the electoral votes of the State of Mississippi be counted.

Mr. EDMUNDS. I ask that the law of Mississippi be read by the Secretary on the second point, which will show the Senate how the law seems to read.

The VICE-PRESIDENT. If there be no objection, this law will be reported.

The Secretary read as follows:

"SEC. 382. The electors chosen shall meet at the seat of government of the State on the first Wednesday in December after such election, and shall there give their votes for President and Vice-President of the United States, and make return thereof, agreeably to the laws of the United States; and should it happen that any elector, so chosen, shall fail to attend and give his vote, the other electors attending shall appoint some person or persons to fill such vacancy or vacancies, who shall attend and vote as electors; and such appointments shall be forthwith reported to the secretary of state."—*Revised Code of Mississippi, 1871, page 98.*

Mr. EDMUNDS. We have the secretary of state's certificate.

Mr. TRUMBULL. I accept the amendment to insert the word "all."

The VICE-PRESIDENT. The question is on the resolution as modified.

Mr. BAYARD. Let it be reported.

The Chief Clerk read the resolution as modified, as follows:

"Resolved, That all the electoral votes of the State of Mississippi be counted."

The VICE-PRESIDENT. The Chair will state that he has not submitted to the Senate the third objection made in the presence of the two Houses by a Representative from New York, [Mr. Potter,] affecting one of these persons and his election as a substitute; but the Chair does not think it will be in the nature of debate to state that in the presence of the two Houses there was a third objection.

Mr. TRUMBULL. It seems to me, then, it would be better to have this separate. The Senator from Maine who moved this amendment has left the Chamber, I believe.

The VICE-PRESIDENT. If the Senator from Illinois withdraws his consent to the acceptance of the amendment, the Chair will submit it.

Mr. TRUMBULL. For the sake of our action going to the House in proper form, I think the questions had better be decided separately. I withdraw my acceptance of the amendment.

The VICE-PRESIDENT. The question, then, is on the amendment of the Senator from Maine to the resolution of the Senator from Illinois.

Mr. ANTHONY. I suggest that the order be reversed, and we take the question first upon the objection raised by the Representative from New York, [Mr. Potter,] and then take the question upon the objection raised by the Senator from Illinois.

Mr. MORTON, and others. That is right.

Mr. HAMLIN. I withdraw my amendment.

The VICE-PRESIDENT. The Senator from Maine withdraws his amendment. Does the Senator from Rhode Island persist in his suggestion?

Mr. ANTHONY. I renew my suggestion.

The VICE-PRESIDENT. If there be no objection, the Chair reserving the second ob-

jection made by the Senator from Illinois, will submit the third objection made by a Representative from New York, touching one of these electors.

Mr. MORTON. I call for the reading of the objection and the reading of the certificate.

The VICE-PRESIDENT. The second objection will be held in reserve by the unanimous consent of the Senate, and the Secretary will now report the third objection made in the presence of the two Houses by the Representative from New York, [Mr. Potter,] and the paper upon which it bears.

The Secretary read as follows:

"Mr. Potter objects to the counting of one vote of the State of Mississippi, because the certificate declares that Spellman was appointed an elector in the stead of A. F. Morgan, absent, by the electoral college of that State, in accordance with the laws of that State, is not signed by the governor of the State; and further, that the certificate of the secretary of state read does not certify anything of his own knowledge, but only states that he has been so notified, as he certifies."

The VICE-PRESIDENT. The Secretary will now read the certificate of the secretary of state of Mississippi.

The Secretary read as follows:

"STATE OF MISSISSIPPI, EXECUTIVE DEPARTMENT,
Jackson, Miss., December 4, 1872.

"This is to certify that on the 4th day of December, A. D. 1872, I was notified by the college of electors of the State of Mississippi that, at a meeting there being held by them for the purpose of giving their votes for President and Vice-President of the United States, A. F. Morgan, one of the electors, not being present, they duly appointed J. J. Spellman to fill the said vacancy, the said appointment being made in accordance with section three hundred and eighty-two, revised code, 1871, of the State of Mississippi.

"JAMES LYNCH,
Secretary of State."

[L. S.]

Mr. MORTON. I inquire if there is any certificate by the electors themselves of the election of this man to fill the vacancy? ["No!" "No!"]

Mr. HAMLIN. I submit a resolution in these words:

"Resolved, That all the votes of the electoral college of Mississippi be counted."

The VICE-PRESIDENT. The question has been submitted, by unanimous consent of the Senate, in regard to this one elector.

Mr. HAMLIN. When we resolve that all be counted, that includes the one elector.

The VICE-PRESIDENT. The question being now submitted to the Senate in regard to the appointment of one elector, the Senator from Maine moves a resolution of the Senate to decide that question, that the votes of all the electors shall be counted. The Chair will submit that resolution to the Senate.

Mr. HAMLIN. I will change my motion so as to read "resolved, that the vote cast by the elector Spellman," if that is his name, "be counted."

The VICE-PRESIDENT. The Senator from Maine moves that the vote cast by this elector shall be counted. Does the Senator desire the statute of the United States to be read? ["No!" "No!"]

Mr. EDMUNDS. We are all agreed about that.

Mr. THURMAN. What became of the resolution offered by the Senator from Illinois, [Mr. Trumbull?]

The VICE-PRESIDENT. With his consent and the unanimous consent of the Senate, it was reserved until the case of this one elector was disposed of by the decision of the Senate.

Mr. THURMAN. What motion is now made?

The VICE-PRESIDENT. A motion is made by the Senator from Maine that the vote of this elector shall be counted.

Mr. THURMAN. I shall vote for it on account of the statute.

The VICE-PRESIDENT. The question is on the motion of the Senator from Maine. Does any Senator desire it to be specifically reduced to writing? ["Yes!"] It will be reported.

The Chief Clerk read the resolution, as follows:

"Resolved, That the vote cast by James J. Spellman, one of the electors for the State of Mississippi, be counted."

Mr. CARPENTER. I want to make a suggestion to the Senator from Maine as to the form of that resolution. It seems to me that it would be very singular to say that the vote cast by that man shall be counted. Suppose the votes should have been cast for ten different men, how can we tell who that man voted for?

Mr. SHERMAN. They all voted the same way.

The VICE-PRESIDENT. The question is on agreeing to the resolution of the Senator from Maine, that the vote of James J. Spellman shall be counted.

The resolution was agreed to.

The VICE-PRESIDENT. The question now recurs on the resolution of the Senator from Illinois, [Mr. Trumbull,] that the votes of the electors from Mississippi shall be counted.

The resolution was agreed to.

Mr. SHERMAN. I move that a message be sent to the House of Representatives that the Senate are ready to proceed with the count.

The motion was agreed to.

IN THE PRESENCE OF THE SENATE AND HOUSE OF REPRESENTATIVES,

February 12, 1873.

At three o'clock and thirty-five minutes p. m. the Senate in a body re-entered the Hall. The VICE-PRESIDENT, (having resumed the chair.) The Chair will read a part of the twenty-second rule:

"And no question shall be decided affirmatively, and no vote objected to shall be counted, except by the concurrent votes of the two Houses; which being obtained, the two Houses shall immediately re-assemble, and the presiding officer shall then announce the decision of the question submitted."

Upon the first point raised by the Representative from Massachusetts [Mr. Hoar] the Senate decided as follows:

"Resolved, That the electoral votes of Georgia, cast for Horace Greeley, be counted."

The House of Representatives decided as follows:

"Resolved, That the votes reported by the tellers as having been cast by the electors of the State of Georgia for Horace Greeley, of New York, as President of the United States ought not to be counted, the said Horace Greeley having died before said votes were cast."

Upon this question there is a non-concurrence of the two Houses.

On the question submitted by the Senator from Illinois [Mr. Trumbull] in regard to the votes of the State of Mississippi, the Senate adopted the following resolution:

"Resolved, That the electoral vote of the State of Mississippi be counted."

And the House or Representatives adopted the following resolution:

"Resolved, That in the judgment of this House the eight votes reported by the tellers as cast by the electors in and for the State of Mississippi ought to be counted as reported by them."

On this question the votes of the two Houses are concurrent.

On the third point raised by the Representative from New York, [Mr. Potter,] which was in regard to the election of one elector from Mississippi, the Senate adopted the following resolution, which is covered also by its action on the full vote of the State:

"Resolved, That the vote cast by James J. Spellman, one of the electors for the State of Mississippi, be counted."

The House of Representatives adopted the following resolution:

"Resolved, That the electors of the State of Mississippi having been appointed in the manner directed by the Legislature of that State, and in accordance with the provisions of the Constitution of the United States, were legally elected, and that the vote of the State as cast by them should be counted, and that the certificate of the governor of that State of the electoral vote cast, and the certificate of the secretary of state of that State in regard to the choice of electors, is in compliance with the Constitution and laws of the United States."

Therefore, by the twenty-second joint rule, there being a non-concurrence between the two Houses upon the three votes cast in the State of Georgia for Horace Greeley for President of the United States, they cannot be counted. And in accordance with the same joint rule, the votes of the State of Mississippi will be counted.

The tellers resumed the counting of the votes, and announced the same until the State of Missouri was reached, when

Senator MORTON said: I desire to call attention to the fact that in the State of Georgia the certificate shows that two votes were cast for Mr. Jenkins, a citizen of the State of Georgia, for President, and five votes for Mr. Colquitt, a citizen of the State of Georgia, for Vice-President, which is in contravention of the twelfth article of amendment to the Constitution, which reads as follows:

"The electors shall meet in their respective States and vote by ballot for President and Vice-President, one of whom, at least, shall not be an inhabitant of the same State with themselves."

The VICE-PRESIDENT. The twenty-second joint rule provides that—

"If, upon the reading of any such certificate by the tellers, any question shall arise in regard to counting the votes therein certified, the same having been stated by the presiding officer, the Senate shall thereupon withdraw, and said question shall be submitted to that body for its decision; and the Speaker of the House of Representatives shall in like manner submit said question to the House of Representatives for its decision."

This objection not having been made when the tellers read the electoral vote of the State of Georgia, in the opinion of the Chair it comes too late.

Senator MORTON. I desire to make the point whether the objection is not in time if it is made before the result is finally announced after the counting of all the votes.

Senator CARPENTER. Is it in order to take an appeal from the decision of the Chair?

The VICE-PRESIDENT. The Senator himself will see that there could not be an appeal taken in a joint meeting of the two Houses; but if any point can be made on which the two Houses can be required to divide, the Chair will entertain it. The language of the joint rule is so emphatic that the Senator from Wisconsin will see that when a thing is directed to be done at a particular time, it must be done at that time.

Senator TRUMBULL. Was the last return read from Missouri?

The VICE-PRESIDENT. It was.

Senator TRUMBULL. If the case of Missouri has not passed from the consideration of this meeting, I ask if the same question does not arise in the case of Missouri, and if there were not votes cast there for citizens of the State for the two offices?

Senator CARPENTER. I withdraw my point.

The VICE-PRESIDENT. The Chair thinks that as the credentials of no other State had been read, the objection will come in time, and the papers in the case of Missouri will be again read.

Senator CONKLING. I beg to ask that at the same time the tellers report whether the same electors voted for citizens residing in the same State for the two offices; whether there is anything on the face of the papers to show that certain electors may not have voted for candidates for President and Vice-President residing in different States, and that certain other electors voted for other candidates who resided in the State?

The VICE-PRESIDENT. The Chair will have all the papers read again.

Senator SHERMAN (one of the tellers) again read the certificates from the State of Missouri.

Senator TRUMBULL. I thought the Senator from Indiana [Mr. Morton] made the point that the vote could not be counted.

Senator MORTON. I simply desired to call the attention of the two Houses to the facts.

Senator CARPENTER. I object to the counting of the vote of Missouri so far as votes were given for President and Vice-President of the United States from the same State, and will reduce my objection to writing.

Senator CONKLING. Meanwhile, may we not have read the concluding statement of that certificate?

The VICE-PRESIDENT. The Secretary of the Senate will read it.

The Secretary of the Senate read as follows:

"And it is hereby further certified that none of said electors who voted for B. Gratz Brown for President voted for him for Vice-President."

Several MEMBERS. That ends the matter.

Senator CARPENTER. Upon examination, I withdraw the point.

Mr. POTTER. In relation to the vote of Texas, I desire to inquire whether I correctly understood the tellers, that there is no certificate from the executive authorities of the State of Texas as to the persons appointed electors?

The VICE-PRESIDENT. The secretary of the State certifies to their election under the seal of the State.

Mr. POTTER. But there is no certificate from the governor of the State?

The VICE-PRESIDENT. There is no certificate from the governor of the State.

Senator TRUMBULL. I desire, then, to object to the reception of the vote of Texas. The case differs from that of Mississippi. There the executive certified to the election of the electors; but in this case I understand there is no certificate from the executive authorities of the State of Texas to the election of the original electors; no certificate from the governor at all.

The VICE-PRESIDENT. The tellers desire the Chair to state that four of the electors met and appointed four others, in place of four persons who were absent, and certified the facts themselves.

Mr. POTTER. But as to the original electors there is no certificate from the governor of the State?

The VICE-PRESIDENT. There appears to be only the certificate of the secretary of the State, under the seal of the State.

Mr. POTTER. This case differs, then, from the Mississippi case. In that case the original electors held certificates from the governor, while the substitute for one of them did not.

Senator TRUMBULL. I object to the reception of the vote of Texas because there is no certificate of the executive authorities of that State to show that the persons who voted for President and Vice-President were appointed as electors of that State, as required by act of Congress.

The VICE-PRESIDENT. The Secretary of the Senate will again read the last certificate.

The Secretary of the Senate read as follows:

"DEPARTMENT OF STATE,
"Austin, Texas, December 4, 1872.

"The following persons, having received the highest number of votes cast for electors of President and Vice-President of the United States, are hereby declared duly elected as such: B. B. Hubbard, A. J. Rainey, B. A. Epperman, J. J. Good, Thomas Harrison, John Ireland, S. A. Darden, J. M. Maxey.

"Witness my hand and official seal at office in the city of Austin, this 4th day of December, A. D. 1872.

"J. E. OLDRIGHT,
"Acting Secretary of State."

Mr. GARFIELD, of Ohio. I would inquire if the certificate of the secretary of the State of Texas is made in terms "by authority of the governor," although the signature of the governor is not there?

The VICE-PRESIDENT. The certificate of the acting secretary of state will again be read.

Mr. DAWES (one of the tellers) read the certificate, as follows:

"DEPARTMENT OF STATE,
"Austin, December 4, 1872.

"The following-named persons, having received the highest number of votes cast for electors of President and Vice-President of the United States, are hereby declared duly elected as such. [Here the names are given.]

"Witness my hand and official seal, at office, in the city of Austin, this 4th day of December, A. D. 1872.

"J. E. OLDRIGHT,
"Acting Secretary of State."

The VICE-PRESIDENT. The certificate has upon it the seal of the State of Texas. The Secretary will now read the objection of the Senator from Illinois.

The Secretary of the Senate read as follows:

"Mr. Trumbull objects to the vote of Texas because there is no certificate by the executive authority of that State that the persons who voted for President and Vice-President were appointed as electors of that State, as required by the act of Congress."

The VICE-PRESIDENT. The Chair would suggest that any other objection to the counting of the vote of Texas be now submitted to the joint convention.

Mr. DICKEY. I object to the counting of the electoral vote of the State of Texas because four of the electors, less than a majority of those elected, undertook to fill the places of other four electors who had been elected and were absent.

The VICE-PRESIDENT. These two objections to counting the vote of Texas having been made, the Senate will now withdraw to their Chamber.

IN THE HOUSE OF REPRESENTATIVES, February 12, 1873.

The SPEAKER resumed the chair, and called the House to order.

The Clerk read the following from the joint convention of the two Houses:

"Mr. Trumbull objected to the vote of Texas because there is no certificate by the executive authority of that State that the persons who voted for President and Vice-President were appointed as electors of that State as required by the act of Congress."

Mr. DAWES submitted the following resolution:

"Resolved, That in the judgment of this House the vote of Texas should be counted as reported by the tellers."

Mr. BECK, of Kentucky. Would it be in order to have again read to the House the certificate of the acting secretary of state of Texas?

The SPEAKER. It would.

The certificate was again read.

Mr. DAWES. I would like to have the statute of Texas on this subject read to the House.

The SPEAKER. The Chair will not permit anything to be read in the nature of debate.

Mr. DAWES. Not a statute?

The SPEAKER. Not even that.

Mr. SPEER. Is it in order to have read the act of Congress referred to in the objection made by the Senator from Illinois?

Mr. BINGHAM. I object.

The SPEAKER. The Chair thinks it cannot be done.

Mr. WOOD. Is it in order to move a substitute for the resolution of the gentleman from Massachusetts, [Mr. Dawes?]

The SPEAKER. It would be if the gentleman yields the floor without calling the previous question on his resolution.

Mr. DAWES. I think the statute of the State of Texas should be read, as it all depends on that.

The SPEAKER. The gentleman from Massachusetts [Mr. Dawes] will perceive that reading the statute of the State of Texas would be in the nature of debate on this point. The rule is as absolute as language can make it, that all points on which the joint convention may differ must be determined without debate.

Mr. DICKEY. I ask unanimous consent of the House that the statute of the State of Texas be read, with reference to the next point coming from the joint convention.

Mr. STEVENSON. It is a joint rule that prescribes there shall be no debate.

The SPEAKER. A rule which the House cannot vary.

Mr. DAWES. Is it in order to take a recess for ten minutes?

The SPEAKER. It would not be. Nothing is in order at this point except the pending resolution.

Mr. FARNSWORTH. Is it not as much in order that the Chair should direct the reading of a statute of the United States as that he should direct the reading of a joint rule of the two Houses?

The SPEAKER. It is not, because the joint rule is a rule of action for the two Houses.

Mr. FARNSWORTH. So is a statute of the United States.

The SPEAKER. But the joint rule precludes debate upon such a question as this; and the reading of a statute is certainly in the nature of debate. There might be a statute the reading of which would occupy three hours.

Mr. PETERS. We might have all the statutes read.

The question being taken on the resolution of Mr. Dawes, it was agreed to; there being—ayes 107, noes 22.

Mr. DAWES moved to reconsider the vote by which the resolution was adopted; and also moved that the motion to reconsider be laid on the table.

The latter motion was agreed to.

The SPEAKER. The Clerk will now report the next objection which comes from the joint convention.

The Clerk read as follows:

"Mr. Dickey objected to the counting of the electoral vote of the State of Texas because four electors, less than a majority of those elected, undertook to fill the places of other four electors, who had been elected and were absent."

Mr. DICKEY. I offer the following resolution:

"Resolved, That in the judgment of this House the electoral vote of the State of Texas for President and Vice-President ought not to be counted, for the reason that four electors, less than a majority of those elected, undertook to fill the places of other four electors who had been elected and were absent."

Mr. DAWES. I move to amend the resolution by substituting the following after the word "resolved:"

"That the vote of Texas ought to be counted."

Mr. RANDALL. Let us vote down the resolution.

Mr. DAWES. Very well; I withdraw my substitute.

Mr. BANKS. I move to amend the resolution by striking out all after the word "resolved" and inserting the following:

"That a quorum is an arbitrary number, which each State has a right to establish for itself; and as it does not appear that the choice of electors was in conflict with the law of that State as to a quorum for the transaction of business, the vote of the electors for President and Vice-President should be counted."

Mr. DICKEY. If this House will allow the statute of Texas to be read—

Mr. ELDRIDGE. I raise a point of order that the pending amendment of the gentleman from Massachusetts [Mr. Banks] is simply an argument upon the question.

Mr. PETERS. A very good argument.

The SPEAKER. The Chair overrules the point of order.

Mr. BANKS. I call for the previous question.

The previous question was seconded and the main question ordered; and under the operation thereof the amendment of Mr. Banks was agreed to, and the resolution, as amended, adopted.

Mr. BANKS moved to reconsider the vote by which the resolution was adopted; and also moved that the motion to reconsider be laid on the table.

The latter motion was agreed to.

Mr. DAWES. I move that copies of the resolutions adopted by the House be communicated forthwith to the Senate.

Mr. GARFIELD, of Ohio. And that the Senate be notified that the House is ready to receive them.

The SPEAKER. The Clerk intimates that there is no necessity for the order suggested by the gentleman from Ohio. The Clerk makes that notification as a matter of course.

Mr. GARFIELD, of Ohio. I simply proposed that the Senate should be notified we are ready to receive them.

The SPEAKER. If the House has acted on all the business coming from the joint convention, the presumption is that the House is ready to receive the Senate.

Mr. BANKS. I move that the House take a recess for five minutes.

The motion was agreed to.

The recess having expired, the Speaker again called the House to order.

Mr. KERR, (after a pause.) Mr. Speaker, would it be in order now to make a report from the Committee of Ways and Means for immediate action?

The SPEAKER. The Chair thinks nothing is in order except what relates to the counting of the electoral votes.

Mr. WOOD. Would it be in order to move to take a recess?

The SPEAKER. It would; but the Chair is advised that the Senate may be expected to return every moment.

Mr. WOOD. I give notice that if the Senate does not return within ten minutes, I shall move a recess till to-morrow.

The SPEAKER. That, of course, will be in order.

IN THE SENATE, *February 12, 1873.*

The Senate returned to its Chamber at four o'clock and twenty-four minutes p. m.

The VICE-PRESIDENT. The Chair will state to the Senate that the two objections made in the Representative Hall to the counting of the electoral votes of Texas are now being reduced to writing and will be sent here in a moment. They will be reported in full when they shall be received. One was in regard to the absence of the governor's signature and the other in regard to the right of four electors to elect four others. In the mean time the Secretary will report the substantial points, so that they shall be before the Senate. The Secretary will first report the certificate of election of these electors.

The Secretary read as follows:

[L. S.]

"DEPARTMENT OF STATE, AUSTIN, *December 4, 1872.*

"The following-named persons, having received the highest number of votes cast for electors of President and Vice-President of the United States, are hereby declared duly elected as such: R. B. Hubbard, A. T. Rainey, B. H. Epperson, J. J. Good, Thomas Harrison, John Ireland, S. H. Darden, J. M. Maxey.

"Witness my hand and official seal at office in the city of Austin, this 4th day of December, A. D. 1872.

[L. S.]

"J. E. OLDRIGHT,

"Acting Secretary of State.

"AUSTIN, TEXAS, *December 4, 1872.*

"This being the first Wednesday in December, 1872, and the time appointed by law for the meeting of the electors of the various States for the election of President and Vice-President of the United States, we, B. H. Epperson, Thomas Harrison, John J. Good, and S. H. Darden, electors chosen by the State of Texas, have assembled at the capitol at Austin aforesaid for the purpose of casting the vote of the State of Texas.

"And it appearing now, at two o'clock p. m., that the following persons, also chosen by the said State of Texas, are absent, namely, A. T. Rainey, J. M. Maxey, John Ireland, and R. B. Hubbard:

"Therefore, acting under the law of Texas, we hereby appoint the following persons as electors of the State of Texas to cast the vote thereof for President and Vice-President of the United States in the place and stead of said absentees, namely: David Sheeks in place of A. T. Rainey, John A. Green in place of J. M. Maxey, F. W. Moore in place of John Ireland, and C. S. West in place of R. B. Hubbard.

"To all of which we certify.

"B. H. EPPERSON.

"THOMAS HARRISON.

"JOHN J. GOOD.

"STEPHEN H. DARDEN."

The VICE-PRESIDENT. The first objection is against counting the votes in consequence of the absence of the signature of the governor. The question before the Senate for its decision is whether the votes shall be counted.

Mr. MORTON. I ask for the reading of the third section of the act of Congress of 1792.

The VICE-PRESIDENT. If there be no objection, the Secretary will report the third section of the act of 1792, to be found on page 306 of McDonald's Digest.

The Chief Clerk read as follows:

"SEC. 3. *And be it further enacted,* That the executive authority of each State shall cause three lists of the names of the electors of such State to be made and certified, to be delivered to the electors on or before the said first Wednesday in December, and the said electors shall annex one of the said lists to each of the lists of their votes."

Mr. CONKLING. I move that the objection which has just been read be overruled by the Senate, which I believe to be a proper form of resolution.

The VICE-PRESIDENT. The Senator from New York moves that the first objection to the counting of the votes of Texas made in the presence of the two Houses be overruled.

Mr. THURMAN. What is that?

The VICE-PRESIDENT. It is the absence of the signature of the governor; that the certificate of the election of electors is by the acting secretary of state with the seal of the State, but does not have to it the signature of the governor. The objections are being copied in the House, but they have not yet been sent to the Secretary's desk, it appears.

Mr. THURMAN. Has the act of Congress been read?

Mr. CONKLING. The third section has been read, which is that in relation to the executive authority.

The VICE-PRESIDENT. The Senator from New York moves that the first objection be overruled by the Senate.

Mr. TRUMBULL. Is that in writing?

The VICE-PRESIDENT. It is not.

Mr. TRUMBULL. I wish to offer an amendment to it.

Mr. CONKLING. The Secretary, I believe, has reduced it to writing.

Mr. TRUMBULL. Let it be reported.

Mr. CONKLING. It is:

"Resolved, That the foregoing objection be overruled."

The VICE-PRESIDENT. The Secretary has written it in another form, but he will reduce it to writing in the language of the Senator.

Mr. MORRILL, of Maine. I suggest to the Senator whether it is not a more correct and proper form to say:

"Resolved, That the vote be counted, the foregoing objection to the contrary notwithstanding."

Mr. CONKLING. I have no objection to that. The Senator from Maine suggests that my resolution read:

"Resolved, That the vote of the State in question be counted, the foregoing objection to the contrary notwithstanding."

I have no objection to that, although my impression is that the simpler way is to sustain or overrule the objection.

The VICE-PRESIDENT. The Chair will state that there is another objection as to the right of four electors to appoint four others, which has not yet been submitted.

Mr. CONKLING. I do not include that, because the Chair suggested, when we were here before, the convenience, if not the propriety, of acting separately on these questions. I humbly conceive that there is nothing whatever in the other objection, and I would embrace it in this resolution if it were convenient to do so; but for the present I move that the objection be overruled which asserts that because the secretary of state has done this the executive authority of the State has not done it.

The VICE-PRESIDENT. The Chair will state this first objection when the two Houses assemble, and the Senator moves that the first objection, as understood now to be read, be overruled. The Secretary has the resolution in writing.

Mr. TRUMBULL. Let it be reported.

The Chief Clerk read as follows:

"Resolved, That the electoral vote of the State of Texas be counted, notwithstanding the foregoing objection."

Mr. TRUMBULL. I move to strike out all of the resolution after the word "resolved" and insert what I send to the Chair.

The VICE-PRESIDENT. The Senator from Illinois offers a substitute for the resolution.

Mr. TRUMBULL. The question is whether we can overrule a direct act of Congress. If so, you can prove by parol how States vote.

Mr. CONKLING. As that is in the nature of debate, I will say that the purpose of my resolution is to assert that the act of Congress has been precisely complied with. Therefore I do not understand that there is any such question here at all.

The VICE-PRESIDENT. As Senators have now spoken on both sides, the Chair must enforce the rule. He was listening for the moment to the Secretary, who has brought him the first objection, the objection made by the Senator from Illinois, [Mr. Trumbull,] which will now be read.

The Chief Clerk read as follows:

"Mr. Trumbull objects to the vote of the State of Texas because there is no certificate by the executive authority of that State that the persons who voted for President and Vice-President were appointed as electors of that State as required by the act of Congress."

The VICE-PRESIDENT. The Senator from New York now offers the following resolution:

"Resolved, That the electoral vote of the State of Texas be counted, notwithstanding the foregoing objection."

The Senator from Illinois moves to strike out all of the resolution after the word "resolved" and insert a substitute which will be reported.

The Chief Clerk read as follows:

"That no list of the names of the persons assuming to cast the vote of the State of Texas for President and Vice-President having been made, certified, and delivered to said persons, not attached to the lists of the votes cast, the vote of said State cannot be received."

Mr. THURMAN. I rise merely to suggest that the same course be taken in this case as was in the other case. If the resolution of the Senator from New York be adopted, it includes both questions. Let us have the other question acted on first. I think it is due to the Representative from Pennsylvania who made the other objection that we shall take that up first before going into a part and deciding upon that.

The VICE-PRESIDENT. Is there objection to submitting the second question first; that is to say, as to the authority of the four electors to appoint the other four?

Mr. CONKLING. I have no objection to it, for one, if the Senator prefers it.

Mr. THURMAN. I prefer that.

Mr. CONKLING. I have no objection.

The VICE-PRESIDENT. Does the Senator from Illinois object to the proposition of the Senator from Ohio? He desires to have the second question taken first.

Mr. TRUMBULL. I have no objection.

Mr. MORTON. I submit the statute of Texas on the subject and ask to have it read.

The VICE-PRESIDENT. The Chair will state what he understands to be the decision of the Senate: that the second objection shall first be considered. The Secretary will report the objection of the Representative from Pennsylvania, [Mr. Dickey.]

The Chief Clerk read as follows:

"Mr. Dickey objects to the counting of the electoral vote of the State of Texas because four electors, less than a majority of those elected, undertook to fill the places of other four electors who had been elected and were absent."

The VICE-PRESIDENT. The Senator from Indiana now desires to have the law of Texas reported without debating it. If there be no objection the Secretary will report it.

Mr. CONKLING. Does the Senator want the law reported on this point or on the other?

Mr. MORTON. In reference to this point I ask the Secretary to read article 3650.

The VICE-PRESIDENT. If there be no objection, the law will be reported without debate.

The Chief Clerk then read as follows:

"SEC. 3650. If any person so chosen as elector shall by death or other disabling cause fail to attend by the hour of two o'clock in the afternoon of the day pointed out in this act, and vote as hereby required, a majority of the electors present, after having convened in accordance with the provisions of this act, may appoint some other person to act in the place of the absentee, and shall immediately report their action to the secretary of state aforesaid."

Mr. CONKLING. I suppose nobody will contend, in the face of that statute, that these four had not a right to appoint. Therefore I submit a motion about that also.

The VICE-PRESIDENT. The Senator from New York moves that this objection of the Representative from Pennsylvania to the counting of the electoral votes of Texas for the reason stated be overruled on behalf of the Senate.

The motion was agreed to.

The VICE-PRESIDENT. The question now recurs on the substitute offered by the Senator from Illinois for the resolution of the Senator from New York.

Mr. TRUMBULL. I have modified it slightly. My amendment now is to strike out all after the word "resolved" in the resolution pending and insert:

"That no list of the names of the persons assuming to cast the vote of the State of Texas for President and Vice-President having been made, certified, and delivered to said persons by the executive authority of said State, nor attached to the lists of the votes cast, the vote of said State cannot be received."

I ask to have the clause in the constitution of Texas read, which I believe the Senator from Indiana has, stating what the executive authority of that State is. Will the Senator from Indiana be good enough to send up to the desk the constitution of Texas, that the clause may be read?

Mr. MORTON. It has just been sent back to the library; but it will be here in a moment.

Mr. TRUMBULL. Is the executive authority vested in the governor? That is the question.

The VICE-PRESIDENT. The Secretary will report the resolution of the Senator from New York and the proposed substitute of the Senator from Illinois as modified.

The Chief Clerk proceeded to read the resolution.

A message was received from the House of Representatives, by Mr. McPherson, its Clerk, announcing that the House had passed the following resolutions:

Resolved, That in the judgment of this House the vote of Texas should be counted as reported by the tellers.

Resolved, That a quorum is an arbitrary number, which each State has a right to establish for itself, and as it does not appear that the choice of the electors is in conflict with the laws of Texas as to a quorum for the transaction of business, the votes of the electors for President and Vice-President should be counted."

MR. CONKLING. Now, I wish to raise a question of order, not to abridge the privileges of any Senator, but that we may act on a uniform understanding. I raise the point of order that the amendment of the Senator from Illinois, in so far as it argues stating the objection made by one Senator, or in so far as it assigns reasons, in the language of the point of order submitted by the Senator from Vermont, is out of order, the purpose here being simply to determine whether the votes shall or shall not be counted. Of course I refer to that part of the amendment which recites certain alleged facts or arguments. I insist they are foreign to the purpose and out of order.

THE VICE-PRESIDENT. The proposed substitute of the Senator from Illinois was about being reported when the Clerk of the House of Representatives appeared. It will be reported, and the Chair will entertain the point of order made by the Senator from New York after it shall have been read. The Senator from Illinois moves to strike out the resolution after the resolving clause and insert what will be read.

THE CHIEF CLERK. The words proposed to be inserted are:

"That no list of the names of the persons assuming to cast the vote of the State of Texas for President and Vice-President having been made, certified, and delivered to said persons by the executive authority of said State, nor attached to the lists of the votes cast, the vote of said State cannot be counted."

THE VICE-PRESIDENT. The Senate have twice decided on questions kindred to this—

MR. TRUMBULL. I think very different.

THE VICE-PRESIDENT. The Senator regards this as a different question, and the Chair will submit it to the Senate, whether they will receive the amendment proposed by the Senator from Illinois as against the point of order raised by the Senator from New York.

The question being put on receiving the amendment,

MR. TRUMBULL. I ask for the yeas and nays.

The yeas and nays were ordered.

THE VICE-PRESIDENT. The question is, Will the Senate receive this amendment of the Senator from Illinois to the proposition of the Senator from New York as being in order under the twenty-second joint rule?

MR. CONKLING. Although I have not a right to do it myself, I think it would be convenient if the Chair would be good enough to state to the Senate the foundation of the point of order, as I see that Senators did not attend to it.

THE VICE-PRESIDENT. The Chair is sometimes so unfortunate as not to be able to quote exactly the language; but as he understands it the point of order made by the Senator from New York is that the amendment of the Senator from Illinois partakes of the nature of argument in stating facts instead of deciding the question. Is that the point?

MR. CONKLING. That is sufficient.

THE VICE-PRESIDENT. The question is, Will the Senate receive this amendment?

The question being taken by yeas and nays, resulted—yeas 31, nays 15; as follows:
YEAS—Messrs. Bayard, Boreman, Carpenter, Clayton, Cooper, Davis, Fenton, Ferry of Michigan, Flanagan, Frelinghuysen, Goldthwaite, Hamlin, Hill, Kelly, Machen, Morton, Norwood, Pool, Pratt, Ransom, Rice, Robertson, Schurz, Scott, Stewart, Stockton, Thurman, Tipton, Trumbull, Windom, and Wright—31.

NAYS—Messrs. Ames, Anthony, Caldwell, Casserly, Cole, Conkling, Edmunds, Ferry of Connecticut, Gilbert, Hamilton of Maryland, Johnston, Nye, Sprague, Stevenson, and Vickers—15.

ABSENT—Messrs. Aleorn, Blair, Brownlow, Buckingham, Cameron, Chandler, Corbett, Cragin, Hamilton of Texas, Harlan, Hitchcock, Howe, Lewis, Logan, Morrill of Maine, Morrill of Vermont, Osborn, Patterson, Pomeroy, Ramsey, Saulsbury, Sawyer, Sherman, Spencer, Sumner, West, and Wilson—27.

THE VICE-PRESIDENT. The amendment is received. The question is on agreeing to it as a substitute for the resolution of the Senator from New York.

MR. CONKLING called for the yeas and nays; and they were ordered.

MR. CASSERLY. I should like to have the resolution read.

THE CHIEF CLERK. The resolution submitted by the Senator from New York [Mr. Conkling] is as follows:

Resolved, That the electoral vote of the State of Texas be counted, notwithstanding the foregoing objection."

The amendment of the Senator from Illinois [Mr. Trumbull] is to strike out all after the word "resolved" and to insert the following:

"That no list of the names of persons assuming to cast the vote of the State of Texas for President and Vice-President having been made, certified, and delivered to said persons by the executive authority of said State, nor attached to the lists of the votes cast, the vote of said State cannot be counted."

MR. THURMAN. I think it is proper that the Senate should hear the provisions of the constitution of Texas in regard to the executive authority and the seal of the State. The first section of article 4 reads as follows:

"The executive department of the State shall consist of a chief magistrate, who shall be styled the governor, a lieutenant-governor, secretary of state, comptroller of the public accounts, treasurer, commissioner of the general land office, attorney-general, and superintendent of public instruction.

The eighteenth section of the same article provides as follows:

"There shall be a seal of the State, which shall be kept by the governor and used by him officially. The seal shall be a star of five points, encircled by an olive and live-oak branches, and the words 'the State of Texas.'"

MR. CONKLING. Now I want to inquire as a matter of fact, either with or without the reading of the certificate, does the seal appear here and also the signature of the secretary of state?

THE VICE-PRESIDENT. The seal does appear here with the signature of the secretary of state of Texas with the heading "Department of State, Austin."

MR. BAYARD. I desire to know, and ask the Secretary to report, whether the great seal of the State of Texas is appended to the certificate?

THE VICE-PRESIDENT. It is. The Secretary can answer if the Senator from Delaware prefers.

MR. SHERMAN. It is not certain that this seal is the great seal of the State. It is the seal of the department of state, apparently.

MR. BAYARD. What department?

MR. SHERMAN. The department of state of the State of Texas. It has a lone star and the words "department of state."

MR. JOHNSTON. I ask for the reading of the seal by the Secretary.

THE VICE-PRESIDENT. The Secretary will report as far as possible so as to convey to the Senate the superscription on the seal. Perhaps the Secretary had better read the whole certificate.

THE CHIEF CLERK. The certificate reads:

[L. S.]

"DEPARTMENT OF STATE,
"Austin, December 4, 1872.

"The following-named persons, having received the highest number of votes cast for electors for President and Vice-President of the United States, are hereby declared duly elected as such."

Then follow the names of the electors.

"Witness my hand and official seal, at office, in the city of Austin, this 4th day of December, A. D. 1872.

[L. S.]

"J. E. OLDRIGHT,
"Acting Secretary of State."

To this paper is attached, at the left-hand corner, on the top of the page, what purports to be the seal of the State of Texas.

MR. CONKLING. I ask the Secretary to state whether the seal contains the coat of arms of the State, namely, the lone star, and "Texas" printed upon that star.

THE CHIEF CLERK. It does.

MR. THURMAN. That is a mere print.

MR. CONKLING. It is the great seal of the State, however, as the Senator from that State will say.

THE VICE-PRESIDENT. The Secretary has now communicated to the Senate the contents of the seal on top of the page, which is a printed seal. The seal at the bottom of the page is a seal impressed. The Secretary will read the printed seal as far as he can.

MR. FLANAGAN. I have no doubt about that being the seal of the State of Texas.

THE VICE-PRESIDENT. The Secretary will describe the printed seal at the head of the page.

THE CHIEF CLERK. The seal consists of a lone star surrounded by concentric circles, and a wreath in the inner one, with the words "The State of Texas—1836, 1845, 1870," printed within the two outer circles.

THE VICE-PRESIDENT. The Secretary will now describe the seal below, which is impressed by a press.

THE CHIEF CLERK. The seal which is stamped appears to be the seal of the office of the department of state, the certificate being signed by "J. E. Oldright, acting secre-

tary." This seal is a lone star with two concentric circles, and between those circles on the outside is printed "department of state."

The VICE-PRESIDENT. The question now is on the amendment of the Senator from Illinois as a substitute for the resolution of the Senator from New York, upon which the yeas and nays have been ordered.

The question being taken by yeas and nays, resulted—yeas 24, nays 34; as follows:
YEAS—Messrs. Boreman, Carpenter, Clayton, Cooper, Corbett, Davis, Edmunds, Fenton, Goldthwaite, Hamlin, Harlan, Hill, Kelly, Morton, Nye, Ramsey, Robertson, Sawyer, Schurz, Scott, Thurman, Trumbull, West, and Windom—24.

NAYS—Messrs. Alcorn, Ames, Bayard, Buckingham, Caldwell, Casserly, Chandler, Cole, Conkling, Cragin, Ferry of Connecticut, Ferry of Michigan, Flanagan, Frelinghuysen, Gilbert, Hamilton of Maryland, Johnston, Logan, Machen, Morrill of Vermont, Norwood, Patterson, Pratt, Ransom, Rice, Saulsbury, Sherman, Sprague, Stevenson, Stewart, Stockton, Tipton, Vickers, and Wright—34.

ABSENT—Messrs. Anthony, Blair, Brownlow, Cameron, Hamilton of Texas, Hitchcock, Howe, Lewis, Morrill of Maine, Osborn, Pomeroy, Pool, Spencer, Sumner, and Wilson—15.

So the amendment was rejected.

The VICE-PRESIDENT. The question recurs on the resolution of the Senator from New York.

The resolution was agreed to—ayes 29, noes not counted.

Mr. SHERMAN. I move that a message be sent to the House stating that the Senate are ready to return.

The VICE-PRESIDENT. The Chair was informed informally by the Clerk that they were waiting.

Mr. SHERMAN. Then I move that we return at once.

The motion was agreed to; and (at five o'clock and five minutes p. m.) the Senate again proceeded to the Hall of the House of Representatives.

IN THE PRESENCE OF THE SENATE AND HOUSE OF REPRESENTATIVES,

February 12, 1873.

At five o'clock and five minutes p. m. the Senate in a body re-entered the Hall.

The VICE-PRESIDENT, (having resumed the chair.) Two objections having been made to the counting of the votes of the electors of the State of Texas, the Senate upon the first objection, made by the Senator from Illinois, [Mr. Trumbull,] resolved as follows:

"Resolved, That the electoral vote of the State of Texas be counted, notwithstanding the objection raised by Mr. Trumbull."

And the House of Representatives resolved as follows:

"Resolved, That in the judgment of this House the vote of Texas should be counted as reported by the tellers."

On the second objection, by Mr. Dickey, the Senate resolved as follows:

"Resolved, That the objection raised by Mr. Dickey to counting the electoral vote of the State of Texas be and the same is overruled."

And the House of Representatives resolved as follows:

"Resolved, That a quorum is an arbitrary number, which each State has a right to establish for itself, and as it does not appear that the choice of electors was in conflict with the law of Texas as to a quorum for the transaction of business, the vote of the electors for President and Vice-President be counted."

So (the two Houses having concurred) the electoral vote of Texas, under the twenty-second joint rule, will be counted.

The presiding officer now presents to the tellers the electoral vote of the State of Iowa.

Mr. SPEER. Is it in order for this joint convention to take a recess until to-morrow at half past twelve o'clock?

The VICE-PRESIDENT. It is not; it must be done, if at all, by each House separately.

The VICE-PRESIDENT presented the electoral votes of the States of Iowa, Wisconsin, California, Minnesota, Oregon, Kansas, West Virginia, Nevada, and Nebraska to the tellers; and they were counted without objection.

The VICE-PRESIDENT. The Chair in presenting the electoral vote of the State of Florida will state that the copy directed to be sent by law to the President of the Senate by mail was received on the 11th of December, 1872, and the copy by messenger was received at the Department of State, and in the absence of the Vice-President by the President *pro tempore* of the Senate on the 2d of January, 1873.

Mr. BECK, of Kentucky, (one of the tellers,) read the electoral vote and the accompanying certificates, and the vote of the State of Florida was counted without objection.

The VICE-PRESIDENT. The Chair in presenting the electoral vote of the State of Arkansas states it was received by him by mail on the 11th of December, 1872, and by messenger at the Department of State, and in the absence of the Vice-President by the

President *pro tempore* of the Senate on the 28th of December, 1872. On the 4th or 5th day of February, during the present month, a person claiming to be the messenger commissioned to bring the electoral vote of the State of Arkansas presented himself at the Vice-President's room with a paper, not in the form of law, but addressed to him as President of the Senate, and stated to him what he alleged to be its contents, representing himself to be commissioned as messenger to bring the vote. The Vice-President said he would open the paper, as it was addressed to him, but he would not receive it even informally. After reading its contents he found that it did not in any respect comply with the requirements of the law on the subject. The papers presented on the 11th of December and the 28th of December are now submitted to the tellers.

MR. RICE. I ask the tellers to read in full the returns from Arkansas.

MR. SHERMAN (one of the tellers) accordingly read the papers in the case of Arkansas, as follows :

“ STATE OF ARKANSAS,
“ *Little Rock, December 4, 1872.*

“ We, the undersigned electors, elected, as shown by the accompanying certificate, at the general election held in the State of Arkansas, November 5, 1872, for a President and Vice-President of the United States for the term commencing March 4, 1873, met in the city of Little Rock, State aforesaid, on Wednesday, the 4th day of December, 1872, and proceeded to vote by ballot, with the following result :

“ D. S. Griffin, W. W. Granger, Thomas H. Barnes, W. H. Howes, Arthur Hemingway, and L. G. Wheeler each cast one vote for Ulysses S. Grant for President of the United States for the term aforesaid, and D. S. Griffin, W. W. Granger, Thomas H. Barnes, W. H. Howes, Arthur Hemingway, and L. G. Wheeler each cast one vote for Henry Wilson for Vice-President of the United States for the term aforesaid, making six votes cast by said electors for each of the respective candidates above named.

“ D. S. GRIFFIN.
“ W. W. GRANGER.
“ THOMAS H. BARNES.
“ W. H. HOWES.
“ ARTHUR HEMINGWAY.
“ L. G. WHEELER.”

“ STATE OF ARKANSAS, STATE DEPARTMENT,
“ *Little Rock, December 4, 1872.*

“ I, J. M. Johnson, secretary of state of Arkansas, certify that the following is the true and correct list of electors in and for the State of Arkansas to vote for a President and Vice-President of the United States for the term commencing March 4, 1873, who were elected at the general election held in pursuance of law in this State, November 5, 1872, namely, D. S. Griffin, W. W. Granger, and Thomas H. Barnes, from the State at large; W. H. Barnes, from first congressional district; Arthur Hemingway, from second congressional district; L. G. Wheeler, from third congressional district.

“ In testimony whereof, I have hereunto set my hand and seal of office at Little Rock, this 4th day of December, A. D. 1872.

[L. S.]

“ J. M. JOHNSON,
“ *Secretary of State.*”

Senator CONKLING. When was that paper received ?

Senator SHERMAN, (one of the tellers.) December 11, 1872.

The VICE-PRESIDENT. That was by mail, and on the 28th of December by messenger.

Senator RICE. I object to counting the vote of Arkansas, and will reduce my objections to writing. I have to change them a little on account of hearing the returns which have been read.

Senator HAMLIN. While the Senator from Arkansas is reducing his objections to writing, I propose we proceed to the electoral vote of the State of Louisiana, on which we all know there will be a separation, so that there may be but one separation in reference to the electoral votes of the State of Arkansas and of the State of Louisiana.

The VICE-PRESIDENT. Is there objection, as there remains only one electoral vote, that of the State of Louisiana, to be read ?

Senator THURMAN. I did not distinctly hear from the Chair whether there were two returns from Arkansas or whether the one was a duplicate of the other.

The VICE-PRESIDENT. There is only one return made in conformity to law from Arkansas; one being received by messenger and the duplicate by mail. On the 4th of February others were received, which were entirely informal.

Senator THURMAN. Are they duplicates of each other ?

The VICE-PRESIDENT. These are duplicates.

Senator THURMAN. How is it with the others ?

The VICE-PRESIDENT. The informal returns were signed by three out of the six elect-

ors, and they stated that they could not obtain the certificate of the governor, and that they therefore inclosed certain correspondence of the governor, which was not, however, inclosed. They were not sealed or indorsed on the back. The Chair opened them on the distinct understanding that they were informal, because they were directed to him as any other letter might be.

From Louisiana there have been received two returns sent by mail and two by messenger, each of the last having been received by the Secretary of State, in the absence of the Vice-President and the President of the Senate *pro tempore* from the seat of Government. The first return, made by L. C. Roudanez, was received on the 31st of December, within the time required by the Constitution. The second return was received on the 2d January, being one day within the time required by the Constitution. What appeared to be the duplicates were received by mail on the 10th and 14th December. The Chair will first submit those returns which reached the office of the Secretary of State, in accordance with law, on 31st December. One of the tellers on the part of the House will report the one first received at the Department of State. The duplicate received by mail is in the hands of the teller on the part of the Senate.

Mr. DAWES (one of the tellers) read the following papers:

“OFFICE OF SECRETARY OF STATE,
“PARISH OF ORLEANS, STATE OF LOUISIANA.
“December 3, A. D. 1872.

“I, George E. Bovee, secretary of state for the state of Louisiana, do hereby certify that the returning officers of the election held in said State on the 4th day of November, A. D. 1872, have returned to me, as secretary of state, according to law the following persons as duly elected electors of President and Vice-President of the United States for the State of Louisiana at such election, to wit: for the State at large, M. F. Bonzano, Jules Lanabere, Charles E. Halstead. For the districts: first district, L. C. Roudanez; second district, A. K. Johnson; third district, Milton Morris; fourth district, Joseph K. Taylor; fifth district, John Ray.

“In testimony whereof I have hereunto signed my name and caused the seal of the State to be attached, this 3d day of December, A. D. 1872, and of the Independence of the United States the ninety-seventh.

[L. S.]

“GEORGE E. BOVEE,
“Secretary of State.

“UNITED STATES OF AMERICA, STATE OF LOUISIANA,
“New Orleans, December 4, 1872.

“We, the electors of President and Vice-President of the United States for the State of Louisiana, do hereby certify that on proceeding to vote by ballot for President of the United States, on the date above, that Ulysses S. Grant, of the State of Illinois, received eight votes for President of the United States, and there were no votes cast for any other person.

“And on proceeding to vote by ballot for Vice-President of the United States, that Henry Wilson, of the State of Massachusetts, received eight votes for Vice-President of the United States, and there were no votes cast for any other person.

“In testimony whereof we, said electors, have hereunto signed our names, the date above mentioned.

“E. P. DURAND.
“JAMES B. LOTT.
“JOHN RAY.
“M. F. BONZANO.
“J. J. LANABERE.
“CHARLES E. HALSTEAD.
“L. C. ROUDANEZ.
“A. K. JOHNSON.

[Copy.]

“The following persons, elected electors of President and Vice-President of the United States according to the certificate of the secretary of state of the State of Louisiana, namely: for the State at large, M. F. Bonzano, Jules Lanabere, and Charles E. Halstead. For the districts: first district, L. C. Roudanez; second district, A. K. Johnson; fifth district, John Ray, met at Mechanics' Institute, in the lieutenant-governor's parlor, the building leased and occupied by the State for the use of the senate and house of representatives and State officers, at three o'clock p. m., on the first Wednesday of December, being the 4th day of said month, Milton Morris, of the third district, and Joseph K. Taylor, of the fourth district, being absent; when, on motion of John Ray, Dr. M. F. Bonzano was selected to preside; and on motion of A. K. Johnson, Charles E. Halstead was appointed secretary.

“The meeting, having taken a recess until four o'clock p. m., met again at that hour: when, upon roll-call, it appeared that Milton Morris and Joseph K. Taylor were not present, having failed to attend. On motion of John Ray, the electors present pro-

ceeded to supply such vacancies by ballot. A. K. Johnson and L. C. Rondanez were appointed tellers; when, after balloting, it was found that E. R. Durand received four votes and W. B. Phillips two, and E. R. Durand was declared elected to fill the vacancy of Milton Morris; and Joseph B. Lott receiving four and R. Blunt three votes, Mr. Lott was declared elected to fill the vacancy of Joseph K. Taylor, both the parties so elected residing in the congressional districts represented by the respective absentees.

"The persons so elected, being present, took their seats as electors. The said electors then proceeded to vote by ballot for President and Vice-President of the United States; when A. K. Johnson and L. C. Rondanez were appointed tellers, and upon counting the ballots for President of the United States it was found that Ulysses S. Grant, of the State of Illinois, had received eight votes for President of the United States; and upon counting the votes for Vice-President of the United States it was found that Henry Wilson, of the State of Massachusetts, had received eight votes for Vice-President of the United States, the vote being unanimous for each, no other person having received any votes for either office; and said electors have issued three certificates in the form following, to wit:

"UNITED STATES OF AMERICA. STATE OF LOUISIANA,
"New Orleans, December 4, 1872.

"We, the electors of President and Vice-President of the United States for the State of Louisiana, do hereby certify that on proceeding to vote by ballot for President and Vice-President of the United States, on the date above, that Ulysses S. Grant, of the State of Illinois, received eight votes for President of the United States, and there were no votes cast for any other person.

"And on proceeding to vote by ballot for Vice-President of the United States, that Henry Wilson, of the State of Massachusetts, received eight votes for Vice-President of the United States, and there were no votes cast for any other person.

"In testimony whereof we, said electors, have hereto signed our names, the date above mentioned.

"Which certificates were placed separately in envelopes and sealed up carefully, and on each envelope was indorsed, that the within contains a list of the votes of the State of Louisiana for President and Vice-President of the United States, one of which was given to the person appointed to convey the vote to the President of the Senate, and was directed to the President of the Senate, and another indorsed in the same way was put in the post-office, and the other deposited with the judge of the district court of the United States for the district of Louisiana.

"On motion of John Ray, the electors proceeded to appoint a person to take charge of and deliver to the President of the Senate, at the seat of Government, before the first Wednesday in January next ensuing, one of said certificates, when L. C. Rondanez was appointed to the above service, and said electors made and signed a certificate of such appointment in the following form:

"UNITED STATES OF AMERICA,
 "STATE OF LOUISIANA, PARISH OF ORLEANS,
"Wednesday, December 4, 1872.

"We, the undersigned electors of President and Vice-President of the United States for the State of Louisiana, do hereby appoint L. C. Rondanez to take charge of and deliver to the President of the Senate of the United States, at the seat of Government, before the first Wednesday in January next, one of the certificates of the votes cast by the undersigned for President and Vice-President of the United States on the date above.

"In testimony whereof we have hereto signed our names the date above.

"On motion, the meeting adjourned until to-morrow at two o'clock p. m."

"NEW ORLEANS, LA., *December 5, 1872.*

"The electors met pursuant to adjournment, the following electors present: M. F. Bonzano, Jules Lanabere, C. E. Halstead, L. C. Rondanez, A. K. Johnson, P. E. Durand, James B. Lott, John Ray.

"The minutes of the previous meeting were read and approved.

"On motion, the meeting adjourned until to-morrow at two o'clock p. m."

"NEW ORLEANS, LA., *December 6, 1872.*

"The electors met pursuant to adjournment, the following members present: M. F. Bonzano, Jules Lanabere, C. E. Halstead, L. C. Rondanez, A. K. Johnson, C. E. Durand, J. B. Lott, John Ray.

"The minutes of the previous meeting were read and approved.

"On motion, the meeting adjourned until Monday, December 9, 1872, at two o'clock p. m."

"NEW ORLEANS, LA., *December 9, 1872.*

"The electors met pursuant to adjournment, the following members present: W. F.

Bonzano, Jules Lanabere, C. E. Halstead, L. C. Rondanez, P. E. Durand, J. B. Lott, John Ray; absent, A. K. Johnson.

"The minutes of the previous meeting were read and adopted.

"On motion, the board adjourned *sine die*.

"M. F. BONZANO, *President*.

"CHARLES E. HALSTEAD, *Secretary*."

The VICE-PRESIDENT. On the 10th of December last the Chair received an envelope by mail, certifying on the outside that it contained the vote for President and Vice-President of the State of Louisiana, signed by eight other persons. On the 2d day of January, being the first Thursday after the first Wednesday in January, a messenger arrived with a sealed envelope signed by the same persons, which was received by the Department of State in the absence from the city of the Vice-President and the President *pro tempore* of the Senate, which was represented to contain the same vote of the State of Louisiana. The Chair now delivers the papers so received to the tellers.

Mr. DAWES (one of the tellers on the part of the House) read the following papers:

"UNITED STATES OF AMERICA,

"*The State of Louisiana, City of New Orleans:*

"Be it known that on this the 4th day of the month of December, A. D. 1872, and of the American Independence the ninety-seventh year, at the seat of government, to wit, at the city of New Orleans, at the capitol of said State, at twelve m., met Messrs. T. C. Manning, C. A. Weed, and Andrew S. Herron, and Hugh J. Campbell, Louis Bush, Allen Thomas, and L. V. Reeves, who appear to be electors for the State of Louisiana by the annexed certificate of the executive of said State attached hereto as part of these presents, when the said electoral college, having ascertained that A. H. Leonard, esq., elector for the fourth district, was absent, according to the requirements of the statutes of the State of Louisiana, (revised statutes, art. 2830,) a respite was taken until four p. m.

"In conformity to the aforesaid respite, at four p. m. of the 4th day of December of the year aforesaid, the above-named electors met at the same place, when the said A. H. Leonard still appearing to be absent, the college proceeded by ballot, as required by the statutes of the State of Louisiana, to supply the vacancy. After the ballots had been duly cast, they were duly canvassed by the chairman of the college, Hon. T. C. Manning, when it appeared that Hon. J. C. Moncure, of the parish of Caldo, a resident of the fourth congressional district, was duly elected to fill the vacancy occasioned by the absence of A. H. Leonard.

"Thus organized, the college then formally selected Hon. T. C. Manning as chairman of the college. Whereupon the chairman submitted to the college the annexed certificate of the executive of the State of Louisiana, and the proceedings of the college selecting Hon. J. C. Moncure, in lieu of A. H. Leonard, esq., as their credentials.

"Under the authority and by virtue of the Constitution and laws of the United States and of the State of Louisiana, the college then proceeded to vote for President of the United States, when it was ascertained that the eight electors present voted each separately in blank, designating no person as the choice of the college for President of the United States. Acting under the same authority and by virtue of the government and law aforesaid, the college then proceeded to vote for Vice-President of the United States, when it was ascertained that T. C. Manning, Andrew S. Herron, and C. H. Weed, electors at large, and Hugh J. Campbell, Louis Bush, Allen Thomas, J. C. Moncure, and L. V. Reeves, district electors, each separately voted for B. Gratz Brown, of the State of Missouri, for Vice-President of the United States.

"In faith whereof we hereunto fix our respective signatures at the city of New Orleans, seat of government of the State of Louisiana, on the day, month, and year aforesaid.

"T. C. MANNING.

"ANDREW S. HERRON.

"C. H. WEED.

"HUGH J. CAMPBELL.

"LOUIS BUSH.

"ALLEN THOMAS.

"J. C. MONCURE.

"L. V. REEVES."

Mr. DAWES, (one of the tellers.) Then follows a certificate of the official count of the votes polled at the election held on the 4th of November.

Then there is the following paper:

"*United States of America, State of Louisiana, city of New Orleans:*

"I, H. C. Warmoth, governor of the State of Louisiana, do hereby certify that the foregoing signature of B. P. Blanchard, State registrar of voters for the State of Louisiana, is genuine; and I do further certify that Messrs. T. C. Manning, A. S. Herron, and C. H. Weed, for the State at large, and Hugh J. Campbell, for first district; Louis

Bush, second district; Allen Thomas, third district; A. H. Leonard, fourth district, and L. V. Reeves, fifth district, were duly and legally elected presidential electors for the State of Louisiana, at an election held in said State on the 4th day of November, A. D. 1872, pursuant to the statutes of the Congress of the United States and State of Louisiana on the subject.

"In faith whereof I have hereunto affixed my official signature and caused the great seal of the State to be hereto attached, at the city of New Orleans, capital of the State, this 4th day of December, A. D. 1872, and of the Independence of the United States the ninety-seventh.

"H. C. WARMOTH.

"By the governor:

[L. S.] "Y. A. WOODWARD,

"Assistant Secretary of State."

Senator WEST. I object to the reception by the Senate and House of Representatives of the electoral vote of Louisiana as certified to by the governor of that State, upon the ground that said certificate was not made in pursuance of law.

Mr. SUELTON. I also object to the counting of the votes cast by T. C. Manning, C. H. Weed, A. S. Herron, Hugh J. Campbell, L. Bush, A. Thomas, J. C. Moncreur, and L. V. Reeves, of Louisiana, for B. Gratz Brown, of Missouri, for Vice-President, for the reason that the certificate of the governor showing them to have been chosen electors is not signed by the person who was at that time assistant secretary of state for the State of Louisiana, and for the further reason that at the time said certificate was executed there had not been made any count, canvass, or return of the votes cast by the people of Louisiana for electors by any lawful authority, and the said certificate was made by the governor without any authentic knowledge of the result of the election by the people of said State, which facts are fully established by the testimony taken by the Senate Committee on Privileges and Elections, and are stated in their report to the Senate.

Senator CARPENTER. I object to the counting of the votes given for U. S. Grant for President, and Henry Wilson, Vice-President, by the electors of Louisiana, because there is no proper return of votes cast by the electors of the State of Louisiana, and because there is no State government in said State which is republican in form, and because no canvass or counting of the votes cast for electors in the State of Louisiana at the election held in November last had been made prior to the meeting of the electors.

Mr. POTTER. I object to counting the electoral vote from the State of Louisiana as cast for Ulysses S. Grant for President and Henry Wilson for Vice-President, for the reason that there is no certificate from the executive authority of that State as required by the act of Congress of 1792, certifying that the persons who cast such votes were appointed electors of said State, but that on the contrary it appears by the certificate of the governor of said State that the persons appointed electors were not the persons who cast such votes for U. S. Grant and Henry Wilson, but were persons who cast their votes not for said Grant and Wilson, but for no person as President, and for B. Gratz Brown as Vice-President.

Mr. STEVENSON. I object to counting the votes from the State of Louisiana, because it does not sufficiently appear that the electors were elected according to law.

Senator BOREMAN. I object to counting any votes from the State of Louisiana for reasons set forth in the report of the Committee on Privileges and Elections submitted to the Senate on the 10th instant, and printed as Report No. 417 of Forty-Second Congress, third session.

Senator TRUMBULL. I object to the counting of the votes cast by the persons in the first certificate read, for the reason that their election is not certified to by the proper officers; that Bovee, who signed the certificate of their election, was not secretary of state at the time of making said certificate, nor in possession of the office of secretary of state nor of the seal of said State; and for the further reason that the certificate of said Bovee is untrue in fact, as appears by the admissions of said Bovee before the committee of the Senate.

The VICE-PRESIDENT. There have been seven objections made in regard to receiving the votes of Louisiana, some of them against receiving any vote from that State. The Chair would suggest that in taking up these objections the two Houses might act first upon those which lie to the counting of the vote of Louisiana at all.

Objection was made.

The VICE-PRESIDENT. Objection being made, each House will proceed to consider the objections made in such order as they may happen to be presented to that House. If no further objections be made to the vote of Louisiana, the seven that have been made will be filed, and copies furnished to the two branches of Congress.

No further objections were made.

Senator RICE. I object to the counting of the votes of the State of Arkansas because the official returns in said State, made according to the laws of said State, show that the persons certified to by the secretary of state as elected were not elected as

electors for President and Vice-President at the election held November 5, 1872; and, secondly, because the returns read by the tellers are not certified according to law. The Senate retired from the hall.

IN THE HOUSE OF REPRESENTATIVES, *February 12, 1873.*

The House was again called to order.

The SPEAKER The Clerk will now read the objection made in joint convention by the Senator from Arkansas [Mr. Rice] to the counting of the vote from that State.

The Clerk read as follows:

"Mr. Rice objects to counting the vote of the State of Arkansas because the official returns of the election in said State, made according to the laws of said State, show that the persons certified to by the secretary of state as elected were not elected as electors for President and Vice-President at the election held November 5, 1872; second, because the returns read by the tellers are not certified according to law."

Mr. SNYDER. I offer the following resolution:

"*Resolved*, That the presidential electors from the State of Arkansas, whose election on the 5th day of November, 1872, is attested by the certificate of the secretary of state, be, and they are hereby, recognized as the duly chosen electors for said State; and that the vote cast, certified, and returned by them for Ulysses S. Grant for President and Henry Wilson for Vice-President be counted as the vote of said State for President and Vice-President of the United States."

Mr. DAWES. I suggest to the gentleman from Arkansas he offer a resolution simply resolving that the electoral vote of Arkansas be counted as reported by the tellers.

Mr. GARFIELD, of Ohio. I hope that will be done. The Senate resolutions are short and crisp.

Mr. KELLOGG. I offer the following substitute:

"*Resolved*, That the electoral vote of Arkansas be counted."

Mr. DAWES. It ought to be that in the judgment of the House the electoral vote be counted.

Mr. KELLOGG. I will modify my resolution in that way, that in the judgment of this House the electoral vote of the State of Arkansas, as reported by the tellers, be counted.

Mr. DAWES. I demand the previous question.

Mr. FARNSWORTH. We are now acting under the joint rule of the two Houses, and I make the point of order there is no such thing as the previous question.

The SPEAKER. The point of order is not well taken.

Mr. FARNSWORTH. The previous question is moved for the purpose of cutting off debate, and it is specially provided in the twenty-second joint rule that no debate shall be allowed on these questions.

The SPEAKER. The previous question is not only to cut off debate but to cut off amendments. There is nothing in the joint rule to prevent the usage and practice of this House.

Mr. KELLOGG. I insist on the demand for the previous question.

The previous question was seconded and the main question ordered; and under the operation thereof Mr. Kellogg's substitute was adopted.

The main question then recurred on the resolution as amended.

The House divided; and there were—ayes 78, noes 45.

Mr. FARNSWORTH demanded tellers.

Tellers were not ordered.

Mr. FARNSWORTH demanded the yeas and nays.

The yeas and nays were ordered.

The question was taken; and it was decided in the affirmative—yeas 103, nays 26, not voting 111; as follows:

YEAS—Messrs. Ambler, Ames, Averill, Banks, Barber, Barry, Bigby, Bingham, Austin Blair, Braxton, Buckley, Buffinton, Bunnell, Burchard, Burdett, Roderick R. Butler, Coburn, Coghlan, Conger, Cotton, Darrall, Dawes, Dodds, Donnan, Duke, Dunnell, Eames, Elliott, Esty, Farwell, Finkelnburg, Charles Foster, Wilder D. Foster, Frye, Garfield, Golladay, Hale, Halsey, Harmer, Harper, George E. Harris, John B. Hawley, Joseph R. Hawley, Hay, Hays, John W. Hazelton, Hibbard, Hill, Houghton, Kellogg, Kerr, Lamport, Lowe, Lynch, Maynard, McJunkin, McKee, Merriam, Leonard Myers, Negley, Orr, Packard, Palmer, Isaac C. Parker, Peck, Pendleton, Perry, Peters, Platt, Poland, Porter, Rainey, Ellis H. Roberts, Rusk, Sargent, Sawyer, Scofield, Sessions, Sheldon, Sheldon, Shoemaker, H. Boardman Smith, Snyder, Sprague, Starkweather, Stevenson, Stoughton, Stowell, St. John, Sypher, Washington Townsend, Turner, Twichell, Tyner, Upson, Voorhees, Waddell, Wakeman, Waldron, Wallace, Wells, Willard, and Williams of Indiana—103.

NAYS—Messrs. Acker, Archer, Arthur, Bell, Briggs, Boles, DuBose, Farnsworth, Giddings, Herndon, Holman, MacIntyre, McClelland, Merrick, Moore, Morphis, Potter, Price, Read, Shoer, Storm, Sutherland, Terry, Wells, Winchester, and Wood—26.

NOT VOTING—Messrs. Adams, Barnum, Beatty, Erasmus W. Beck, James B. Beck,

Bird, James G. Blair, Boorman, Bright, Brooks, Benjamin F. Butler, Caldwell, Campbell, Carroll, Clarke, Cobb, Comingo, Conner, Cox, Crebs, Creely, Critcher, Crocker, Crossland, Davis, Dickey, Dox, Duell, Eldredge, Ely, Forker, Henry D. Foster, Garrett, Getz, Goodrich, Griffith, Haldeman, Hambleton, Hancock, Handley, Hanks, John T. Harris, Havens, Gerry W. Hazelton, Hereford, Hoar, Hooper, Kelley, Kendall, Ketcham, Killinger, King, Kinsella, Lamison, Lansing, Leach, Lewis, Manson, Marshall, McCormick, McCrary, McGrew, McHenry, McKinney, McNeely, Benjamin F. Myers, Mitchell, Monroe, Morey, Morgan, Silas L. Niblack, William E. Niblack, Packer, Hosea W. Parker, Perce, Prindle, Randall, Edward Y. Rice, John M. Rice, Ritchie, William R. Roberts, Robinson, John Rogers, Sion H. Rogers, Roosevelt, Seeley, Shellabarger, Sherwood, Slater, Slocum, Sloss, John A. Smith, Worthington C. Smith, Snapp, Speer, Stevens, Swann, Taffe, Thomas, Dwight Townsend, Tuthill, Van Trump, Vaughan, Walden, Wheeler, Whiteley, Whitthorne, Williams of New York, Jeremiah M. Wilson, John T. Wilson, and Young—111.

So the resolution, as amended by Mr. Kellogg's substitute, was adopted.

Mr. SNYDER moved to reconsider the vote by which the resolution was adopted; and also moved that the motion to reconsider be laid on the table.

The latter motion was agreed to.

Mr. ACKER If I have the floor, I move that the House take a recess until ten o'clock to-morrow morning.

Mr. GARFIELD, of Ohio. I offer the following resolution.

The Clerk read as follows :

"Resolved, That in the judgment of this House none of the returns reported by the tellers as the electoral vote of the State of Louisiana should be counted."

Mr. SPEER. I offer the following as a substitute :

"Resolved, That the vote of Louisiana for B. Gratz Brown, of Missouri, for Vice-President, should, in the judgment of this House, be counted."

Mr. GARFIELD, of Ohio. I must demand the previous question.

Mr. SPEER. I modify my substitute so as to add "but no vote for President should be counted."

Mr. STEVENSON. I move the following as a substitute ;

"Resolved, That the vote of the State of Louisiana be not counted, because it does not sufficiently appear that any electors were chosen according to law."

Mr. SUELDOX. I offer the following preamble and resolution :

"Whereas it appears that the choosing M. F. Bonzano, Jules Lanabere, Charles F. Halstead, L. C. Rondanez, A. K. Johnson, Milton Morris, Joseph Taylor, and John Ray, as electors of the State of Louisiana for President and Vice-President, is duly certified to by the actual secretary of state of the State of Louisiana, and by the returning board decided to be the legal one by the supreme court of said State, and following the precedent established in counting the votes cast by the electoral college of the State of Texas.

"Be it resolved, That the votes of the electoral college of the State of Louisiana be counted for President and Vice-President as cast by M. F. Bonzano, Jules Lanabere, Charles F. Halstead, L. C. Rondanez, A. K. Johnson, E. R. Durand, Joseph B. Lott, and John Ray."

The SPEAKER. More resolutions have been offered than can be entertained under the rule.

Mr. POTTER. I rise to a question of order. I ask whether the proper course is not that the objections taken in joint convention should be reported separately to the House, and resolutions submitted in reference to them ?

The SPEAKER. The Chair thinks that would be the correct course. At the same time, such a resolution as that of the gentleman from Ohio [Mr. Garfield] having been put in first, necessarily removed any action upon the separate objections. If desired by the gentleman from New York, [Mr. Potter,] the objections will be read.

Mr. SPEER. I desire to modify my amendment.

The SPEAKER. The Clerk will read the several objections which come to the House from the joint convention.

Mr. POTTER. I do not demand the reading of them.

The SPEAKER. The Chair will now cause to be read the various propositions which have been submitted to the House, and will then call the attention of the House to the parliamentary position of the question. The gentleman from Ohio, the chairman of the Committee on Appropriations, [Mr. Garfield,] offers the resolution which will now be read by the Clerk.

The Clerk read as follows :

"Resolved, That in the judgment of this House none of the returns reported by the tellers as electoral votes of the State of Louisiana should be counted."

The SPEAKER. The gentleman from Pennsylvania [Mr. Speer] moves a substitute, which the Clerk will read.

The Clerk read as follows :

"Resolved, That the vote of the electors of the State of Louisiana, certified to by H. C. Warmoth, governor, should be, in the judgment of this House, counted."

The SPEAKER. The gentleman from Ohio in front of the Chair [Mr. Stevenson] has offered the following amendment:

"Resolved, That the vote of the State of Louisiana be not counted, because it does not sufficiently appear that any electors were chosen according to law."

The SPEAKER. That is in effect the same as the first resolution. The Clerk will read the amendment offered by the gentleman from Louisiana.

The Clerk read as follows:

"Whereas it appears that the choosing of M. F. Bonzano, Jules Lanabere, Charles F. Halstead, L. C. Roudanez, A. K. Johnson, Milton Morris, Joseph Taylor, and John Ray, as electors of the State of Louisiana for President and Vice-President is duly certified to by the actual secretary of state of the State of Louisiana, and by the returning board decided to be the legal one by the supreme court of said State, and following the precedent established in counting the votes cast by the electoral college of the State of Texas:

"Be it resolved, That the votes of the electoral college of the State of Louisiana be counted for President and Vice-President as cast by M. F. Bonzano, Jules Lanabere, Charles F. Halstead, L. C. Roudanez, A. K. Johnson, E. R. Durand, Joseph B. Lott, and John Ray."

Mr. POTTER. I desire to offer a substitute.

The SPEAKER. That cannot be done unless by unanimous consent. Only three resolutions can be entertained: the original resolution, an amendment, and an amendment to the amendment. The gentleman from Ohio, the chairman of the Committee on Appropriations, [Mr. Garfield,] offered the original resolution. The gentleman from Pennsylvania moves an amendment to that. The gentleman from Ohio [Mr. Stevenson] moves one which is in effect the same as the original resolution. The Chair, therefore, recognizes the amendment of the gentleman from Louisiana as presenting another phase of the question. The original resolution is to the effect that there is no return; the resolution of the gentleman from Pennsylvania [Mr. Speer] is that that of Governor Warmoth is the true one; that of the gentleman from Louisiana is that the return signed by the secretary of state is the true one. Three distinct phases of the question are thus presented.

Mr. POTTER. Before the vote is taken, I desire to have read the objection which was made in joint convention by Senator Trumbull.

The Clerk read as follows:

"Mr. Trumbull objects to counting the votes cast by the persons in the first certificate read, for the reason that their election is not certified to by the proper officer; that Bovee, who signed the certificate of their election, was not the secretary of state at the time of making the said certificate, nor in possession of the office of secretary of state nor of the seal of said State; and for the further reason that the certificate of the said Bovee is untrue in fact, as appears by the admission of said Bovee before the committee of the Senate."

Mr. POTTER. Mr. Speaker, I wish the tellers to report to the House whether the great seal of the State purports to be on the certificate signed by Mr. Bovee as secretary of state.

The SPEAKER. The Chair knows nothing about the work of the tellers. But the gentleman has the right to have the document read. The Clerk will again report the certificate signed by Mr. Bovee.

The certificate was again read.

Mr. POTTER. Is there a seal attached to the document?

Mr. BINGHAM. I object to all this.

Mr. POTTER. I call attention to the fact that the thing attached—

The SPEAKER. That is in the nature of argument, which the Chair will not permit. The gentleman had a right to call for the reading of the paper, and it has been read.

Mr. POTTER. I demand of the Speaker whether the seal of the State of Louisiana is attached to that certificate?

The SPEAKER. The Chair does not know.

Mr. BINGHAM. It is certified that it is on it, and that is enough.

Mr. AMBLER. I desire to ask a parliamentary question.

The SPEAKER. The Chair will hear it.

Mr. AMBLER. Is it not the right of the House, in passing upon the question now presented to it, as to which, if either, of these certificates of the electoral votes of Louisiana shall be received, to know whether in point of fact the seal of the State of Louisiana is attached to one or both of those certificates?

The SPEAKER. As a matter of fact the Chair never in his life saw the seal of the State of Louisiana and would not know it if he were to see it now.

Mr. AMBLER. Would it not at least be proper that the House should be advised whether the seals attached to the two papers are the same?

The SPEAKER. If the gentleman desires it, the Chair will direct the reading of any other matter that relates to the certificates of the electors of the State of Louisiana.

But the Chair cannot indulge and will not permit any debate as to what is the true seal of the State of Louisiana.

Mr. AMBLER. Under the statement of the Speaker, I will ask that the statement of Mr. Bovee before the Committee on Privileges and Elections of the Senate be read.

Mr. BINGHAM. I object to that.

The SPEAKER. That would be in the nature of debate, and is not in order.

Mr. STORM. I ask that the inscription on the seal be read.

The SPEAKER. That is proper to be done.

The Clerk read the inscription, which was "Union, justice, and confidence; State of Louisiana."

Mr. FAIRBANKS. Is there not another paper somewhere, signed by Bovee, in which he states that he did not put the seal of the State to that certificate? And if so, is it not in order to have it read?

The SPEAKER. It is not.

Mr. STEVENSON. Is it not in order to have a comparison of the two seals made, and to have the officers of the House state whether they are of the same character?

The SPEAKER. It is in order to examine them so far as to read what is upon them; and that has already been done.

Mr. STEVENSON. Have they been examined, so as to determine whether they are of the same size?

Mr. PETERS. And of the same color?

Mr. STEVENSON. In order that it may be shown whether they are impressions from the same seal.

Mr. BINGHAM. You do not determine such a question as that in that way.

The SPEAKER. The question is upon the substitute moved by the gentleman from Louisiana [Mr. Sheldon] for the amendment moved by the gentleman from Pennsylvania, [Mr. Speer.]

The resolution moved by Mr. Sheldon was read, as follows:

"Resolved, That the vote of the electoral college of the State of Louisiana be counted for President and Vice-President as cast by M. F. Bonzano and others."

The question was taken: and it was not agreed to.

The next question was upon the amendment of Mr. Speer to the resolution moved by Mr. Garfield, of Ohio.

The amendment moved by Mr. Speer was read, as follows:

"Resolved, That the vote of the electors of the State of Louisiana, certified to by H. C. Warmoth, governor, should be, in the judgment of this House, counted."

Mr. SPEER. Upon that question I call for the yeas and nays.

The yeas and nays were ordered.

During the call of the roll.

A message from the Senate, by Mr. Sympton, one of its clerks, informed the House that the Senate had resolved that the electoral vote of Arkansas should not be counted.

The message further announced that the Senate had resolved that, all the objections presented having been considered, no electoral vote purporting to be that of the State of Louisiana should be counted.

Mr. SPEER. As it is evident, from the action of the Senate just communicated to the House, that the electoral vote of Louisiana cannot be counted, I ask unanimous consent to withdraw my demand for the yeas and nays.

The SPEAKER. The call of the roll having begun, it must be completed.

The call of the roll was completed; and there were—yeas 59, nays 85, not voting 96; as follows:

YEAS—Messrs. Acker, Adams, Ambler, Archer, Arthur, James B. Beck, Boies, Braxton, Burchard, Carroll, Crossland, Dodds, Dox, DuBose, Duke, Farnsworth, Finkelnburg, Getz, Giddings, Golladay, Haldeman, Hancock, Handley, Hanks, Hay, Hereford, Herndon, Hibbard, Holman, Kerr, Ketcham, McIntyre, Manson, McClelland, McHenry, McKinney, Merrick, Morgan, Silas L. Niblack, Perry, Potter, Price, Randall, Read, Ellis H. Roberts, William R. Roberts, Sion H. Rogers, Shoer, Sloeum, Speer, Storm, Terry, Voorhees, Waddell, Warren, Wells, Willard, Williams of New York, and Winchester—59.

NAYS—Messrs. Averill, Barry, Beatty, Bigby, Bingham, James G. Blair, Buckley, Buffinton, Bunnell, Burdett, Roderick R. Butler, Coburn, Coghlan, Conger, Cotton, Darrall, Dawes, Donnan, Dunnell, Eames, Elliott, Farwell, Charles Foster, Wilder D. Foster, Frye, Garfield, Hale, Halsey, Harmer, Harper, George E. Harris, John B. Hawley, Joseph R. Hawley, Hays, John W. Hazelton, Kellogg, Lamport, Lowe, Maynard, McKunkin, McKee, Merriam, Moore, Morey, Morphis, Leonard Myers, Orr, Packard, Palmer, Isaac C. Parker, Peck, Pendleton, Perce, Peters, Platt, Poland, Porter, Prindle, Rainey, Rusk, Sargent, Sawyer, Seofield, Sessions, Sheldon, Shoemaker, H. Boardman Smith, John A. Smith, Sprague, Starkweather, Stevenson, Stoughton, Stowell, St. John, Sypher, Thomas, Washington Townsend, Turner, Twichell, Tyner, Upson, Wake-man, Waldron, Wallace, and Williams of Indiana—85.

NOT VOTING—Messrs. Ames, Banks, Barber, Barnum, Erasmus W. Beck, Bell, Biggs, Bird, Austin Blair, Boorman, Bright, Brooks, Benjamin F. Butler, Caldwell, Campbell, Clarke, Cobb, Comingo, Conner, Cox, Crebs, Creely, Critcher, Crocker, Davis, Dickey, Duell, Eldredge, Ely, Esty, Forker, Henry D. Foster, Garrett, Goodrich, Griffith, Hambleton, John T. Harris, Havens, Gerry W. Hazelton, Hill, Hoar, Hooper, Houghton, Kelley, Kendall, Killinger, King, Kinsella, Lamson, Lansing, Leach, Lewis, Lynch, Marshall, McCormick, McCrary, McGrew, McNeeley, Benjamin F. Meyers, Mitchell, Monroe, Negley, William E. Niblack, Packer, Hosea W. Parker, Edward Y. Rice, John M. Rice, Ritchie, Robinson, John Rogers, Roosevelt, Seeley, Shanks, Shellabarger, Sherwood, Slater, Sloss, Worthington C. Smith, Snapp, Snyder, Stevens, Sutherland, Swann, Taffe, Dwight Townsend, Tuthill, Van Trump, Vaughan, Walden, Wheeler, Whiteley, Whitthorne, Jeremiah M. Wilson, John T. Wilson, Wood, and Young—95.

So the substitute of Mr. Speer was not agreed to.

Mr. STEVENSON. As the resolution of my colleague [Mr. Garfield, of Ohio] conforms to the action reported from the Senate, I ask unanimous consent to withdraw my amendment.

Mr. RANDALL. I object.

The SPEAKER. In point of fact, that amendment is not pending.

Mr. DAVES. I do not see how it is covered by the previous question.

Mr. STEVENSON. I thought it was received. I thought the Speaker so ruled.

The SPEAKER. The question recurs upon the original resolution offered by the gentleman from Ohio, [Mr. Garfield.] It will be read.

The Clerk read as follows:

“Resolved, That, in the judgment of this House, none of the returns reported by the tellers as electoral votes of the State of Louisiana should be counted.”

The resolution was adopted.

Mr. GARFIELD, of Ohio, moved to reconsider the vote by which the resolution was adopted; and also moved that the motion to reconsider be laid on the table.

The latter motion was agreed to.

IN SENATE, February 12, 1873.

The Senate returned to its Chamber at six o'clock and twenty minutes p. m.

The VICE-PRESIDENT. In the meeting of the two Houses objections were made to the reception of the votes from Arkansas, and also numerous objections to receiving the votes of Louisiana, there being two sets of returns, objections lying to each one of the returns, and also to any returns being counted. The objections have not yet been copied, as they are somewhat voluminous. The twenty-second joint rule states as follows:

“Such joint meeting shall not be dissolved until the electoral votes are all counted and the result declared; and no recess shall be taken unless a question shall have arisen in regard to counting any of such votes; in which case it shall be competent for either House, acting separately, in the manner hereinbefore provided, to direct a recess, not beyond the next day at the hour of one o'clock p. m.”

The first question is the objection to the reception of the electoral votes from Arkansas, made by the Senator from Arkansas. [Mr. Rice.]

Mr. THURMAN. I move that the Senate take a recess until half past ten o'clock to-morrow morning.

Mr. EDMUNDS and others. O, no; let us finish this matter.

The VICE-PRESIDENT. Under this rule it is “competent for either House, acting separately, in the manner hereinbefore provided, to direct a recess, not beyond the next day at the hour of one o'clock p. m.” The question is on the motion of the Senator from Ohio.

The question being put, there were, on a division—ayes 23, noes 20.

Mr. EDMUNDS. I ask for the yeas and nays.

The yeas and nays were ordered; and being taken, resulted—yeas 23, nays 31; as follows:

YEAS—Messrs. Ames, Bayard, Casserly, Cooper, Fenton, Gilbert, Hamilton of Maryland, Hill, Johnston, Kelly, Machen, Norwood, Ransom, Rice, Saulsbury, Schurz, Sprague, Stevenson, Stockton, Thurman, Tipton, Trumbull, and Vickers—23.

NAYS—Messrs. Anthony, Boreman, Buckingham, Caldwell, Carpenter, Chandler, Clayton, Cole, Conkling, Corbett, Cragin, Edmunds, Ferry of Connecticut, Ferry of Michigan, Flanagan, Frelinghuysen, Hamlin, Harlan, Howe, Logan, Morrill of Maine, Morrill of Vermont, Morton, Nye, Pool, Ramsey, Robertson, Scott, Sherman, Stewart, and West—31.

ABSENT—Messrs. Alcorn, Blair, Brownlow, Cameron, Davis, Goldthwaite, Hamilton of Texas, Hitchcock, Lewis, Osborn, Patterson, Pomeroy, Pratt, Sawyer, Spencer, Sumner, Wilson, Windom, and Wright—19.

So the motion was not agreed to.

The VICE-PRESIDENT. The Chair was about to submit the objection of the Senator from Arkansas, [Mr. Rice.] It is being copied in the Representative Hall, but the Senator from Arkansas has sent up the rough draught from which he made the objection

which he states is the same, with perhaps some mere verbal differences, but substantially all the points are embraced in it. It will be read by the Secretary.

The Secretary read as follows:

"Mr. Rice objects to the counting of the votes of the State of Arkansas.

"First, because the official returns of the election in said State, made according to the laws of said State, show that the persons certified by the secretary of state as elected were not elected as electors for President and Vice-President at the election held on the 5th day of November, 1872.

"Second, because the returns read by the tellers are not certified according to law."

Mr. MORTON. I offer the following resolution:

"Resolved, That the electoral vote of Arkansas should be counted."

Mr. EDMUNDS. I ask to have the papers upon which the question arises read.

Mr. MORTON. The papers do not show anything about it.

Mr. EDMUNDS. I want to see whether they do or not.

Mr. RICE. Is a resolution in order?

The VICE-PRESIDENT. A resolution will be in order as an amendment to the resolution of the Senator from Indiana.

Mr. RICE. I offer the amendment which I send to the desk.

The VICE-PRESIDENT. The Senator from Arkansas moves an amendment, which will be read, and then the Senator from Vermont desires to have the papers read.

The CHIEF CLERK. The amendment is to strike out all of the resolution after the word "resolved" and to insert:

"That the Senate bring before it the officers and persons having in their possession the returns of the late election in the State of Arkansas relating to the election of electors of President and Vice-President for that State, together with all such returns."

Mr. CONKLING. Is that a resolution?

The VICE-PRESIDENT. The Senator from Arkansas proposes this as a substitute for the resolution of the Senator from Indiana.

Mr. CONKLING. I raise the point of order upon it that was made in other cases.

The VICE-PRESIDENT. The Senator from New York raises the question of order that the duty of the Senate is to decide the question as to whether the votes shall or shall not be counted. If the Senator from Arkansas insists on his amendment, the Chair will submit the question to the Senate.

Mr. RICE. I do insist upon it.

The VICE-PRESIDENT. The Senator from Arkansas insists upon it, and the question is whether the Senate will receive it, under the twenty-second joint rule, as an amendment to the resolution of the Senator from Indiana.

The question being taken, it was decided in the negative.

The VICE-PRESIDENT. The question recurs on the resolution of the Senator from Indiana, and the Secretary will now report the papers, as the Senator from Vermont has desired.

The Chief Clerk read as follows:

"STATE OF ARKANSAS,

"Little Rock, Ark., December 4, 1872.

"We, the undersigned, electors elected, as shown by the accompanying certificate, at the general election held in the State of Arkansas, November 5, 1872, for a President and Vice-President of the United States for the term commencing March 4, 1873, met in the city of Little Rock, State aforesaid, on Wednesday, the 4th day of December, 1872, and proceeded to vote by ballot, with the following result: D. S. Griffin, W. H. Granger, Thomas H. Barnes, W. H. Howes, Arthur Hemingway, and L. G. Wheeler each cast one vote for Ulysses S. Grant for President of the United States for the term aforesaid; and D. S. Griffin, W. H. Granger, Thomas H. Barnes, W. H. Howes, Arthur Hemingway, and L. G. Wheeler each cast one vote for Henry Wilson for Vice-President of the United States for the term aforesaid, making six votes cast by said electors for each of the respective candidates above named.

"D. S. GRIFFIN.

"W. H. GRANGER.

"THOMAS H. BARNES.

"ARTHUR HEMINGWAY.

"W. H. HOWES.

"L. G. WHEELER.

"STATE OF ARKANSAS, STATE DEPARTMENT,

"Little Rock, Ark., December 4, 1872.

"I, J. M. Johnson, secretary of state of Arkansas, certify that the following is the true and correct list of electors in and for the State of Arkansas, to vote for President and Vice-President of the United States for the term commencing March 4, 1873, who were elected at the general election held in pursuance of the law, in this State, No.

vember 5, 1872, namely : D. S. Griffin, W. H. Granger, Thomas Barnes, W. H. Howes, Arthur Hemingway, and L. G. Wheeler.

[L. S.]

"J. M. JOHNSON,
"Secretary of State."

Mr. MORTON. I ask if there is no certificate there from the governor?

Several SENATORS. No.

Mr. MORTON. I then ask leave to withdraw my resolution.

Mr. EDMUNDS. I should like to have the seal read. It does not purport to be the seal of the State, but the seal of the secretary.

The VICE-PRESIDENT. The Senator from Indiana withdraws his resolution.

Mr. SHERMAN. I renew it.

Mr. EDMUNDS. Let it be read, and then I will move to amend it.

Mr. SHERMAN. The resolution?

Mr. EDMUNDS. Yes, sir.

The Chief Clerk read as follows :

"Resolved, That the electoral vote of Arkansas should be counted."

Mr. EDMUNDS. I move to amend that by inserting after the word "should" the word "not." I ask now that the Secretary may report to the Senate the seal which attests this action of the secretary of state of Arkansas.

The VICE-PRESIDENT. The Secretary will, as far as possible, communicate to the Senate what is the impression of this seal.

The CHIEF CLERK. The seal is composed of a field, the figures of which I cannot very well describe, with two concentric circles, between which are the words "seal of the secretary of state, Arkansas."

Mr. EDMUNDS. It is not the State seal at all.

The VICE-PRESIDENT. The Chair will state that he has received from the House of Representatives a copy of the protest made by the Senator from Arkansas, [Mr. Rice,] which is exactly like the rough copy which he sent up, and will therefore be substituted on the Journal for it. The question is on the amendment of the Senator from Vermont, to insert the word "not" in the resolution of the Senator from Ohio.

Mr. RICE. I ask to have the constitution of the State of Arkansas in regard to the seal of the State read, and also in regard to the certificate required to the electoral vote.

Mr. ANTHONY. I submit whether that is not debate.

The VICE-PRESIDENT. The Senator from Rhode Island objects. The Chair has stated heretofore that laws, &c., could be read only by unanimous consent. The rule is imperative against debate. No protest has heretofore been made against reading laws. When the point is made by the Senator from Rhode Island the Chair must rule that it is not in accordance with the twenty-second joint rule. ["Question!" "Question!"] The question is on the amendment of the Senator from Vermont, to insert the word "not;" so as to make the resolution read that the vote of Arkansas shall not be counted.

Mr. EDMUNDS. I will ask again that the full inscription of the seal, or what purports to be the seal, should be read. I believe the Secretary by accident did not read all the words. I believe it appears distinctly to be the seal of the secretary, and not the seal of the State.

The VICE-PRESIDENT. The Secretary will report it.

The CHIEF CLERK. The words of "Seal of the secretary of state, Arkansas."

Mr. EDMUNDS. That is it.

Mr. CONKLING. May I inquire whether the coat of arms of Arkansas is not there, after the impress of the seal?

Mr. EDMUNDS. Who can answer that question?

Mr. CONKLING. Certainly the Senators from the State know whether it is or not.

Mr. HAMILTON, of Maryland. I ask the Senator from Arkansas—

Mr. TRUMBULL. I object to this debate. If the statute cannot be read, certainly Senators should not be allowed to indulge in debate.

The VICE-PRESIDENT. The Senator from Illinois insists on the enforcement of the rule. The Chair has ruled that this is in the nature of debate. The Secretary has read the official paper from Arkansas and attempted to describe the seal—

Mr. CONKLING. I beg pardon of the Chair if I interrupt him.

The VICE-PRESIDENT. Not at all.

Mr. CONKLING. My purpose is to ask unanimous consent that we may hear the statute read, if there be a statute bearing on the subject.

The VICE-PRESIDENT. The Senator from Rhode Island objected.

Mr. ANTHONY. I withdraw the objection; but I ask the Chair if the Senate, by unanimous consent, can dispense with a joint rule of the two Houses of Congress? I make no objection, however.

The VICE-PRESIDENT. The Senate by unanimous consent cannot dispense with a joint rule; and if there is no protest against a statute being read, that not being language spoken by any Senator, the Chair himself would not check the reading of that

statute; but he would if any Senator commented on it, which would be in the nature of debate. The Chair does not know where the statute is; but if no Senator objects, the statute will be reported. [A pause.] It does not appear to be in the Chamber.

MR. RICE. I have sent for the statute.

MR. CLAYTON. Will it be in order to have this seal compared with the seal of the State named, on file in the archives of the Senate?

THE VICE-PRESIDENT. The Chair thinks not.

MR. STEWART. It could be compared with the credentials of Senators.

THE VICE-PRESIDENT. The Chair thinks the presentation of documents in the Department of State or in the Secretary's office of the Senate would be in the nature of debate.

MR. HOWE. By the unanimous consent of the Senate, I suppose that comparison might be made.

THE VICE-PRESIDENT. The Chair has stated, in regard to official documents, that he would not himself arrest them as in the nature of debate.

MR. HOWE. So that if there be no objection this comparison may be made.

MR. BOREMAN. I should like to have the paper read.

THE VICE-PRESIDENT. The Chair does not know where the paper is that is sought to be compared with the seal on this certificate.

MR. CLAYTON. It can be compared with the seal on the credentials of the Senator-elect lately presented.

THE VICE-PRESIDENT. The question recurs on the amendment of the Senator from Vermont to insert the word "not."

MR. CLAYTON. I only want to say that that is the seal of the State.

THE VICE-PRESIDENT. That is debate. The question is on the amendment of the Senator from Vermont to insert the word "not."

MR. RICE. I ask for the yeas and nays.

The yeas and nays were ordered.

MR. RAMSEY. May I presume to ask the Senator from Arkansas whether this is the great seal—

MR. TRUMBULL and others. I object.

THE VICE-PRESIDENT. The question is in the nature of debate, and is objected to by several Senators.

The question being taken on the amendment of Mr. Edmunds, by yeas and nays, resulted—yeas 24, nays 25; as follows:

YEAS—Messrs. Bayard, Boreman, Carpenter, Casserly, Cooper, Edmunds, Fenton, Ferry of Michigan, Hamilton of Maryland, Hamlin, Hill, Johnston, Kelly, Machen, Morrill of Maine, Norwood, Ransom, Rice, Robertson, Saulsbury, Schurz, Scott, Stevenson, Stockton, Thurman, Tipton, Trumbull, and Vickers—28.

NAYS—Messrs. Ames, Anthony, Caldwell, Chandler, Clayton, Cole, Conkling, Corbett, Cragin, Ferry of Connecticut, Flanagan, Frelinghuysen, Gilbert, Harlan, Hitchcock, Howe, Logan, Morrill of Vermont, Nye, Pool, Ramsey, Sherman, Sprague, Stewart, and West—25.

ABSENT—Messrs. Alcorn, Blair, Brownlow, Buckingham, Cameron, Davis, Goldthwaite, Hamilton of Texas, Lewis, Morton, Osborn, Patterson, Pomeroy, Pratt, Sawyer, Spencer, Sumner, Wilson, Windom, and Wright—20.

So the amendment was agreed to.

THE VICE-PRESIDENT. The question recurs upon agreeing to the resolution as amended, that the vote of Arkansas shall not be counted.

MR. STEWART called for the yeas and nays, and they were ordered; and being taken, resulted—yeas 28, nays 24; as follows:

YEAS—Messrs. Bayard, Boreman, Carpenter, Casserly, Cooper, Edmunds, Fenton, Ferry of Michigan, Hamilton of Maryland, Hamlin, Hill, Johnston, Kelly, Machen, Morrill of Maine, Norwood, Ransom, Rice, Robertson, Saulsbury, Schurz, Scott, Stevenson, Stockton, Thurman, Tipton, Trumbull, and Vickers—28.

NAYS—Messrs. Ames, Caldwell, Chandler, Clayton, Cole, Conkling, Corbett, Cragin, Ferry of Connecticut, Flanagan, Frelinghuysen, Gilbert, Harlan, Hitchcock, Howe, Logan, Morrill of Vermont, Nye, Pool, Ramsey, Sherman, Sprague, Stewart, and West—24.

ABSENT—Messrs. Alcorn, Anthony, Blair, Brownlow, Buckingham, Cameron, Davis, Goldthwaite, Hamilton of Texas, Lewis, Morton, Osborn, Patterson, Pomeroy, Pratt, Sawyer, Spencer, Sumner, Wilson, Windom, and Wright—21.

So the resolution was agreed to.

THE VICE-PRESIDENT. There were seven objections submitted in the Representative Hall by Senators and Representatives against counting the votes from Louisiana. The Chair thinks he has them in the order in which the objectors were recognized by the Chair: first, the Senator from Louisiana, [Mr. West;] second, the Representative from Louisiana, [Mr. Sheldon;] third, the Senator from Wisconsin, [Mr. Carpenter;] fourth, the Representative from New York, [Mr. Potter;] fifth, the Representative from Ohio, [Mr. Stevenson;] sixth, the Senator from Illinois, [Mr. Trumbull;] and seventh, the Senator from West Virginia, [Mr. Boreman.]

Mr. CARPENTER. I ask leave to offer the following resolution :

Resolved, That the electoral vote of the State of Louisiana be not counted."

Mr. FRELINGHUYSEN. Mr. President, they—

The VICE-PRESIDENT. The Senator from New Jersey. The Chair must first submit these papers.

Mr. FRELINGHUYSEN. They have all been read.

The VICE-PRESIDENT. They will be considered as read, if there be no objection.

Mr. FRELINGHUYSEN. I offer a substitute, which the Senator from Wisconsin will probably accept.

The VICE-PRESIDENT. The Senator from Wisconsin moves the resolution just reported, and the Senator from New Jersey moves to amend it. The amendment will be read.

The Chief Clerk read as follows :

Resolved, That all the objections presented having been considered, no electoral vote purporting to be that of the State of Louisiana be counted."

Mr. CARPENTER. I accept that amendment.

The VICE-PRESIDENT. The Senator from Wisconsin accepts the amendment; and the question is on agreeing to the resolution as modified.

Mr. TRUMBULL. I offer a substitute, which I send to the desk.

The Chief Clerk read as follows :

"Whereas the Constitution of the United States declares that 'each State shall appoint, in such manner as the Legislature thereof may direct,' the number of electors of President and Vice-President to which such State may be entitled; and whereas an election for electors was held in the State of Louisiana on the 4th day of November, 1872, in pursuance of the Constitution and laws of the United States and of the State of Louisiana; and whereas the official returns of said election were transmitted to the governor of the State as required by the laws thereof, and by him opened and laid before a returning board of which the governor was, *ex officio*, a member, to be canvassed by said board in pursuance of the laws of said State; and whereas before the canvass of said returns was completed said returning board was enjoined and restrained from further proceeding by an order of E. H. Durell, United States judge for the district of Louisiana; and whereas the official returns so received and opened by the governor were tabulated by the assistant secretary of said returning board, and are now in the possession of the Senate, from which it appears that T. C. Manning, C. A. Weed, Andrew S. Herron, Hugh J. Campbell, Louis Bush, Allen Thomas, L. V. and J. C. Moncure received a majority of votes cast for electors at said election; and whereas said governor caused lists of the names of said electors to be made, certified, and delivered as required by the act of Congress of March 1, 1792"

Mr. WEST. I raise the point of order on the reading of that preamble, that it is in the nature of argument.

Mr. TRUMBULL. Let it all be read first.

Mr. CONKLING. It need not be read, necessarily.

Mr. WEST. The same point of order was taken against the Senator from New York.

The VICE-PRESIDENT. The proposition has not been read.

Mr. WEST. Enough of it has been read for my satisfaction.

The VICE-PRESIDENT. That may be; but the Chair thinks it is the right of a Senator to submit a paper—

Mr. CONKLING. I beg leave to ask a question of the Chair. Where a paper has been so far read as to show that it is out of order, is it the right of any Senator to have the whole of it read? The point of the Senator from Louisiana is that this is out of order by reason of what has been read. If he is in the right about that, I submit there is no reason why it should be read through.

Mr. CARPENTER. If that be not so, the rule can be evaded by presenting an argument in the form of a proposition, and then withdrawing it after it has been fully read.

Mr. TRUMBULL. I object to these speeches.

The VICE-PRESIDENT. The Senator from Illinois objects to debate. The paper offered by the Senator from Illinois as an amendment having been read as far as the Secretary had progressed with it, the Senator from Louisiana makes the point of order that sufficient has been read to disclose the fact that it is not in order under the twenty-second joint rule. The Chair submits that question to the Senate.

Mr. TRUMBULL. Cannot the Senate hear it read before deciding upon it? It is nearly through.

Mr. SHERMAN. You might as well send up the Congressional Globe.

The VICE-PRESIDENT. It is a question to be decided by the Senate, as the Chair has stated. Is the Senate ready for the question?

Mr. TRUMBULL. What is the question? Whether my amendment shall be read?

The VICE-PRESIDENT. The question is, whether the Senate will receive this as an amendment.

Mr. TRUMBULL. Without having it read?

The VICE-PRESIDENT. As far as it has been read, it having been sufficiently dis-

closed by the reading that it is not in order under the twenty-second joint rule. That is the point made.

MR. TRUMBULL. The Chair will bear witness that the amendment of the Senator from New York was read once or twice before we voted on it.

MR. CONKLING. Not after the point of order?

MR. STEVENSON. Is it not the right of a Senator to have a paper read? How can we vote knowingly without having it read?

THE VICE-PRESIDENT. Each Senator votes on the part which has been read. The Senator from Louisiana makes the point of order that that discloses the fact that this proposition is not in order under the twenty-second joint rule; and if there is any doubt about it Senators will vote in the negative so that it shall be read through.

MR. STEVENSON. I submit to the Presiding Officer of the Senate whether a Senator has not the privilege of having every paper read for information that he is called upon to vote on.

THE VICE-PRESIDENT. Not always. If a motion to adjourn was made, a Senator would not have a right to have a paper read pending that motion.

MR. STEVENSON. Can the Clerk be interrupted in the middle of the reading of a paper?

THE VICE-PRESIDENT. The Chair thinks he can. For instance, if pending the resolution of the Senator from New Jersey, now before the body, some Senator should move an appropriation bill as an amendment to it, the Chair would think its reading could be interrupted, as not being in order. But the Chair desired the paper to be read; his preference was that it should be read, but the Senator from Louisiana made the point.

MR. WEST. And I now renew it.

THE VICE-PRESIDENT. That point of order is before the Senate, and they are about to decide it.

MR. CONKLING, (to Mr. West.) Let us vote; that is all you want.

THE VICE-PRESIDENT. Senators, you who are in favor of considering the amendment as far as read, in order, under the twenty-second joint rule, will say ay; those opposed will say no.

MR. STEVENSON. I ask for the yeas and nays. This is an important question; it applies not to to-day alone, but to all time.

The yeas and nays were ordered; and being taken, resulted—yeas 21, nays 29; as follows:

YEAS—Messrs. Bayard, Carpenter, Casserly, Cooper, Fenton, Hamilton of Maryland, Hamlin, Hill, Johnston, Kelly, Machen, Norwood, Ransom, Rice, Saulsbury, Stevenson, Stockton, Thurman, Tipton, Trumbull, and Vickers—21.

NAYS—Messrs. Ames, Anthony, Boreman, Caldwell, Chandler, Clayton, Cole, Conklings, Corbett, Cragin, Edmunds, Ferry of Connecticut, Ferry of Michigan, Flanagan, Frelinghuysen, Gilbert, Harlan, Howe, Logan, Morrill of Maine, Morrill of Vermont, Nye, Pool, Ramsey, Sawyer, Sherman, Sprague, Stewart, and West—29.

ABSENT—Messrs. Alcorn, Blair, Brownlow, Buckingham, Cameron, Davis, Goldthwaite, Hamilton of Texas, Hitchcock, Lewis, Morton, Osborn, Patterson, Pomeroy, Pratt, Robertson, Schurz, Scott, Spencer, Sumner, Wilson, Windom, and Wright—23.

THE VICE-PRESIDENT. The Senate refuses to receive the amendment, so far as read, as in order.

MR. TRUMBULL. I offer the rest of the paper which I sent up to the Chair as an amendment to the resolution pending. [Laughter.]

THE VICE-PRESIDENT. The Senator from Illinois offers the remaining part of the paper. The Secretary will report it.

The chief clerk read as follows:

"Resolved, That the votes of the electors declared to have been elected as aforesaid by the governor of the State of Louisiana are entitled to be counted."

MR. TRUMBULL. I inquire if the Secretary had read all but that?

THE VICE-PRESIDENT. He had.

MR. TRUMBULL. All but that? [Laughter.]

THE VICE-PRESIDENT. He had. The question is on the amendment of the Senator from Illinois.

MR. EDMUNDS. I should like to hear the original resolution reported.

THE VICE-PRESIDENT. The original resolution will be read.

The chief clerk read as follows:

"Resolved, That all the objections having been considered, no electoral vote purporting to be that of the State of Louisiana be counted."

The chief clerk also read the amendment of Mr. Trumbull.

MR. FLANAGAN. I rise to a point of order, sir. The point is this: there was only one resolution in that paper, and we have voted upon that.

THE VICE-PRESIDENT. The Senator is mistaken. The reading of the preamble, which was quite lengthy, had just been completed, and the Secretary had reached the resolution, but had not read it, when the Senator from Louisiana made a point on what had been read, and the Senate ruled that out; but the resolution itself was not ruled

out; and the question now is on agreeing to the amendment of the Senator from Illinois to the resolution of the Senator from Wisconsin.

Mr. TRUMBULL. I ask for the yeas and nays. It is an important question whether a return in all respects in conformity with law shall be received.

Mr. EDMUNDS. That is debate.

The yeas and nays were ordered; and being taken, resulted—yeas 20, nays 35; as follows:

YEAS—Messrs. Bayard, Casserly, Cooper, Fenton, Ferry of Connecticut, Hamilton of Maryland, Johnston, Kelly, Machen, Ransom, Rice, Saulsbury, Schurz, Sprague, Stevenson, Stockton, Thurman, Tipton, Trumbull, and Vickers—20.

NAYS—Messrs. Ames, Anthony, Boreman, Caldwell, Carpenter, Chandler, Clayton, Cole, Conkling, Corbett, Cragin, Edmunds, Ferry of Michigan, Flanagan, Frelinghuysen, Gilbert, Hamlin, Harlan, Hill, Hitchcock, Howe, Logan, Morrill of Maine, Morrill of Vermont, Morton, Norwood, Nye, Pool, Ramsey, Robertson, Sawyer, Scott, Sherman, Stewart, and West—35.

ABSENT—Messrs. Alcorn, Blair, Brownlow, Buckingham, Cameron, Davis, Goldthwaite, Hamilton of Texas, Lewis, Osborn, Patterson, Pomeroy, Pratt, Spencer, Sumner, Wilson, Windom, and Wright—18.

So the amendment was rejected.

The VICE-PRESIDENT. The question recurs on the resolution of the Senator from Wisconsin, [Mr. Carpenter.]

Mr. THURMAN. I call for the yeas and nays on that.

The yeas and nays were ordered; and being taken, resulted—yeas 33, nays 16; as follows:

YEAS—Messrs. Ames, Anthony, Boreman, Caldwell, Carpenter, Chandler, Cole, Conkling, Corbett, Edmunds, Ferry of Michigan, Flanagan, Frelinghuysen, Gilbert, Hamlin, Harlan, Hill, Hitchcock, Howe, Logan, Morrill of Maine, Morrill of Vermont, Morton, Norwood, Nye, Pool, Ramsey, Robertson, Sawyer, Scott, Sherman, Stewart, and West—33.

NAYS—Messrs. Bayard, Casserly, Cooper, Ferry of Connecticut, Hamilton of Maryland, Johnston, Kelly, Machen, Ransom, Saulsbury, Sprague, Stevenson, Stockton, Thurman, Tipton, and Vickers—16.

ABSENT—Messrs. Alcorn, Blair, Brownlow, Buckingham, Cameron, Clayton, Cragin, Davis, Fenton, Goldthwaite, Hamilton of Texas, Lewis, Osborn, Patterson, Pomeroy, Pratt, Rice, Schurz, Spencer, Sumner, Trumbull, Wilson, Windom, and Wright—24.

The VICE-PRESIDENT. The resolution is agreed to; and the Secretary will at once communicate to the House of Representatives this action of the Senate.

Mr. MORTON. Now that the vote is taken, would it be in order to make a remark? ["No."]

The VICE-PRESIDENT. The Chair thinks that until the point of order raised by the Senator from Vermont [Mr. Edmunds] is decided, which has been submitted to the Senate, it would not be in order to take up any proposition or indulge in debate. The Senator from Vermont has made the point of order that until the joint convention dissolves, no business, except that relative to the counting of the electoral votes, can be entertained under the twenty-second joint rule and the Constitution. That was about to be submitted to the Senate, but at that time the Senate went to the House of Representatives.

Mr. MORTON. I simply desire to call the attention of the Senate to the fact that the Senate has voted to exclude the electoral vote of Arkansas because of the want of the certificate—

Mr. EDMUNDS. I object to debate. If there is to be speech-making here, I wish to make a speech myself.

The VICE-PRESIDENT. Until the point of order is decided by the Senate whether any other proposition can be taken up, nothing can be debated or proposed even.

Mr. MORTON. I was not proposing to make a speech or to debate anything.

The VICE-PRESIDENT. But the joint convention is still in session.

Mr. MORTON. I was disposed to make a remark in lieu of making a question of order.

The VICE-PRESIDENT. If it is a question of order the Chair will hear the Senator. Mr. MORTON. I shall have to make the remark to state the question. [Laughter.]

The VICE-PRESIDENT. A point of order is not debate, because the Senator from Indiana can take any Senator off his feet with a legitimate point of order. That he has the right to do at any time.

Mr. CLAYTON. I want to make a personal explanation in relation to what transpired relative to the vote of Arkansas.

Mr. EDMUNDS. I object to that, Mr. President.

The VICE-PRESIDENT. The Senator from Vermont objects.

Mr. CLAYTON. I should like to make a personal explanation.

Mr. EDMUNDS. I object, Mr. President.

The VICE-PRESIDENT. The Senator from Vermont objects.

Mr. CLAYTON. I will do so on some other occasion, then.

The VICE-PRESIDENT. If it is the pleasure of the Senate to have the question raised by the Senator from Vermont submitted, the Chair will now submit it to the Senate: and that is that until the final declaration of the votes for President and Vice-President in the presence of both houses, no other business is in order. That question is to be submitted to the Senate.

The question being put, it was decided in the affirmative.

Mr. EDMUNDS. I withdraw the objection I made to the Senator from Arkansas making a personal explanation.

The VICE-PRESIDENT. The Senator from Arkansas now asks consent to make a personal explanation.

Mr. CLAYTON. It will take but a minute.

The VICE-PRESIDENT. Is there objection?

Mr. SPRAGUE. I object.

Mr. CLAYTON. I want to correct a misstatement.

The VICE-PRESIDENT. The Senator from Rhode Island objects.

Mr. FRELINGHUYSEN. The Senator from Arkansas wishes to correct a misstatement of his own. I hope nobody will object.

The VICE-PRESIDENT. Does the Senator from Rhode Island withdraw his objection to the Senator from Arkansas correcting a misstatement of his own?

Mr. SPRAGUE. I withdraw the objection.

Mr. CLAYTON. While the question was up as to the seal which was upon the certificate from Arkansas, I gave it as my opinion that that was the seal of the State. I have since examined the seal on the credentials of Mr. Dorsey, and I find that I was mistaken; that this is the seal of the secretary of state, and not the seal of the State.

Mr. SCOTT. I move that the House be informed that the Senate have decided the question.

The VICE-PRESIDENT. As soon as the Chair announced the last vote, the Secretary left the door of the Senate to go to the House to communicate the action of the Senate.

A message was received from the House of Representatives, by Mr. McPherson, its Clerk, announcing that the House had passed the following resolution:

“Resolved, That the electoral vote of the State of Arkansas, as reported by the tellers, be counted.”

Mr. EDMUNDS. I move, if it be in order, that the Senate take a recess for five minutes.

The VICE-PRESIDENT. The rule provides—

“Such joint meeting shall not be dissolved until the electoral votes are all counted and the result declared; and no recess shall be taken unless a question shall have arisen in regard to counting any of such votes, in which case it shall be competent for either house, acting separately, in the manner hereinbefore provided, to direct a recess not beyond the next day at the hour of one o'clock p. m.”

The Senator from Vermont moves that the Senate take a recess for five minutes.

Mr. CONKLING. Is it not by concurrent resolution that that must be done?

The VICE-PRESIDENT. The rule is specifically the other way. The Chair will again read it:

“In which case it shall be competent for either house, acting separately, in the manner hereinbefore provided, to direct a recess not beyond the next day at the hour of one o'clock p. m.”

The question is on the motion of the Senator from Vermont, that the Senate now take a recess for five minutes.

The motion was agreed to; and at the expiration of the recess the Senate resumed its session, when the following message was received from the House of Representatives by Mr. McPherson, its Clerk:

Mr. President, the House of Representatives have passed the following resolution:

“Resolved, That in the judgment of the House, none of the returns reported by the tellers as electoral votes of the State of Louisiana should be counted.”

Mr. SHERMAN. I move that the Senate now return to the hall of the House of Representatives.

The motion was agreed to; and the Senate (at seven o'clock and forty-six minutes p. m.) again proceeded to the hall of the House of Representatives.

IN THE PRESENCE OF THE SENATE AND HOUSE OF REPRESENTATIVES,

February 12, 1873.

At seven o'clock and forty-five minutes p. m. the Senate in a body re-entered the hall.

The VICE-PRESIDENT having resumed the chair, said: The objection made by the Senator from Arkansas to the counting of the electoral vote of that State as declared by the tellers having been considered by the two houses, the Senate has resolved as follows:

“Resolved, That the electoral vote of Arkansas should not be counted.”

And the House has resolved as follows :

"Resolved, That the electoral vote of the State of Arkansas, as reported by the tellers, be counted."

There being a non-concurrence of the two houses on this question, the vote of Arkansas, in accordance with the provisions of the twenty-second joint rule, will not be counted. That rule provides that—

"No question shall be decided affirmatively, and no vote objected to shall be counted, except by the concurrent votes of the two houses."

The several objections made on various grounds to the counting of the electoral votes from Louisiana having been considered by the two houses, the Senate has resolved as follows :

"Resolved, That all objections presented having been considered, no electoral vote purporting to be that of the State of Louisiana be counted."

And the House has resolved as follows :

"Resolved, That, in the judgment of this House, none of the returns reported by the tellers as electoral votes of the State of Louisiana should be counted."

On this question there is a concurrence of the houses; and the electoral votes of Louisiana will not be counted. The tellers will now announce the result of the vote.

Senator SHERMAN (one of the tellers) announced the result, as follows :

List of votes for President and Vice-President of the United States for the constitutional term to commence on the 4th of March, 1873.

States.	Number of electoral votes.	For President.						For Vice-President.								
		Ulysses S. Grant, of Illinois.	Horace Greeley, of New York.	B. Gratz Brown, of Missouri.	Thomas A. Hendricks, of Indiana.	Charles J. Jenkins, of Georgia.	David Davis, of Illinois.	Henry Wilson, of Massachusetts.	B. Gratz Brown, of Missouri.	Nathaniel P. Banks, of Massachusetts.	George W. Julian, of Indiana.	Alfred H. Colquitt, of Georgia.	John M. Palmer, of Illinois.	Thomas E. Bramlette, of Kentucky.	William S. Groesbeck, of Ohio.	Willis B. Machen, of Kentucky.
Maine	7	7						7								
New Hampshire	5	5						5								
Vermont	5	5						5								
Massachusetts	13	13						13								
Rhode Island	4	4						4								
Connecticut	6	6						6								
New York	35	35						35								
New Jersey	9	9						9								
Pennsylvania	29	29						29								
Delaware	3	3						3								
Maryland	8				8			8								
Virginia	11	11						11								
North Carolina	10	10						10								
South Carolina	8	7						7								
Georgia*	11			6		2		5	1			5				
Alabama	10	10						10								
Louisiana†	8															
Ohio	22	22						22								
Kentucky	12			4	8			8						3		1
Tennessee	12				12			12								
Indiana	15	15						15								
Illinois	21	21						21								
Missouri	15			8	6		1	6			5		3		1	
Arkansas†	6															
Mississippi	8	8						8								
Michigan	11	11						11								
Florida	4	4						4								
Texas	8				8			8								
Iowa	11	11						11								
Wisconsin	10	10						10								
California	6	6						6								
Minnesota	5	5						5								
Oregon	3	3						3								
Kansas	5	5						5								
West Virginia	5	5						5								
Nevada	3	3						3								
Nebraska	3	3						3								
Total	366	286	....	18	42	2	1	286	47	1	5	5	3	3	1	1

* The three votes of Georgia for Horace Greeley, of New York, for President were excluded.

† The electoral votes of Louisiana and Arkansas were not counted.

The VICE-PRESIDENT. The whole number of electors to vote for President and Vice-President of the United States, as reported by the tellers, is 366, of which the majority is 184. Of these votes, 349 have been counted for President and 352 for Vice-President of the United States. The result of the vote for President of the United States, as reported by the tellers, is: for Ulysses S. Grant, of Illinois, 286 votes; for B. Gratz Brown, of Missouri, 18 votes; for Thomas A. Hendricks, of Indiana, 42 votes; for Charles J. Jenkins, of Georgia, 2 votes; and for David Davis, of Illinois, 1 vote. The result of the vote, as reported by the tellers, for Vice-President of the United States is: for Henry Wilson, of Massachusetts, 286 votes; for B. Gratz Brown, of Missouri, 47 votes; for Nathaniel P. Banks, of Massachusetts, 1 vote; for George W. Julian, of Indiana, 5 votes; for Alfred H. Colquitt, of Georgia, 5 votes; for John M. Palmer, of Illinois, 3 votes; for Thomas E. Bramlette, of Kentucky, 3 votes; for William S. Groesbeck, of Ohio, 1 vote; and for Willis B. Machen, of Kentucky, 1 vote.

Wherefore I do declare that Ulysses S. Grant, of the State of Illinois, having received a majority of the whole number of electoral votes, is duly elected President of the United States for four years, commencing on the 4th day of March, 1873; and that Henry Wilson, of the State of Massachusetts, having received a majority of the whole number of electoral votes for Vice-President of the United States, is duly elected Vice-President of the United States for four years, commencing on the 4th day of March, 1873.

The object for which the House and Senate have assembled in joint convention having been accomplished, the Senate will retire to its chamber.

The Senate accordingly retired from the hall of the House of Representatives.

The Speaker then resumed the chair, and called the House to order.

And then, on motion of Mr. SPEER, (at eight o'clock p. m.,) the House adjourned.

IN SENATE, *February 12, 1873.*

NOTIFICATION OF ELECTION.

Mr. SHERMAN. I desire to offer a formal resolution:

Resolved, That a committee of one member of the Senate be appointed by this body to join a committee of two members of the House of Representatives, to be appointed by that house, to wait on Ulysses S. Grant, of Illinois, and to notify him that he has been duly elected President of the United States for four years, commencing on the 4th day of March, 1873; and also to notify Henry Wilson, of Massachusetts, that he has been duly elected Vice-President of the United States for four years, commencing on the 4th day of March, 1873."

The resolution was considered by unanimous consent, and agreed to.

The VICE-PRESIDENT. How shall the committee be appointed?

Mr. EDMUNDS. By the Chair.

The VICE-PRESIDENT. If there be no objection, that will be regarded as the sense of the Senate, and the Chair appoints the Senator from Ohio, (Mr. Sherman.)

Mr. EDMUNDS. I move that the Senate do now adjourn.

The motion was agreed to; and (at 8 o'clock and 7 minutes p. m.) the Senate adjourned.

IN SENATE, *February 13, 1873.*

TWENTY-SECOND JOINT RULE.

Mr. SHERMAN submitted the following concurrent resolution; which was referred to the Committee on Privileges and Elections:

Resolved, (the House of Representatives concurring,) That the twenty-second joint rule be rescinded.

BEST AND MOST PRACTICABLE MODE OF ELECTING PRESIDENT AND VICE-PRESIDENT.

IN SENATE, *May 28, 1874.*

Mr. Morton submitted the following report:

On the 10th day of March, 1873, the Senate of the United States adopted the following resolution:

Resolved, That the Committee on Privileges and Elections be instructed to examine and report, at the next session of Congress, upon the best and most practicable mode of electing the President and Vice-President, and providing a tribunal to adjust and decide all contested questions connected therewith, with leave to sit during vacation."

In pursuance of the authority and instructions contained in this resolution, the Committee on Privileges and Elections have had the subjects under consideration, and submit the following report, embodying the conclusions at which they have arrived:

PRESENT MODE OF ELECTION.

The existing provision in the Constitution of the United States for the election of the President and Vice-President is in the following words:

"Each State shall appoint, in such manner as the legislature thereof may direct, a number of electors equal to the whole number of Senators and Representatives to which the State may be entitled in the Congress; but no Senator or Representative, or person holding an office of trust or profit under the United States, shall be appointed an elector. (Art. II, sec. 2.)

"The electors shall meet in their respective States, and vote by ballot for President and Vice-President, one of whom, at least, shall not be an inhabitant of the same State with themselves; they shall name in their ballots the person voted for as President, and in distinct ballots the person voted for as Vice-President, and they shall make distinct lists of all persons voted for as President and of all persons voted for as Vice-President, and of the number of votes for each, which lists they shall sign and certify, and transmit sealed to the seat of Government of the United States, directed to the President of the Senate. The President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates, and the votes shall then be counted. The person having the greatest number of votes for President shall be the President, if such number be a majority of the whole number of electors appointed; and if no person have such majority, then from the persons having the highest number, not exceeding three, on the list of those voted for as President, the House of Representatives shall choose immediately, by ballot, the President. But in choosing the President the votes shall be taken by States, the representation from each State having one vote; a quorum for this purpose shall consist of a member or members from two-thirds of the States, and a majority of all the States shall be necessary to a choice. And if the House of Representatives shall not choose a President whenever the right of choice shall devolve upon them, before the 4th day of March next following, then the Vice-President shall act as President, as in the case of the death or other constitutional disability of the President. The person having the greatest number of votes as Vice-President shall be Vice-President, if such number be a majority of the whole number of electors appointed, and if no person have a majority, then, from the two highest numbers on the list, the Senate shall choose the Vice-President; a quorum for this purpose shall consist of two-thirds of the whole number of Senators, and a majority of the whole number shall be necessary to a choice. But no person constitutionally ineligible to the office of President shall be eligible to that of Vice-President of the United States.' (Amendments, Art. XII.)

PROPOSED AMENDMENT.

As a substitute for the foregoing provisions, the committee propose the following joint resolution.

"Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, (two-thirds of each House concurring therein,) That the following article is hereby proposed as an amendment to the Constitution of the United States, and, when ratified by the legislatures of three-fourths of the several States, shall be valid, to all intents and purposes, as a part of the Constitution, to wit:

"ARTICLE —.

"I. The President and Vice-President shall be elected by the direct vote of the people in the manner following: Each State shall be divided into districts, equal in number to the number of Representatives to which the State may be entitled in the Congress, to be composed of contiguous territory, and to be as nearly equal in population as may be; and the person having the highest number of votes in each district for President shall receive the vote of that district, which shall count one presidential vote.

"II. The person having the highest number of votes for President in a State shall receive two presidential votes from the State at large.

"III. The person having the highest number of presidential votes in the United States shall be President.

"IV. If two persons have the same number of votes in any State, it being the highest number, they shall receive each one presidential vote from the State at large; and if more than two persons shall have each the same number of votes in any State, it being the highest number, no presidential vote shall be counted from the State at large. If more persons than one shall have the same number of votes, it being the highest number in any district, no presidential vote shall be counted from that district.

"V. The foregoing provisions shall apply to the election of Vice-President.

"VI. The Congress shall have power to provide for holding and conducting the elections of President and Vice-President, and to establish tribunals for the decision of such elections as may be contested.

"VII. The States shall be divided into districts by the legislatures thereof, but the Congress may at any time by law make or alter the same."

In support of the proposed amendment, the committee submit the following observations:

THE ORIGINAL THEORY.

The theory of the electoral college was, that a body of men should be chosen for the express purpose of electing a President and Vice-President, who would be distinguished by their eminent ability and wisdom, who would be independent of popular passion, who would not be influenced by tumult, cabal, or intrigue, and that in the choice of the President they would be left perfectly free to exercise their judgment in the selection of the proper person. And in order to secure more perfectly the independence of the electors, the Constitution provides that they shall vote by ballot in the electoral college so that it might not be known to each other or to the country how they voted. The idea was that a small body of select men could be more safely intrusted with the election of President and Vice-President than the whole body of the people.

The members of the convention in 1787 started out with the idea that the President and Vice-President could not be safely chosen by the people of the United States. The theory of democratic government was then so imperfectly understood that it was not deemed safe to trust the mass of the people with the election of the Chief Magistrate; and when they finally agreed to vest the election in electors chosen for the express purpose, it was deemed a great stride toward popular government.

It was objected to leaving the election of President to the mass of the people as one community, that it would result in consolidation—that the smaller States would be swallowed up by the larger. It was further objected that in such an election the slave States would be shorn of their power, because their slaves could not vote and the masters could not vote for them. The idea of interposing an electoral body between the chief magistracy and the people had come down from ancient times, and had its origin in aristocratic forms of government, where the nobility elected the sovereign or chief magistrate.

The first plan in the convention of 1787 was that Congress should elect the President, and when the idea of an electoral college was first discussed, it was proposed that the electors themselves should be appointed by Congress, but it was afterward determined to leave the choice of electors to the legislatures of the several States, in order to make the Executive independent of the legislature, and preserve the power of the States, which was as near as they were willing to bring the presidential election to the people.

THE LESSON OF EXPERIENCE.

Now that democracy is better understood, and popular government has been more thoroughly tested, we have learned that large electoral bodies can be more safely trusted than small ones; that while it may be possible to corrupt small bodies, it is impossible to corrupt large ones, and that the danger of tumult, which was ever present in the minds of the framers of the Constitution, arises chiefly from the exclusion of the masses from power, and conferring it upon a few.

That the candidates for electors should be pledged in advance to vote for particular persons was not only not contemplated by the framers of the Constitution, but was expressly excluded by their theory. They were to be independent, not influenced by previous committals or engagements, so that when they came together they could deliberate with perfect freedom for the best interests of the Republic. How completely this theory has been overturned in practice for more than seventy years we need not recite. For more than seventy years the electors have been pledged in advance to vote for particular persons for President and Vice-President. They themselves have been nominated as candidates for electors upon express pledges or understandings, which, although not binding in law, have been effectually binding upon them in public opinion, insomuch that an elector who would violate the understanding upon which he was nominated, and vote for the opposite candidate, would be rendered infamous and visited with every form of indignation that society could invent.

So powerful have been these obligations, that I believe scarce an instance is known where electors have violated these pledges.

A DANGEROUS AND USELESS SYSTEM.

The more complicated the machinery is, whether in politics or in the arts, the more liable it is to get out of order. In the complex system of electing a President which we now have, contingencies may arise which cannot be foreseen, which may lead to civil war and disaster. The simpler the machinery of Government, the more easily it is understood and the less liable to accident.

Not only has the result been that the electors are not left free to select a President and Vice-President, they being in all instances pledged in advance, but it has unquestionably been a blessing that this has been so, for experience has demonstrated that small bodies of men intrusted with such vast powers as the choice of the Chief Magistrate of the Republic are liable to the arts of corruption, cabal, and intrigue, while the great body of the people cannot be reached in that way.

Mr. Benton once declared that "the only effectual mode of preserving our Government from the corruptions which have undermined the liberty of so many nations is to confide the election of our Chief Magistrate to those who are furthest removed from the influence of his patronage; that is, to the whole body of American citizens." His patronage would be ample to reach every elector in every State, but it cannot reach the whole body of the people. This danger has in effect been avoided by pledging the electors in advance to vote for particular persons. But this pledge in advance defeats the very purpose for which the electoral college was created, and converts it into a body of agents, who are to execute their powers according to strict instructions given before their appointment.

The electoral colleges have turned out to be wholly useless. Every reason given for their original establishment has absolutely failed in practice. But while they are powerless for good, they may be potent for evil. In their election errors may easily be committed, and in very many instances have been. While nobody would mistake the name of Grant or Greeley, changes in the names on the long list of electors may occur from errors in printing or fraud sufficient to reverse the vote of a State.

AN UNNECESSARY RESTRICTION.

One great objection to the present electoral system is that it absolutely circumscribes the power and the rights of the individual voter. He cannot now vote for the man of his choice for President, but must vote for electors. There may be two sets of electors, representing two different parties before the people, but he may not be in favor of either, and would prefer to cast his vote for a third; yet he has no power to do it. It would be impossible for him alone in the State in which he lives to put candidates for electors in the field who would vote for the man of his choice. That can only be done by an organized party, which may have no considerable vote in the State in which he lives, though it may be strong in other States. As an illustration: In 1856, thousands of men in the Southern States were absolutely deprived of the right of voting for President and Vice-President, because no electoral ticket for Frémont and Dayton had there been put in the field.

In effect, the electoral system absolutely deprives the voter of his power to vote for men of his choice for President and Vice-President, unless there are enough of his way of thinking in the same State to meet in convention and nominate electors to represent their views. Such a system can scarcely be called free or republican. No system deserves that name which does not enable the individual voter to cast his vote for the men of his choice whether anybody else in the same State votes for them or not. The electoral system makes the convention or caucus indispensable in all cases and everywhere, for the individual voter cannot give effect to his vote or give to it moral or political significance unless there are others who will act in concert, that is, in convention with him in the nomination of candidates for electors.

AN ELECTION BY STATES, NOT BY THE PEOPLE.

Under the present system it is entirely possible that the President may be elected by a comparatively small minority of all the votes of the nation. He may carry enough States to give him a majority of the electoral votes by an aggregate majority not exceeding fifty thousand votes, and his opponent may carry the remaining States by such majorities as to give him perhaps half a million majority of the whole vote of the people. The present mode of choosing the President is, though not generally so called, an election by States.

It had its origin in the idea of preserving, as nearly as possible, the equality of the States in the election of the President, and this for the protection of the small States. But let us look at the question from a distance of ninety-five years and with a population of over forty millions. Under the present apportionment, the electoral votes of ten States out of thirty-seven may elect a President, and as, under the practical working of our institutions, the vote of each State is cast solidly, it is the same as if the people of these ten States had voted unanimously for the same man, a thing which will be likely never to happen.

FAIRNESS OF THE AMENDMENT.

By the proposed change each State will have as many votes in the election of President and Vice-President as it has now. Each State will be divided into as many districts as it has Representatives in Congress; each district to have one vote in the election of President and Vice-President, and the vote of that district to be counted in favor of the candidates for President and Vice-President who have the largest number of votes in it. Each State will have two presidential votes at large, to be given to that candidate who has the largest number of votes in the whole State, thus preserving the autonomy of the States and their State character in the presidential election.

This plan is greatly in favor of giving due weight to the small States; for under the present system the vote of each State is cast solidly for a single candidate for President, so that it has happened, and may happen again, that the solid vote of one

of the large States, which may be determined within itself by a small majority of the popular vote, will be decisive of the election, as in the case of New York in 1845, when the small vote of five thousand, drawn off by Mr. Birney, resulted in giving the whole electoral vote of that State to Mr. Polk, and elected him over Mr. Clay; whereas, if the vote of the people had been given by districts, New York would have been divided, perhaps nearly equally, so that it might give but one or two votes for the general majority for the President.

INJUSTICE OF VOTING BY STATES.

In this argument we have said nothing as yet concerning the intrinsic injustice, under the present system, of requiring the vote of a State to be cast solidly. In the great State of New York one party may have a majority over the other of but one thousand, which carries with it the vote of the whole State, the one thousand thus in effect silencing the voice and suppressing the wishes of more than two million people. This result preserves the power and autonomy of the State as a municipal body, which is unnecessary and pernicious in the election of a President; but it is destructive of the principle of representation, impairs the nationality of the presidential election, and makes it more completely an election by the States. Under the working of the present system the election of President is made more completely an election by States than was even intended by the framers of the Constitution. As before stated, they intended that the electoral colleges should be free deliberative bodies, the members of which, after full consideration, were to cast their votes for whom they pleased, so that the electoral vote of a State might be divided up between three or four persons. But in practice it has turned out that the electors are pledged in advance to vote for particular persons for President and Vice-President, and the whole set of electors pledged to vote for the same persons are elected, so that the vote of each State is given *in solido*, and the President is in effect elected by the States.

But if the President was elected by the votes of the people in districts, a part of the districts in a State might vote for one person and a part for another, so that the election would have less of a State character and be more national. The framers of the Constitution, intending that the electoral college should be deliberative bodies, of course did not expect them to vote solidly for President, but to divide up as deliberative bodies are apt to do; and therefore, in dividing up the vote of the people of the State by having the President elected by districts, we are but carrying out their notions.

ITS ORIGIN.

It is somewhat curious to note in this connection that while the doctrine of State sovereignty has been generally insisted upon as a protection to the smaller States, yet this particular feature of it has been preserved and strengthened by the large States at the expense of the small ones. As before stated, the electors were at first generally chosen by districts in States that did not choose them by their legislatures, but this practice was broken up, more particularly by the action of Virginia and Massachusetts, at a time when they were the two leading States, because it tended to divide and destroy their power in the presidential election. When their votes were to be cast solidly, the vote of the whole State being thrown as a unit, it is obvious that they were of greater consideration than under a system which might divide them up between the contending candidates. We have seen in recent elections with what anxiety the result has been looked for, in New York and Pennsylvania for example, because their votes being cast *in solido* would be likely to determine the result, but if the votes of those States might have been divided up by the people voting directly for President in districts, the case would have been quite different.

ITS UNFAIRNESS ILLUSTRATED.

An examination of the working of the electoral college for the last fifty years will prove beyond all question that in a number of cases the will of the majority has been completely defeated; that if the majority is represented in the result of a presidential election it is quite as much the result of accident as of the natural working of the machinery; that the final result produced by the electoral machinery has not within fifty years approached as near as within 10 per cent. of being a true representation of the will of the people as expressed in their votes, and in a number of instances has departed from it over 30 per cent.

The following statement of the result in the different presidential elections from 1872 back to 1844 will establish the truth of what we have said:

In 1872 General Grant received 55 per cent. of the votes of the people; in the electoral college he received 81 per cent.

In 1868 General Grant received 52 per cent. of the popular vote and 73 per cent. of the electoral vote.

In 1864 Mr. Lincoln received 55 per cent. of the popular vote and 91 per cent. of the electoral vote.

In 1860 Mr. Lincoln received only 40 per cent. of the popular vote; he received 59 per cent. of the electoral vote.

In 1856 Mr. Buchanan received only 45 per cent. of the popular vote; he received 59 per cent. of the electoral vote.

In this election Fillmore received 25 per cent. of the popular vote and only 2 per cent. of the electoral vote; but fourteen of his friends were elected to Congress.

In 1852 Pierce received 51 per cent. of the popular vote and 55 per cent. of the electoral vote.

In 1848 General Taylor received 47 per cent. of the popular vote and 56 per cent. of the electoral vote. At this election Mr. Van Buren received about 10 per cent. of the popular vote, and received no electoral vote; but three of his friends were elected to the House of Representatives.

In 1844 Mr. Polk received not quite 50 per cent. of the popular vote. He received 62 per cent. of the electoral vote.

To illustrate the operation of the district system, we will consider the comparative results of the elections for President and for members of Congress, in the four States of Pennsylvania, Ohio, Indiana, and Illinois, from 1860 to 1872.

These States voted solidly for Mr. Lincoln in 1860, casting 74 electoral votes. At the same election they returned 66 members of Congress, of whom 24 were democrats.

In 1864 the same States cast 76 electoral votes for Mr. Lincoln again and elected the same year 68 members of Congress, of whom 16 were democrats.

In 1868 the same States threw 76 electoral votes solidly for General Grant and elected 68 members of Congress, of whom 22 were democrats.

In 1872 the same States again voted solidly, giving 85 electoral votes to General Grant, and elected 77 members of Congress, of whom 25 were democrats.

In these four States the democratic strength, as compared with the republican, has been about as 9 to 10, but under the operation of the general-ticket system they had been wholly unrepresented in the electoral college; but in the House of Representatives, under the district system, they have had an average of nearly one-third of the members.

Take the State of New York alone for the same period. In 1860 New York cast her 35 electoral votes solidly for Mr. Lincoln. At the same time she elected 33 members of Congress, of whom 9 were democrats. In 1864 she again cast her 33 electoral votes solidly for Mr. Lincoln and at the same time elected 31 members of Congress, of whom 11 were democrats. In 1868 she cast her 33 electoral votes solidly for Mr. Seymour. The State was carried for Mr. Seymour by his overwhelming majority in the city of New York, about the character of which grave charges were made, but of which the committee expresses no opinion; but the rest of the State, unaffected in their districts by this large majority in the city, returned 18 out of the 31 members of Congress, who were opposed to Mr. Seymour, thus showing conclusively how the voice of the people of New York outside of the city had been stifled in the presidential election by the city majority, operating through the general-ticket system. In 1872 New York cast her 35 electoral votes solidly for General Grant, at the same time electing 33 members of Congress, of whom 9 were democrats.

THE DISTRICT SYSTEM WOULD PREVENT FRAUD.

Under the present system, the State, voting solidly, there is great temptation to fraud. Where the condition of parties is nearly balanced in a State, a successful fraud may determine the vote of the whole State. This puts the whole votes of States in the hands of the large cities. The material with which to perpetrate frauds predominates especially in large cities, such as New York, Philadelphia, Boston, Baltimore, Cincinnati, Saint Louis, and New Orleans. Under the district system the frauds in the large cities would only affect the vote in the district in which they occurred, and could not, in their consequences, extend to the vote of the whole State. But under the present system the successful city fraud may determine the vote of the whole State.

Where the fraud will only affect the vote of a single district, the temptations to commit it are greatly diminished. Men will not take the risks and incur the expense of committing a great fraud to carry the vote of a single district, which they would do if the result of the fraud was to determine the vote of the whole State, and perhaps secure the election of a President.

THE LEGISLATURES NOW CONTROL THE APPOINTMENT OF PRESIDENTIAL ELECTORS.

The Constitution provides that—

“Each State shall appoint, in such manner as the legislature thereof may direct, a number of electors, equal to the whole number of Senators and Representatives to which the State may be entitled in the Congress.”

The appointment of these electors is thus placed absolutely and wholly with the legislatures of the several States. They may be chosen by the legislature, or the legislature may provide that they shall be elected by the people of the State at large, or in districts, as are members of Congress, which was the case formerly in many States;

and it is no doubt competent for the legislature to authorize the governor, or the supreme court of the State, or any other agent of its will, to appoint these electors.

This power is conferred upon the legislatures of the States by the Constitution of the United States, and cannot be taken from them or modified by their State constitutions any more than can their power to elect Senators of the United States. Whatever provisions may be made by statute, or by the State constitution, to choose electors by the people, there is no doubt of the right of the legislature to resume the power at any time, for it can neither be taken away nor abdicated. In the early presidential elections the electors were chosen in many States by the legislatures, and as late as 1824, in Delaware, Georgia, South Carolina, Louisiana, New York, and Vermont, they were chosen by the legislatures, and South Carolina continued this practice up to the war of the rebellion.

Therefore, under the Constitution as it now stands, it is in the power of any legislature to repeal all laws providing for the election of electors by the people, and take such election into their own hands. It may be said this is not likely to be done; but the answer is that it may be and that it has been done; and who can tell what may be the future exigencies of parties and politicians, or what they may not do? As has been already remarked, South Carolina chose electors by her State legislatures up to the period of the rebellion, and at all presidential elections prior to 1852 the electors were variously chosen—some by the legislatures in joint convention; others by the two houses, where they were divided in politics, acting separately and dividing the electors between them by contract. Other States chose electors by the general-ticket system; others again by the single-district system; and still others by the double or triple district system, that is, dividing the State into a smaller number of districts than there were members of Congress, and choosing two or three electors in one district. These heterogeneous methods, setting at defiance the popular will, long ago established the necessity for a uniform constitutional rule upon this subject, and nearly every eminent American statesman within fifty years has urged its adoption.

NO TRIBUNAL OR LAW TO DECIDE CONTESTS.

It will thus be seen that the mode of choosing the electors is placed entirely beyond the power and jurisdiction of the National Government; and whatever disorders, irregularities, or failures in the appointment of electors may occur in any of the States, they are entirely without remedy or redress upon the part of the Government of the United States. All of the States now, by the enactments of their legislatures, provide that the electors shall be chosen at large by the qualified voters of the State; but in no State, we believe, is there any legal provision made for the settlement of any contest that may arise in regard to such election. Though the election of electors may have been marked by the most monstrous and palpable frauds, entirely subverting the will of the people, or though a large portion of the people may have been prevented from voting or controlled in their action by violence and disorder, yet, so far as we know, there is not in any State any provision for settling such a contest and setting aside fraudulent returns. Every State provides by law for contesting the elections for governor and other State officers and members of the legislature, but no provision is made for contesting the election of electors; and whatever returns shall be made up, although produced in whole or in part by fraud or violence, must stand, and the vote be counted upon them, if returned in time.

PERILS IN THE FUTURE.

There is imminent danger of revolution to the nation whenever the result of a presidential election is to be determined by the vote of a State in which the choice of electors has been irregular or is alleged to have been carried by fraud or violence, and where there is no method of having these questions examined and settled in advance—where the choice of President depends upon the election in a State which has been publicly characterized by fraud or violence, and in which one party is alleged to have triumphed and secured the certificates of election by chicanery or the fraudulent interposition of courts. Such a President would in advance be shorn of his moral power and authority in his office, would be looked upon as a usurper, and the consequences that would result from such a state of things no man can predict; but it may be compared to what has so often occurred in history, where the successor to the crown in a monarchy was believed by a large part of the nation to be illegitimate, or not to be rightfully entitled thereto under the laws or usages of the nation. We have seen how in all ages there have been numerous bloody and destructive revolutions arising from such causes, and the conviction on the part of the people that the reigning monarch was not entitled lawfully to the crown. It is the part of wisdom in a monarchy to avoid such contingencies, if possible, by settling definitely the rightful descent of the crown; and in republics there ought to be such machinery of government provided that it would seem to be impossible that any man should ever reach the presidential chair who was not legitimately chosen thereto.

THE PRESENT METHOD OF COUNTING.

The Constitution provides that Congress may determine the time of choosing the electors and the day on which they shall meet in the several States and cast their votes, which day shall be the same throughout the United States. It further provides that "the electors shall meet in their respective States, and vote by ballot for President and Vice-President, one of whom at least shall not be an inhabitant of the same State with themselves. They shall name in their ballots the person voted for as President, and in distinct ballots the person voted for as Vice-President, and they shall make distinct lists of all persons voted for as President, and of all persons voted for as Vice-President, and of the number of votes for each, which list they shall sign and certify, and transmit sealed to the seat of the Government of the United States, directed to the President of the Senate. The President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates, and the votes shall then be counted."

THE HOUSES MERE WITNESSES.

The Constitution provides that the President of the Senate shall be the depository of the electoral votes of the States, and that he "shall, in the presence of the Senate and House of Representatives, open all the certificates, and the notes shall then be counted." It has been generally conceded that this means that the two houses shall be present in their separate characters, and not as a joint convention; that they cannot act and vote as one body; that the two bodies cannot deliberate and act as separate bodies in each other's presence; that they are simply brought together to witness the result of the opening and counting of the vote as reported by the President of the Senate. The fact that tellers have been generally appointed by the two houses in no wise affects the question, for they are mere facilities to actually count and make record of such votes as the Vice-President hands to them for that purpose.

THE WISCONSIN VOTE IN 1857.

Such had been the understanding and practice, apparently without question, until 1857. When the electoral votes were counted that year in the presence of the two houses an objection was made by a member of the Senate to receiving and counting the vote of Wisconsin, because the record showed that the electors in that State had not met and cast their votes on the day prescribed by law, and upon which the electors in all the other States voted. The objection, it would seem, should have been fatal, for the Constitution expressly declares that the electors shall meet and vote upon the same day in all the States, and the history of this clause shows that great importance was attached to it by the framers. But the President of the Senate, Mr. Mason, declared that the objection was out of order, and that nothing was in order but to open and count the electoral votes returned, and the vote of Wisconsin was counted, after which he stated the result of the vote, and declared James Buchanan and John C. Breckinridge elected President and Vice-President of the United States. Motions were then made to correct the count and exclude the vote of Wisconsin, all of which he decided out of order, and, the business having been accomplished for which the two houses had assembled, he declared the meeting dissolved, and at the head of the Senate returned to the Senate chamber.

Upon the retirement of the Senate, an elaborate debate took place in the House, in which a variety of opinions was expressed, but the better one seemed to be that the two houses had no jurisdiction over the matter of counting the electoral votes either jointly or separately, and that the decision of the President of the Senate was final. So the matter was dropped. The Senate, upon re-assembling in its chamber, began the consideration of the subject, and after a long debate, with about the same result, it was dropped.

It seemed to be a necessary conclusion from these discussions that it was a *casus omnisus* in the Constitution, and that the power of the President of the Senate to count the vote resulted, *ex necessitate rei*, from the failure of the Constitution to give to the two houses any jurisdiction over it; but they were to be present at the counting as solemn witnesses of its accuracy and result. In that case the vote of Wisconsin was not important, because Messrs. Buchanan and Breckinridge were elected whether it was received or not; but if it had so happened that the election depended upon the vote of Wisconsin; that by counting it Frémont and Dayton would have been elected, or by rejecting it Buchanan and Breckinridge would have been elected, the question being left to the decision of the President of the Senate, Mr. Mason, of Virginia, he would have had the result of the election in his own hands. His decision either way might have resulted in civil war or revolution. Had he rejected the vote and elected Mr. Buchanan, he would undoubtedly have been supported by his party and sustained by the letter of the Constitution; while, on the other hand, it would have been insisted that that provision of the Constitution was merely directory; that the vote of Wisconsin was not forfeited because it was cast one day after the time fixed by law, as the failure to vote at the proper time was occasioned by a snow-storm which prevented the

assembling of the electors, and that Mr. Buchanan was therefore fraudulently elected; and the danger of a revolution would have been imminent.

But suppose that when the objection was made to counting the vote of Wisconsin it had been entertained, and the decision of it referred to the concurrent vote of the two houses, taken separately, as now provided by the twenty-second joint rule? The Senate was then strongly democratic and the House republican. The Senate would in all probability have decided that the vote of Wisconsin should be rejected, and the House that it should be received. Their failure to agree would have resulted in the contingency we have supposed, in throwing the election of the President into the House of Representatives, in which Maryland, carried by Mr. Fillmore, and which had been carried by the know-nothings in the election of members of Congress in 1854, would, under the twenty-second joint rule, have held the balance of power, and Mr. Fillmore, with but one vote in the House to begin with, would very probably have been elected President.

A DANGEROUS POWER.

Upon the hypothesis that the President of the Senate has the power to open and count the electoral votes, and that the two houses are to be present merely as witnesses, and have no jurisdiction over the subject, either jointly or separately, everybody must perceive that it is a vast and dangerous power to repose in the hands of one man, especially when he may be ardently devoted to the fortunes of a great party, or when he may be personally interested, sitting as a judge in his own case; for it has happened six times in the history of our Government that the President of the Senate has opened and counted the votes for himself, either for President or Vice-President. In 1797 John Adams, as Vice-President, opened the votes for himself and declared himself elected President. In 1801 Jefferson, as President of the Senate, opened and counted the votes for himself when he and Burr were the candidates for President. In 1821 Vice-President Tompkins, as President of the Senate, opened and counted the votes for himself, he being a candidate for re-election; and in 1837, Mr. Van Buren, then Vice-President, counted the votes for himself as President and declared himself elected. In 1841 Richard M. Johnson, then Vice-President, opened and counted the votes for his re-election as against Mr. Tyler, the opposing candidate; and in 1861 Mr. Breckinridge, then President of the Senate, opened and counted the votes for himself as a candidate for the Presidency.

Clearly the framers of the Constitution did not contemplate that the President of the Senate, in opening and counting the vote for President and Vice-President, should exercise any discretionary or judicial power in determining between the votes of two sets of electors, or upon the sufficiency or validity of the record of the votes of the electors in any State; but that he should perform a merely ministerial act, of which the two houses were to be witnesses and to make record. But the exercise of these high powers may devolve upon him *ex necessitate rei*, and whatever decision he may make between the two sets of electors, or upon the sufficiency and validity of the record of the votes—whether on the evidence of the right of the electors to cast votes, or whether they have been cast in the manner prescribed by the Constitution—his decision is final.

The action of the two houses in 1821 in regard to counting the vote of Missouri is no exception to this view of the power of the President of the Senate, for the question in that case was not as to any irregularity in regard to the electoral vote of Missouri, but whether Missouri was at that time a State in the Union and entitled to participate in the presidential election at all, which was also the question in the election in 1817 in regard to Indiana, and in 1869 in regard to Georgia.

The President of the Senate may, indeed, be impeached for high crimes and misdemeanors, should he grossly violate his duty and thus fraudulently count or reject electoral votes; but that would not amend the record which had been made, undo the wrong, help the presidential candidate who may have been cheated out of the office, nor protect the nation from disorder and civil war.

If it should happen, upon the recurrence of any one of the cases we have been considering, that the decision of the President of the Senate should determine the result and give the Presidency to the candidate who would otherwise have been defeated, or throw the election into the House of Representatives, where the candidate who had been rejected by the people should be elected by the vote of the States, all can understand the imminent peril in which the nation would be placed.

In 1801, when Mr. Jefferson, as President of the Senate, counted the vote as between himself and Aaron Burr for President, it turned out to be a tie-vote, and had there then been a question or contest in regard to a single vote, such as exists to-day in regard to several, he might have decided himself elected, and the nation would have been without redress. Such a temptation, springing lion-like upon a man of less patriotism and weaker virtue, backed by a great party, in a season of high excitement, might have proved fatal to the peace of the nation.

THE TWENTY-SECOND JOINT RULE.

We now come to the consideration of the twenty-second joint rule of the two houses, adopted in 1865, in regard to the counting of the electoral vote. This rule was un-

doubtedly the result of a conviction in Congress of the necessity of providing some method for avoiding the dangers we have been discussing; but it was certainly adopted without much consideration, and with a view apparently of furnishing an additional safeguard against receiving electoral votes from States that had been in rebellion. But it is general in its character, is applicable to all the States, and will continue in operation until it is amended or repealed.

It is, in our judgment, the most dangerous contrivance to the peace of the nation that has ever been invented by Congress—a torpedo planted in the straits, with which the ship of state may at some time come into fatal collision. This rule provides, among other things, that when the vote shall be counted in the presence of the two houses:

“If, upon the reading of any certificate, any question shall arise in regard to counting the votes therein certified, the same having been stated by the Presiding Officer, the Senate shall thereupon withdraw, and said question shall be submitted to that body for its decision; and the Speaker of the House of Representatives shall, in like manner, submit said question to the House of Representatives for its decision; and no question shall be decided affirmatively, and no vote objected to shall be counted, except by the concurrent votes of the two houses; which being obtained, the two houses shall immediately re-assemble, and the Presiding Officer shall then announce the decision of the question submitted, and upon any such question there shall be no debate in either house; and any other question pertinent to the object for which the two houses are assembled may be submitted and determined in like manner.”

A TEMPTATION TO INJUSTICE.

By this rule it is provided that whenever an electoral vote is objected to, the Senate shall retire to its chamber, and each house shall separately consider the objection, and the vote shall not be counted unless the two houses concur to that effect. If the two houses disagree, the vote of the State is lost. This may result in a tie, or in the election of the candidate who would otherwise have been defeated, or in preventing either of the candidates from having a majority of all the votes and thus throwing the election into the House of Representatives. Each house is to decide the question without debate, in a summary manner, without investigation and without adjournment. Here is a powerful temptation to the House of Representatives by non-concurrence to throw the election into its own body, and thus, perhaps, secure the election of a candidate who may have been overwhelmingly beaten at the polls. The two houses may be under the control of different parties, as in 1857, led by politicians, ambitions, exasperated, and thirsting for power, who are thus enabled by a mere non-concurrence to defeat an election by the people and seize the administration of the Government into the hands of their party.

“Lead us not into temptation” is a part of the Lord’s prayer, and here is a mortal temptation spread in the pathway of a defeated party by which they may snatch victory from the jaws of defeat at the very last step in the tedious process of electing a President. The substance of this rule is that, in the eleventh hour, in the last stage of the proceedings for the choice of the Chief Magistrate, a formal objection made to the electoral votes of a State suspends the count, and makes the right of the people of that State to a voice in the election to depend upon the affirmative concurrent vote of the two houses, which, in the exigency of parties, may not be obtained, however small the merit of the objection.

THE RULE UNREASONABLE.

To us the proposition seems very plain that the Constitution confers upon Congress no power, whether by statute or joint rule, to make the right of the people of a State to participate in the presidential election to depend upon such a contingency. If the rule were reversed, and provided that the vote of a State should be counted unless the two Houses concurred in its rejection, it would be far more reasonable and far less dangerous. It would be much more logical to require the concurrent action of the two houses to reject the vote of a State in favor of which the presumptions of the law should lie, than to make its admission depend upon the concurrence of the two houses, as if the presumption of the law were against its fairness and legality. Logically, it would seem that the objection made to receiving the vote of a State, to be valid, ought to be sustained by the vote of the two houses, but under this rule the objection is assumed to be good unless overcome affirmatively by the vote of the two houses, thus expressly placing it in the power of one house to reject the vote of a State.

The rule is an invitation to partisans to make captious and factious objections. It makes the concurrent action of the two houses necessary where it should not be; and, to sum up its perilous absurdity, its “monstrous illogic,” its dangerous unconstitutionality, it places it in the power of a defeated party, which may happen to have a majority in either house, to defeat an election by the people, and to take the chances of anarchy, or of a victory, by throwing the election into the House of Representatives.

But it may be said that neither house would take the responsibility of refusing to concur in counting the vote of a State unless the objection to it were well founded

This is not the history of parties or of parliamentary proceedings. It is not the history of parties that they will voluntarily surrender an advantage, though tainted with odium and injustice, or that their representatives in the legislature will; for it is a law of parties to obtain all the power possible, and to yield no advantage except upon compulsion or for compensation.

But this extraordinary provision by which either house is empowered to reject the vote of a State in the election of a President is created by a joint rule of the two Houses. The Constitution provides that "each house may determine the rules of its own proceedings," that is, the mode of conducting its business and doing those things which, by the Constitution and laws, it has a right to do. But surely this clause does not give the two houses the power by a joint rule to enable either house to disfranchise States by rejecting their electoral votes. The provisions of this rule, to have any validity, must be embraced in a law duly enacted, which has been submitted to the President for his approval; and, even as a law, it would be the most fearful enactment on the statute-book, conferring as it does upon either house the power to block the wheels of government and plunge the nation into anarchy. It was the purpose of the framers of the Constitution to make the executive and legislative branches so far independent of each other that the existence of the one would not depend upon the consent or action of the other; but here is a rule, a mere parliamentary rule, which gives to either house a fatal negative upon the election of a President by the people. A power so vast and dangerous certainly cannot be created as a mere rule of proceeding.

CONGRESS IS NOT A CANVASSING BOARD.

The proposition that Congress has power to sit as a canvassing board upon the electoral votes of the States, admitting or rejecting them for reasons of its own, subverts the whole theory by which their appointment was conferred upon the States; makes Congress the judge of the election and qualifications of President and Vice-President, and, by the operation of the twenty-second joint rule, gives that power to each house separately, as in case of its own members. There is no such express power given to Congress in the Constitution, nor is it necessary to carry out any express power therein given, and its exercise would be in direct conflict with the known purpose of the framers to make the executive and legislative departments as nearly independent of each other as possible.

The act of 1792, which is still in force, provides that the electors shall meet in each State and cast their votes on the first Wednesday in December, and that they shall be chosen within thirty-four days before that time, leaving no room between the two periods for a contest as to their election before any tribunal, and making it impossible that Congress should, in any way, pass upon the regularity or rightfulness of their election. When they had cast their votes on the first Wednesday of December, they were *functus officio*, and could never meet again, either to correct a mistake or for any purpose whatever. It is obvious that it was not contemplated by the framers of the Constitution that after the electors had met and cast their votes, and had become *functus officio*, there was any tribunal that could inquire into the rightfulness or regularity of their election and set aside their votes. The framers of the Constitution seem not to have anticipated the possibility of two sets of electors, each claiming to cast the vote of a State, or of irregularities or frauds in the choice of electors, which would warrant the rejection of their votes. It was clearly a *casus omissus*, and one of the imperfections of a new scheme of government which could not, in fact, have been perfect unless its framers had been infallible.

If it were admitted that the twenty-second joint rule is constitutional, or that the two houses by their joint action could reject the vote of a State upon objection being made, the inquiry would be presented, what could the two houses do? The Constitution requires that the votes in the several electoral colleges shall be sealed up and sent to the President of the Senate, and that the certificates thus sealed up shall not be opened except in the presence of the two houses, and the vote shall *then* be counted. Clearly, the authority of the two houses, putting the most liberal interpretation upon the clause, would be confined to the determination of mere questions of form—whether the lists were properly made out as required by the Constitution, or properly certified as required by the law. There would be no time, opportunity, or place for the investigation of any questions of fact, or the determination of any matter not appearing upon the face of the papers. Although the election of the electors in a given State may have been a monstrous fraud, patent to the whole world, and known to each member of the houses of Congress, yet clearly they have no power, time, or opportunity to investigate the fact, and must *then* count the fraudulent votes if it shall appear in due form upon the papers.

THE PLURALITY RULE PROPOSED.

By the present provision of the Constitution there can be no election of a President except by a majority of all the electoral votes, and if no candidate receives such majority the election is thrown into the House of Representatives, where the choice is to

be made between the three highest candidates; the character and consequences of which will be hereafter considered. By the amendment proposed, the candidate receiving the highest number of presidential votes will be elected, although he may not have a majority of all the presidential votes; and the election in every case is final. In other words, it adopts what is known as the plurality rule, and only requires that the successful candidate shall have a majority over any other one.

There is no virtue in a majority vote over a plurality vote, where the majority is the result of compulsion, as by requiring a second election between the two candidates having the highest vote at the first. In that case the persons whose votes are changed to one or the other of the two candidates may do it as a choice, upon compulsion, between what they regard as two evils.

The adoption of the plurality rule does not at all interfere with the other principle, that the majority should govern. The majority may always govern, if it chooses to act together; but the people cannot be compelled to form themselves into a majority. They vote for whom they please, or they may refuse to vote at all; and if they vote with a full knowledge that the candidate receiving the highest number of votes shall be declared elected, it is impossible to see how their rights have been infringed.

If one candidate has a majority, undoubtedly he should prevail; but if he has not a majority of all the votes, but has a majority over any other candidate, he should prevail over any other candidate, because the voters have been left free in the exercise of their suffrages to vote for whom they pleased or not to vote at all, and it is expedient that there should be some choice, and that the election should be final. Where, in order to secure a majority of all the votes for one candidate, a second election is required, and the voters are confined to two or more candidates having the highest number of votes, great opportunities and inducements are presented for corruption, and corruptionists then know just where and how to work to secure their triumph.

APPROVED BY EXPERIENCE.

The staple argument in favor of requiring a majority of all the votes to elect, and against the plurality system has been that the officer elected by a majority of all the votes carries with him a greater moral force and authority than one elected by a plurality. From experience in the different States of this Union under the plurality rule for a century past, we are able to say that this argument is wholly speculative, and is destitute of all force in practice. A President elected by a plurality of all the votes in a fair election would carry with him the whole moral power of the office, and be regarded by the nation as completely the President, morally and legally, as if he had received a majority of all the votes.

But if a President who had been in a minority at the polls, having received fewer votes than another candidate or other candidates, should be made President by the artificial machinery of the electoral college, or the arbitrary and anti-republican rule of an election by the States in the House, as was the case with Mr. Adams, he would be shorn of moral power and be regarded by the nation as only a technical President.

It is not to be denied that the Vice-Presidents Johnson, Fillmore, and Tyler, who, by the death of Presidents elected by the people, have become acting Presidents of the United States, have not carried with them the respect and moral force which belong to those who were elected directly, from the fact that they have become Presidents by the operation of law and not by the direct vote of the people. But the moral force of Presidents Lincoln, Buchanan, Taylor, and Polk was not impaired because they had only received a plurality of all the votes cast at the polls.

The plurality system has been tried in all the States but four for State officers, members of Congress, members of the legislature, and all subordinate officers, and has worked well.

The argument on the other side is, that no man should be President who does not receive a majority of all the electoral votes. There is no moral force in this position, unless that majority of electoral votes should represent a majority of the votes of the people; but a majority of the electoral votes, by the peculiar machinery of the election, may represent only a small minority of the whole number of votes cast by the people.

The present system seems designed to defeat the popular will as far as possible, and provides for the election of a candidate who may have received but a minority of the votes of the people.

Where the plurality system is adopted, and the people vote directly for candidates, and not for electors or intervening agents, every man casts his vote with a knowledge that the candidate who receives the most votes will be declared elected. There can be no inducement, therefore, to scatter the vote with a view of throwing the election into the House, as there may be under the present system; and every voter will have strong inducement to give his vote for the best man, knowing that the result of the election is to be final.

In the States where the election of governor and other State officers by the direct vote of the people is conducted on the plurality system, it happens in a majority of

cases that the officers elected actually get a majority of all the votes cast, but where they do not receive a clear majority it nearly always happens that their vote approaches very closely to a majority, and is generally a fair expression of the wishes of the people; and we have never known a case of the election of governor or other important State officers who had not received one-third of the votes, as was the case with Mr. Adams, in 1825, who was made President through the machinery of the election in the House.

Whatever objection may exist to the plurality system, where the people vote directly for candidates for President and Vice-President, must prevail with tenfold force under the electoral system, for under the electoral system it is quite possible, and even probable, that the man may have the majority of electoral votes who is largely in the minority in the popular vote. Under the plurality rule no man can be elected who has not received more votes than any other candidate; but under the present system a man may be chosen President who receives the smallest number of votes, by means of the electoral college or throwing the election into the House.

It may be further remarked, that while there can be no election of President under the present system except by a majority of all the electoral votes, yet the electoral colleges themselves, in the several States are, and have been from the first, chosen upon the plurality system, and are not in any case required to have a majority of all the votes cast in the State.

ELECTION BY THE HOUSE.

The Constitution provides that when the vote is counted in the presence of the two houses—

“The person having the greatest number of votes for President shall be the President, if such number be a majority of the whole number of electors appointed; and if no person have such majority, then from the persons having the highest numbers, not exceeding three, on the list of those voted for as President, the House of Representatives shall choose immediately by ballot the President. But in choosing the President the votes shall be taken by States, the representation from each State having one vote; a quorum for this purpose shall consist of a member or members from two-thirds of the States, and a majority of all the States shall be necessary to a choice.”

ITS DANGEROUS CHARACTER.

That this provision for electing a President is fraught with danger to the nation will scarcely be denied by any.

It is matter of history that the election of Mr. Jefferson by the House of Representatives in 1801 came near making shipwreck of the Government and involving the nation in civil war. Nothing prevented that result but the patriotism of several members of the House who voted, against their principles and their party, for Mr. Jefferson, to relieve the nation from the great peril in which it was placed. Again, in 1825, when Mr. Adams was elected by the House, the proceedings became odious to the nation, and drew upon all parties concerned an unpopularity from which they never recovered.

The objections to this constitutional provision for the election of a President need only to be stated, not argued.

First. Its manifest injustice. In such an election each State is to have but one vote. Nevada, with its 42,000 population, has an equal vote with New York, having one hundred and four times as great a population. It is a mockery to call such an election just, fair, or republican.

Again, this plan of election furnishes the grandest opportunities for corruption, cabal, and intrigue. Where the delegation of a State is equally divided, it is in the power of one venal member, by a change of his vote, to control the vote of the State. Such charges were rife in both the election of Mr. Jefferson and that of Mr. Adams; and the great and patriotic Clay never recovered from the charge that, as a member of the House, he cast his vote and influence for Mr. Adams, and afterward became his Secretary of State.

ITS UTTER UNFAIRNESS.

In the election of a President in the House of Representatives under the present apportionment, each State having one vote, forty-five members out of the two hundred and ninety-two may make the election, as follows: Delaware, Nebraska, Nevada, and Oregon have each one member, and four members would cast the votes of those four States; Rhode Island and Florida have each two, and four members would cast the votes of those States; Minnesota, New Hampshire, West Virginia, Vermont, and Kansas have each three members, and two votes in each, or ten members in all five, would cast the votes of those five States; Arkansas, California, and Connecticut have four members each, and three in each, or nine in all, may cast their votes; Maine and South Carolina have each five members, three of whom in each, or six in both, may cast their two votes; Maryland, Mississippi, and Texas have each six members, and

four in each, or twelve in all, may cast the vote of those three States. This makes nineteen States, or a majority of the States in the Union, and forty-five members may cast their votes and elect a President of the United States against the wishes of the other two hundred and forty-seven members of the House of Representatives. Again, these nineteen States have an aggregate population by the census of 1870 of a fraction over eight millions of people, while the remaining eighteen States have an aggregate population of about thirty millions. So that nineteen States, having scarce more than one-fifth of the entire population of the United States, may elect a President in the House of Representatives against the wishes of the other four-fifths; and this, by courtesy, has been called republican government!

Such a combination and result as above exhibited may not be likely to occur; but they are possible under the present system of electing a President in the House of Representatives by a majority of States; and no system admitting such possibilities should be tolerated. In 1825 it did happen that Mr. Adams was elected in the House over General Jackson, who had received a larger proportional majority of the popular vote than has any President elected since that time; and who had also a large plurality of the electoral votes.

There is always danger to a country in an injustice in its institutions, and the danger increases as the injustice is aggravated.

When the smallest State is made equal to the largest in the choice of the President of the United States, the gross inequality becomes offensive, and must become dangerous to the country whenever the power is exercised. Surely every patriot who looks forward with anxiety to the future peace and perpetuity of the Republic, must earnestly pray that it may never again be exposed to the trial of electing a President by the House of Representatives under the present provision of the Constitution; and, most of all, should the small States ask to be delivered from the exercise of a power so grossly unequal and offensive.

Another absurdity in the election of a President by States in the House of Representatives is found in the fact that the election is to be had by members elected two years before, without reference to the election of President. The issues upon which they were elected to the House may have passed away, or the politics of the country may have changed entirely within two years, so that the members elected two years before that may not represent the sentiment of the country at the time the presidential election takes place.

If there is any use in having a President elected every four years, it is that the public sentiment of the country may find expression; that a man may be chosen to represent that sentiment; but when the election is committed to the members of the House, who were elected two years before, and whose political sentiments may have been expressly repudiated at the last election, we can understand how completely this system is calculated to baffle and defeat the popular will.

THE TIME OPPORTUNE FOR CHANGE.

We point out to the Senate and to the country dangers that lie in the pathway of the nation, contingencies, some of them not remote, but near and probable, which threaten the country with revolution and the Government with destruction, and urge that the path of duty is the path of safety; that now, in a time of peace and political calm throughout the nation, we should address ourselves to the removal of these perilous obstructions that were hidden to the eyes of our fathers, but have been brought to our knowledge by observation and experience.

CONCLUSION—THE PROPOSED CHANGES.

In conclusion, we would say that if the system of electoral colleges is to be continued, some means should be devised by which the election of these electors in the States may be contested, so that if it has been controlled by fraud or violence, or if there be two sets of electors, each claiming the right to cast the vote of a State, there may be some machinery or tribunal by which fraudulent returns could be set aside or corrected, and the contending claims of different sets of electors be settled in advance of the time when the vote is to be finally counted, and by which the President of the Senate may no longer be left to exercise the dangerous powers that seem to be placed in his hands by the Constitution, nor the two houses of Congress by the operation of the twenty-second joint rule. Patriotic men of all parties must rejoice that General Grant was re-elected by so large a majority that the electoral votes of Louisiana and Arkansas were unimportant to the result, for without intending here to express any opinion in regard to those votes, we must be permitted to say that they were surrounded by such circumstances and attended with so much doubt in the public mind that the peace of the nation would have been imperilled if the result of the presidential election had been determined by them.

The plan of dispensing with the electoral colleges and electing the President directly by the vote of the people seems to be a remedy for many of the evils and dangers to which we have referred; but even then some tribunal should be appointed

settle contested and doubtful results in districts or at the disputed polls, and this tribunal should be removed as far as possible from the control of excited parties. It has seemed to us inexpedient to attempt to establish such a tribunal in an amendment to the Constitution, and we therefore recommend that Congress be clothed with power to establish such tribunal by law. Whatever tribunal might be created would require much consideration in regard to details and method of operation, into which it is not important that we should now attempt to enter.

As to the districts into which it is proposed to divide the States for election purposes, the plan presented invests Congress with the same power over this subject which it now has over the representative districts in the States, leaving to the States first the formation of such districts, but giving to Congress the power at any time to alter or establish them. We propose that the election for President and Vice-President shall be conducted under the authority of the United States and by the machinery to be provided by Congress. The election of the Chief Magistrate is the most important act which the people can be called upon to perform, and it is expedient that it should be conducted in every State under uniform laws and methods. Nevertheless, under the amendment proposed, it would be in the power of Congress, should it see proper, to adopt the machinery of the States in the conduct of the election.

AMENDMENT TO THE CONSTITUTION.

IN SENATE, January 20, 1875.

ELECTION OF PRESIDENT AND VICE-PRESIDENT.

Mr. MORTON. I move that the Senate proceed to the consideration of the proposition reported by the Committee on Privileges and Elections for an amendment to the Constitution in regard to the election of President and Vice-President of the United States.

Mr. SHERMAN. I am inclined to yield to the Senator from Indiana and will support his motion, but after that matter is disposed of I give notice to the Senate that I shall claim the floor for the consideration of the Louisiana question.

The VICE-PRESIDENT. The question is on the motion of the Senator from Indiana.

The motion was agreed to; and the joint resolution (S. R. No. 16) proposing certain amendments to the Constitution of the United States was read twice and considered as in Committee of the Whole.

Mr. MORTON. I ask that the proposition reported by the committee be read in full.

The Chief Clerk read as follows:

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, (two-thirds of each house concurring therein,) That the following article is hereby proposed as an amendment to the Constitution of the United States, and, when ratified by the legislatures of three-fourths of the several States, shall be valid, to all intents and purposes, as a part of the Constitution, to wit:

ARTICLE —.

1. The President and Vice-President shall be elected by the direct vote of the people in the manner following: Each State shall be divided into districts, equal in number to the number of Representatives to which the State may be entitled in the Congress, to be composed of contiguous territory, and to be as nearly equal in population as may be; and the person having the highest number of votes in each district for President shall receive the vote of that district, which shall count one presidential vote.

2. The person having the highest number of votes for President in a State shall receive two presidential votes from the State at large.

3. The person having the highest number of presidential votes in the United States shall be President.

4. If two persons have the same number of votes in any State, it being the highest number, they shall receive each one presidential vote from the State at large; and if more than two persons shall have each the same number of votes in any State, it being the highest number, no presidential vote shall be counted from the State at large. If more persons than one shall have the same number of votes, it being the highest number in any district, no presidential vote shall be counted from that district.

5. The foregoing provisions shall apply to the election of Vice-President.

6. The Congress shall have power to provide for holding and conducting the elections of President and Vice-President, and to establish tribunals for the decision of such elections as may be contested.

7. The States shall be divided into districts by the legislatures thereof, but the Congress may at any time by law make or alter the same."

So Mr. MORRILL, of Vermont. I take it the Senator from Indiana would hardly feel disposed to go on at this late hour, and with his permission I move that the Senate proceed to the consideration of executive business.

January 21, 1875.

ELECTION OF PRESIDENT AND VICE-PRESIDENT.

The Senate, as in Committee of the Whole, proceeded to consider the joint resolution (S. R. No. 16) proposing an amendment to the Constitution prescribing the manner of electing the President and Vice-President of the United States.

Mr. MORTON. Mr. President, it is pleasant to be able to present to the Senate a subject which is entirely above all party considerations, and to which men of all parties can address themselves independent of the excitement which now seems to prevail throughout the country.

The proposition is to amend the Constitution of the United States as to the method of electing President and Vice-President, so as to bring the election home to the people as nearly as possible, and at the same time to avoid the dangers that exist under the present method. No more important question can be considered by the Senate of the United States at this session of Congress; for in my opinion great dangers impend, owing to the imperfection of the present system of electing the President and Vice-President of the United States.

When we look back through the history of the country as to former elections, it becomes a matter of surprise that there have not been collisionous and troubles resulting from the imperfections of our system. We may fairly assume that we have had a series of happy accidents by which these collisions have been avoided; but we cannot hope that these happy accidents will continue to occur; and in fact the dangers arising from the present system of election are greater now than they have been before in the history of the country, and will increase.

The system of electing the President and Vice-President by means of electors appointed by the legislature of each State, as is well understood, had its origin in a profound distrust of the people. It was not believed by the framers of the Constitution to be safe to intrust the election of President and Vice-President to the people of the United States. Democracy was not so well understood then as it is now. It was believed that it was necessary to place the election of President and Vice-President in the hands of a small body of men, to be selected on account of their wisdom and of their character; that those men should be made entirely independent of the people and entirely independent of Congress; that their action should be unknown to the people and unknown to each other, so as to secure their complete independence. The first proposition in the convention of 1787 was that the President and Vice-President should be elected by the Congress itself. That was afterward changed, and it was then proposed that they should be elected by electors, and that these electors should be chosen by Congress. Then the plan was changed, and it was agreed that they should be elected by the States through the medium of electors, and that the electors should be chosen by the legislatures of the several States; and the purpose was to place the election of electors and the election of President and Vice-President entirely beyond the control of Congress, that those elections should not be under the supervision of Congress. I will ask the Secretary to read the second clause of the first section of the second article of the Constitution.

The Chief Clerk read as follows:

"Each State shall appoint, in such manner as the legislature thereof may direct, a number of electors, equal to the whole number of Senators and Representatives to which the State may be entitled in the Congress; but no Senator or Representative, or person holding an office of trust or profit under the United States, shall be appointed an elector."

Mr. MORTON. The first point now to which I call the attention of the Senate is that the election of electors was placed absolutely under the control of the legislatures of the several States and that Congress had no power over the election of these electors or to determine any question in regard to their election, but that the selection or appointment of electors was to be placed exclusively in the hands of the State legislatures. The States could not by their constitutions control or in any manner change the appointment of electors; the power of a legislature to appoint electors is conferred not by the State constitution, but is conferred by the Constitution of the United States, so that it is not in the power of a State constitution to take from the legislature the power to appoint electors in any way that that legislature may see proper. The legislature may repeal any day the law by which electors are elected by the people. The legislature may elect these electors by joint ballot of the two houses; it may authorize the governor to appoint them; it may authorize the supreme court of the State to appoint them; and this power has been exercised in various ways in various States. In some States the electors were once elected by separate districts, like members of Congress; in all the States now by general ticket. In some States in times past they were chosen by the different houses of the legislatures, and where the houses were divided in politics, the senate, for instance, being federal, and the house republican, they divided the electors by contract, the senate to choose so many and the house to choose so many. They have been elected by double and treble districts, by dividing the

State into a number of districts less than the number of members of Congress, so that one district would elect two or three electors. In other words, various expedients and various methods have been adopted by the States at different times in the choice of electors, and this power to choose electors being placed absolutely with the legislature of each State by the Constitution, it is in the power of any legislature, at the next or before the next election, to withdraw the election from the people and choose electors in some other way that may seem good to the legislature of the State, and Congress has no power to control it; it has no power to determine whether the election has been properly held or not. In other words, no contested election of electors can be determined by the Congress of the United States, because the Constitution has placed that election absolutely and entirely with the States. All the power that Congress has over the electors is contained in the third clause of that section, which is in these words:

"The Congress may determine the time of choosing the electors, and the day on which they shall give their votes; which day shall be the same throughout the United States."

With these two exceptions everything is left to the States through their legislatures.

This brings me to the consideration of the next proposition. Congress has no power to provide for contesting the election of electors. That power is devolved entirely upon the State legislatures; and if they make no provision for cases of contested elections of electors Congress cannot do it, because it was the policy of the framers of the Constitution to make the election of President entirely independent of Congress, so that the executive should be entirely independent of the legislative; and, therefore, if there is to be any provision made under the present Constitution for determining a contested election of electors, it must be made by the several States and cannot be made by Congress. All the power that Congress has is to fix the time when the electors shall be chosen by the States, and to determine the day when they shall come together as electors to cast their votes, which shall be the same day in all the States.

The next proposition that I call the attention of the Senate to is that the States have made no provision for contesting the election of electors. All the States have now provided for electing electors by general ticket by the vote of the people; but this is of recent origin. Up to 1824 eight States chose electors by the legislature, and up to the beginning of the war in 1860 South Carolina chose her electors by the legislature, just as she did her Senators. Now all the States, however, have agreed that they shall be elected by the people upon general ticket, so that whatever set of electors get the most votes in the State, if it is only a majority of five, cast the whole vote of the State.

But no State has provided any method of contesting the election of electors. Though this election may be distinguished by fraud, notorious fraud, by violence, by tumult, yet there is no method for contesting it; no State has passed a law for that purpose. Every State has passed laws for contesting the election of governor, of lieutenant-governor, of members of the legislature, and of all State officers; but no State has made any provision for determining a contested election as to electors; so that whatever electors are certified to by the State authorities have the right to cast the vote, and there is no power in Congress or anywhere else to prevent them from doing it, although it may be known to the whole world that they were not honestly elected and have no right to cast the vote of that State.

Not only that, but the law passed by Congress in 1792, to carry out the provision of the Constitution, prohibited any contest in effect either by the State or by Congress. That law provides that the electors shall assemble in the several States on the first Wednesday in December and cast their votes. It further provides that the electors shall be chosen, whether by the people or by the legislatures, within thirty-four days of the time when they are required to cast their votes, so that no time is left between the selection and the vote for any contest; nor can there be any contest afterward. When the electors have cast their votes, they are *functus officio*; they can never meet again; their office has expired. When they meet and vote on the first Wednesday in December, their functions have expired; they can never be called together again.

And then the Constitution goes on to provide that they shall vote by ballot. Why? That it may not be known to each other how they voted; that it may never be known to the people how they voted; and then, that the vote shall be sealed up and sent to the President of the Senate, and that he shall not open that vote until the day it is counted; that the vote is to be opened in the presence of the two houses and at the very moment it is to be counted; so that if there is any informality in that vote, if there is any fraud or irregularity, there is no possibility of knowing it, there is no possibility of correcting it, because the sealed package is not to be opened until the very moment the vote is to be counted in the presence of the two houses. It seems never to have occurred to the members of the convention that there could be two sets of electors; it seems never to have occurred to them that there would be fraud or corruption or any reason why the votes of electors should be set aside. It is clearly a *casus omissus*, a thing overlooked by the framers of the Constitution, and there is no

place to contest the vote either of the electors by the people, or by the legislature, or the vote of the electors for President, because all that they have done is to be absolutely sealed until the very moment when the vote is to be counted.

Then, Mr. President, how is the vote to be counted? I come to that as the next consideration. The Constitution provides that the vote shall be sealed up when it is cast by the electors, and sent to the President of the Senate, and that he shall open the sealed paper in the presence of the two houses, "and the votes shall then be counted." The two houses are to come together, and they are to be as witnesses merely. They cannot act together as a joint convention; they cannot vote as one body. There is no function that they can perform when they are together. They are there simply as witnesses. The vote is to be sealed up and sent to the President of the Senate, and he is to open it in the presence of the two houses, but the two houses thus assembled can do nothing, whatever may be the irregularity, whatever may be the wrong visible on the face of the papers. They cannot act together as a joint convention; they cannot act as one body; they cannot act as separate houses in the presence of each other; but the Constitution says "the vote shall then be counted." That is all that is to be done.

Now we see the power which is given to the President of the Senate, ordinarily the Vice-President of the United States. The sealed votes are to be sent to him and he is to open them in the presence of the two houses, "and the votes shall then be counted." Suppose there are two sets of electoral votes, as from Louisiana at the last election, sent up to the Vice-President; he has two packages, and he causes both to be opened in the presence of the two houses; who shall determine which set shall be counted? The one handed over by the Vice-President to be counted must be counted. The choice is left with him. There is no earthly power to correct it. If in the case of Louisiana the Vice-President had handed over to the tellers the electoral votes that had been certified to by McEnery, they must have been counted; there was no power to prevent it; or if on the other hand he had handed over those that had been signed by Kellogg, they must have been counted. The two houses together could do nothing. The two houses separately could do nothing. This is a case where this great power is vested in the hands of the Vice-President because of an omission in the Constitution. There is no power provided anywhere to determine which of these two sets of electoral votes should be counted, and it depends upon him as to which set he will hand over.

MR. SARGENT. Does not a disagreement between the two houses reject a vote?

MR. MORTON. I am coming to that after a while. That is a very important question. See what a vast power is placed in the hands of the Vice-President. He may understand, as likely he will, the contents of the different papers that are placed in his hands, and he may be a candidate himself for election. That has so happened six times. It has happened six times that the Vice-President has opened and counted the votes where he himself was a candidate. John Adams as Vice-President opened and counted the votes and declared himself elected in 1797. Mr. Jefferson as Vice-President opened and counted the votes in 1801, when he was a candidate for President, and he declared the vote to be a tie. Suppose in that case there had been two sets of electoral votes from a State, certified to, and in his hands, one of which would have made a tie, and the other of which would have elected him President; there was no constitutional power anywhere to prevent him from handing over that set which would have elected himself as President. Nor could his action have been revised in any possible way. Again, in 1821, Mr. Tompkins counted the votes when he himself was a candidate for re-election as Vice-President. In 1837 Mr. Van Buren counted the votes and declared himself elected President of the United States. In 1841 Mr. Johnson counted the vote when he was a candidate for re-election as Vice-President. In 1861 Mr. Breckinridge opened and counted the vote when he was a candidate for President. True, it was done honestly in all these cases; but suppose a case where the election is close, where by opening one set of papers the Vice-President is to be elected President, and by opening another set he is to be defeated, or where by refusing to count at all the vote of a particular State the result will be to elect him or to elect the candidate of his party! You see what a monstrous and irresponsible power has been placed in the hands of the Vice-President or the President of the Senate.

I have spoken of the theory of the electoral college; and now let us consider how completely it has failed; let us see how completely that theory has been reversed in practice. What was the theory? That the President should not be elected by the people—the people could not be trusted—but the election was to be vested in the hands of selectmen, who were to come together and act as deliberative, independent bodies. They were all to vote on the same day, so that there should be no collusion between them. The votes could not be cast on different days, where there might be correspondence with different States so as to control the last elections. That might take place; but the Constitution requires that the electors shall vote in all the States on the same day. And how are they to vote? Vote by ballot, so that one elector may not know how the others vote, and so that the people shall never know how they vote;

but they were to deliberate, to be deliberative bodies. They were to consider and discuss, and were thus made independent of all knowledge by the people, that they might act entirely independent of all improper considerations or influences. That was the theory.

How has it turned out in practice? It has turned out in practice that the electors are pledged in advance to vote for a particular candidate; that they have been elected as mere agents, to cast their votes for the candidates of their party, a pledge that has never been violated and the violation of which would bring upon the offending party all the indignation that society could invent. It never has been violated, and it probably never will. Therefore the theory is a total failure. Instead of being deliberative bodies, they are pledged in advance to vote for particular men. Therefore the reasons for the electoral college have gone. Why not let the people vote themselves for the presidential candidates, instead of voting for electors who are pledged to do the same thing?

Now, let me consider some of the dangers and difficulties attending this system. In the first place, by law when electors have died since their election, or fail to attend, then the others may fill their vacancies. In the case of Texas at the last election, when the electors met to vote four were absent, just one-half the whole number. The other four supplied the vacancies by election. Suppose there should be five in favor of one candidate and five in favor of another and one elector dies. Then one five will have the majority over the other, and they can fill the vacancy, and they can thus secure a majority in the electoral college.

But let us look at the unfairness of it in another particular as now adopted. They vote by general ticket in all the States. That set of electors that get a majority of one vote cast the vote of the whole State. A majority of one will cast the entire vote of New York; so that nearly two million and a half of people are utterly silenced in their vote for President. It becomes an election by States. That was not intended by the framers of the Constitution. They did not intend to make it an election by States in one particular, because they expected the electoral colleges to be deliberative bodies, and as deliberative bodies to divide up, some to vote for one candidate and some for another; but it has turned out in practice that the electors are all pledged in advance to vote for a particular candidate, and that one set or the other set will be elected as an entirety, and they come together and cast the vote of the State. It is therefore a vote by States; and under the present system ten States can elect a President of the United States. It is just the same thing as if every man in those ten States had cast their votes for those candidates, a thing never likely to happen; but that is the effect of it. It is an election now by States. It is not a national election. It is removed further from a national election than was contemplated by our fathers, because they supposed these electors would divide—first deliberate, first discuss and consider with each other, and then divide the votes; but it turns out they do not do so. They are pledged in advance. They vote as a unit; and therefore the vote of New York, of Indiana, of Pennsylvania, of Illinois, is given as an entirety. It is therefore an election by States. It enables a small minority of the people of the United States to elect a President. Let us suppose, for example, that one man receives enough electoral votes to elect him; that he has carried enough States by small majorities to give him 186 electoral votes. If you please, he has carried New York by 5,000, Pennsylvania by 3,000, and so on, so that his aggregate majority in those States is less than 50,000. His opponent carries the other States by large majorities, so that it may turn out that his opponent will have half a million majority of the popular vote of the United States.

Mr. BAYARD. That was the case with Mr. Lincoln, I believe. He had a very small minority of the entire popular vote of the United States.

Mr. MORTON. But the remaining vote was divided between two other candidates.

Mr. BAYARD. I say he had a small minority of the entire popular vote of the United States.

Mr. MORTON. Yes, he had. It turns out that four Presidents have had less than a majority of the popular vote, and it is the possibility at all times under this system that a small minority of the votes of the people may elect a President of the United States. That is anti-republican; it is anti-democratic; and that possibility of itself calls for a change in the method of electing a President and Vice-President of the United States.

For my part, I would much rather elect the President by the people of the United States as one entire community; but I know we cannot change the Constitution to that effect. I know the small States will never vote for that; but I would prefer it. But the next and the nearest approach that we can make to an election by the people is to elect by districts. Now, I wish to read from the report, which is more accurate than I can state it. I wish to show by past history how far the electoral college has come from representing the popular vote, and how much nearer the district system would approach to it, and I will ask the attention of the Senate to this extract from the report, which has been carefully prepared.

Mr. OGLESBY. From what report does the Senator read?

Mr. MORTON. The report made by the Committee on Privileges and Elections. In the first place, I will state that so far as I can gather the evidence the electoral college has never come within 10 per cent. of representing the popular vote, and it several times has differed from it more than 30 per cent.

The following statement of the result in the different presidential elections from 1872 back to 1844 will establish the truth of what we have said:

"In 1872 General Grant received 55 per cent. of the votes of the people; in the electoral college he received 81 per cent.

In 1868 General Grant received 52 per cent. of the popular vote, and 73 per cent. of the electoral vote.

In 1864 Mr. Lincoln received 55 per cent. of the popular vote, and 91 per cent. of the electoral vote.

In 1860 Mr. Lincoln received only 40 per cent. of the popular vote; he received 59 per cent. of the electoral vote.

In 1856 Mr. Buchanan received only 45 per cent. of the popular vote; he received 59 per cent. of the electoral vote.

In this election Fillmore received 25 per cent. of the popular vote, and only 2 per cent. of the electoral vote; but fourteen of his friends were elected to Congress.

In 1852 Pierce received 51 per cent. of the popular vote, and 85 per cent. of the electoral vote.

In 1848 General Taylor received 47 per cent. of the popular vote, and 56 per cent. of the electoral vote. At this election Mr. Van Buren received about 10 per cent. of the popular vote, and received no electoral vote; but three of his friends were elected to the House of Representatives.

In 1844 Mr. Polk received not quite 50 per cent. of the popular vote. He received 62 per cent. of the electoral vote."

To compare the district system with the general-ticket system and to see how much nearer it comes to representing the people, I call the attention of the Senate to the following statements. I will take the four States of Pennsylvania, Ohio, Indiana, and Illinois:

"These States voted solidly for Mr. Lincoln in 1860, casting 74 electoral votes. At the same election they returned sixty-six members of Congress, of whom twenty-four were democrats.

In 1864 the same States cast 76 electoral votes for Mr. Lincoln again, and elected the same year sixty-eight members of Congress, of whom sixteen were democrats.

In 1868 the same States threw 76 electoral votes solidly for General Grant, and elected sixty-eight members of Congress, of whom twenty-two were democrats.

In 1872 the same States again voted solidly, giving 85 electoral votes to General Grant, and elected seventy-seven members of Congress, of whom twenty-five were democrats.

In these four States the democratic strength, as compared with the republican, has been about as 9 to 10, but under the operation of the general-ticket system they had been wholly unrepresented in the electoral college; but in the House of Representatives, under the district system, they have had an average of nearly one-third of the members."

Now I will take the State of New York alone for the same period:

"In 1860 New York cast her thirty-five electoral votes solidly for Mr. Lincoln. At the same time she elected thirty-three members of Congress, of whom nine were democrats. In 1864 she again cast her thirty-three electoral votes solidly for Mr. Lincoln, and at the same time elected thirty-one members of Congress, of whom eleven were democrats. In 1868 she cast her thirty-three electoral votes solidly for Mr. Seymour. The State was carried for Mr. Seymour by his overwhelming majority in the city of New York, about the character of which grave charges were made, but of which the committee expresses no opinion; but the rest of the State, unaffected in their districts by this large majority in the city, returned eighteen out of the thirty-one members of Congress, who were opposed to Mr. Seymour, thus showing conclusively how the voice of the people of New York outside of the city had been stifled in the presidential election by the city majority, operating through the general-ticket system."

There is a very fair illustration of the dangers of the general-ticket system. A large fraud in the city of New York controls the election for governor, controls the election for President; but in the election of members of Congress by districts, out of the city, not being affected by this large fraud in the city, they elected eighteen republicans out of the thirty-one members of Congress, showing what would have been the voice of New York if the country had not been stifled by the enormous fraud committed in the city, about which fraud there was scarcely any dispute and will be scarcely any now. These cities present the elements of fraud: New York, Philadelphia, Boston, Cincinnati, Saint Louis, and New Orleans—all these large cities—and the fraud committed in a city may control the vote of a whole State, so far as the election by general ticket is concerned; but if the election is by districts, that fraud only affects the district in which

it is committed, and will not control the vote of the whole State. Here is great temptation to fraud; because where parties are closely divided in a State, with but a small margin one way or the other, there is great temptation to commit a fraud which determines the vote of the whole State. By the election by districts you do not bring the vote absolutely home to the people as you would by a vote as one community, but you come as near to it as possible. You find that the district system approaches more nearly by one-third to the whole popular vote than the election by general ticket in the present method.

I would prefer to elect the President by the vote of the whole people as one community; yet I think we cannot do that. I then prefer to come as near to it as possible, to elect the President by districts; and that is what we propose by this amendment. We propose, in the first place, that the candidate who gets the highest number of votes in a State shall have two presidential votes. This is to preserve the autonomy and the power of the small States. They now have two presidential electors, two votes at large, as they have two Senators. We preserve that theory by giving them two presidential votes; and the man who gets the highest vote in the State shall get those two votes. Then we have the State divided into as many districts as it has members of Congress, and the candidate who gets the highest vote in a district has the vote of that district. He may not have a majority, but if he has a plurality, if he has more votes than any other candidate, he gets the vote of the district, and it counts one. This brings the election home to the people as nearly as possible. So far as these districts are concerned, we leave the power to make the districts just as it is now with regard to members of Congress. The States now district themselves by their legislatures, but Congress has the power at any time to lay off the districts for electing members of Congress. It has never been exercised, but that power is reserved to Congress. And we make the same provision in regard to these presidential districts: that is, leave the States to form them in the first place, but reserve the power in Congress to alter them or to change them at any time. These districts may be gerrymandered, as they are for Congress. That has been done; it is an evil; you cannot correct it altogether. But we require the districts to be composed of contiguous territory as nearly as possible, and as nearly equal in population as possible. Under the system of electing members of Congress by districts instead of by general ticket, as I have already shown, you approach one-third more nearly to the popular vote than by electing by the general ticket. In the States that I have mentioned the votes were cast solidly for one candidate for President, yet the same States elected nearly one-third of all their members of Congress on the other side, electing democrats; showing that by the district system you give to the people of the States comparatively a voice in the election of President according to their views.

There is another question involved in electing by districts as compared with general ticket, and that is that when you elect by general ticket under the present system no man can vote unless he has a party in the State large enough to hold a convention and put an electoral ticket in the field. If I want to vote for a particular candidate and that candidate has no party in my State, though he may have a strong party in other States, I cannot do it; I must vote for electors who will vote for him. I cannot put an electoral ticket into the field myself, but there must be a party convention to do it. Therefore I am disfranchised in point of fact, unless there is a convention held in that State which will appoint an electoral ticket to vote for a candidate I am in favor of. How did this operate in the South in 1856 and in 1860? In 1856 there were thousands of republicans in the South who did not vote because there were no electoral tickets in the field for Frémont and Dayton. That particular state of public opinion prevailed in those States that republicans could not meet in convention and nominate electoral tickets. Therefore the votes of those men that were in favor of Frémont and Dayton were entirely lost; they could not vote at all. Under the present system, to enable a man to vote, there must be enough men of his own way of thinking in his State to put an electoral ticket in the field that he may vote for it. Now, this can hardly be called republican. The government is republican which enables every man to vote directly for the man of his choice, although there may not be another man in the whole State that feels as he does. A particular candidate may have a majority in some States, but he may have scarcely any friends in others: his friends may all be in one district; they may be concentrated; but unless there is a convention, a caucus, if you please, to nominate candidates for electors, his friends are excluded from voting because they cannot vote directly, but must vote for intermediate men.

Now, Mr. President, I consider another question, and that is the danger of the present system. Mark you, no State in this Union has a law to contest the election of electors, and there is no room for a State law; there is no time for it, even if the States were disposed to enact laws. Congress has no power, there is no power to judge except the President of the Senate. He is irresponsible; he is the depositor of all the votes, and as to whether these votes shall be cast depends entirely upon himself, so far as the Constitution is concerned. Suppose that the election of President had depended in 1872 upon the vote of Louisiana, or upon the vote of Arkansas, or upon the vote of

Texas, would we not in all probability have been involved in revolution? If the election of Greeley had depended upon counting the votes certified to by McEnery, or the election of Grant had been dependent upon counting the votes certified to by Kellogg, I ask you what would have been our condition? If it had been decided either way, in all probability there would have been resistance, and there would have been rebellion. It is full of danger. We have escaped it thus far. It was a matter of congratulation to both democrats and republicans that Grant's majority was so large as to make the vote of Louisiana, of Arkansas, and of Texas unimportant; but if it had been otherwise, if the election was to depend upon the vote of any one of those States, what would have been the result?

Mr. President, let me consider the result in 1857, when Buchanan and Frémont were candidates. The electoral vote of Wisconsin was not cast on the day fixed by law. The Constitution requires all these votes to be cast upon the same day. There was a snow-storm in Wisconsin that prevented the electors from coming together and voting upon that day. They voted upon the next day. When they came to count the votes in 1857, a motion was made by a Senator to reject the vote of Wisconsin because it was not cast upon the day provided by law. I think the objection itself was good; but what was the decision of the President of the Senate, Mr. Mason. He decided that the motion was out of order. He said nothing was in order but to count the votes. He overruled the motion, and he would have overruled a motion to exclude the vote of any State. He took the view of his power, and I think it was correct, that the two houses were there simply as witnesses; they were not there to make motions, they were not there to offer objections; but they were simply there to witness the count; and so he decided. And when motion after motion was made to exclude the vote of Wisconsin because it was not cast as required by law, he decided every time that nothing was in order but to count the votes. And when they had counted the votes, he said the purpose for which they had assembled had been discharged, and the two houses separated. They had a great debate in the house over the question, which lasted two or three days, and they came to the conclusion, substantially, that the two houses had no power over the question. They had a debate in the Senate, and they arrived at the same conclusion in the Senate, although not by resolution, that they were powerless. Now, suppose the election had turned upon the vote of Wisconsin; that by counting the vote of Wisconsin Frémont would have been elected; that by rejecting it Buchanan would have been elected. If Mr. Mason had excluded the vote of Wisconsin his party would have supported it; if he had received the vote of Wisconsin, the republicans would have supported it; and in that case he would have had, beyond all question, the decision of the election in his own hands. In either case, it would, in all probability, have resulted in violence, in insurrection. The danger was escaped, in that case, because Buchanan was elected independently of the vote of Wisconsin, and it was no matter how it was cast. But the point to which I call the attention of the Senate was the decision of the Vice-President in that case, that nothing was in order but to count the votes, and that the houses were there simply to witness that count, but without having any power whatever.

Now, Mr. President, I come to the consideration of what is called the twenty-second joint rule of the two houses.

Mr. SARGENT. Will the Senator allow me to make a suggestion?

Mr. MORTON. Certainly.

Mr. SARGENT. The Senator, by his amendment, it seems to me, does not make provision for one contingency. It may be a remote contingency, but still it may arise, and that is in case no person should receive a majority of the votes thus cast in the various districts, or if two persons receive the same number, it does not provide which shall have the place or how that controversy shall be settled. Perhaps it is not so remote a contingency, when we find the remarkable fact that in districts where thousands and tens of thousands of votes are cast, still on counting them they come out nearly even. There seems to be some law of chance which leads to parallels in such cases that are really remarkable. It certainly would not be very remarkable if, after all the votes are cast in the districts and the additional votes are given in the proper manner, it should be found that two persons have an equal number.

Mr. MORTON. I will state that that contingency is not provided for by the amendment. The committee did not agree upon it. I was of the opinion that in such cases as that the election would be by both houses of Congress in joint convention, each Senator and each Representative having one vote. I will come to the consideration of that after a while. But in regard to the question of majority we provide for that. We dispense with the requirements of a majority and we adopt the plurality system, and I will now speak of that. We intend to avoid an election by the House altogether, and that that candidate having a plurality shall be elected and not require a majority of all the votes cast. We now require a majority of all the electors appointed to elect, and if no candidate gets a majority of all, then the election goes to the House of Representatives, and the election is there not by each member having a vote, but the election is by States. Now one word as to the plurality rule. It is adopted by all the

States except three in the election of State officers. It is adopted by all the States in regard to the election of members of Congress, and no complaint is made of it. It is adopted by the States in the election of electors. The electors who have a plurality are elected. A majority is not required to elect electors, even, under the present system. We believe that the election there should be final, that there should be no second election required, and that that candidate who has a plurality of all the votes, that is, a majority over anybody else, shall be elected. It has worked well in the States; it has been used in most of the States for a hundred years, and no State now proposes to go back from the plurality to the majority system. I now ask for the reading of the twenty-second joint rule.

The Chief Clerk read as follows:

"The two houses shall assemble in the hall of the House of Representatives at the hour of one o'clock p. m., on the second Wednesday in February next succeeding the meeting of the electors of President and Vice-President of the United States, and the President of the Senate shall be their presiding officer; one teller shall be appointed on the part of the Senate and two on the part of the House of Representatives, to whom shall be handed, as they are opened by the President of the Senate, the certificates of the electoral votes; and said tellers, having read the same in the presence and hearing of the two houses then assembled, shall make a list of the votes as they shall appear from the said certificates; and the votes having been counted, the result of the same shall be delivered to the President of the Senate, who shall thereupon announce the state of the vote and the names of the persons, if any, elected; which announcement shall be deemed a sufficient declaration of the persons elected President and Vice-President of the United States, and, together with a list of the votes, be entered on the journals of the two houses. If, upon the reading of any such certificate by the tellers, any question shall arise in regard to counting the votes therein certified, the same having been stated by the Presiding Officer, the Senate shall thereupon withdraw, and said question shall be submitted to that body for its decision; and the Speaker of the House of Representatives shall, in like manner, submit said question to the House of Representatives for its decision; and no question shall be decided affirmatively, and no vote objected to shall be counted, except by the concurrent votes of the two houses; which being obtained, the two houses shall immediately re-assemble, and the Presiding Officer shall then announce the decision of the question submitted, and upon any such question there shall be no debate in either house; and any other question pertinent to the object for which the two houses are assembled may be submitted and determined in like manner. At such joint meeting of the two houses seats shall be provided as follows: For the President of the Senate, the 'Speaker's chair;' for the Speaker, a chair immediately upon his left; the Senators in the body of the hall, upon the right of the Presiding Officer; for the Representatives, in the body of the hall not occupied by the Senators; for the tellers, Secretary of the Senate, and Clerk of the House of Representatives, at the Clerk's desk; for the other officers of the two houses, in front of the Clerk's desk and upon either side of the Speaker's platform. Such joint meeting shall not be dissolved until the electoral votes are all counted and the result declared; and no recess shall be taken unless a question shall have arisen in regard to counting any of such votes, in which case it shall be competent for either house, acting separately, in the manner hereinbefore provided, to direct a recess, not beyond the next day at the hour of one o'clock p. m."

Mr. MORTON. The first point to which I call the attention of the Senate is that this twenty-second joint rule is grossly unconstitutional. No provision can be found in the Constitution that gives a shadow of power for its adoption. Not only is it without authority, but it is in violation of the very theory of the Constitution. The intention was to place the election of President independent of Congress, to make the Executive independent of the Legislature, but this makes the election of President to depend upon either house, not by a law, but by a joint rule. It enables the Senate by a vote to throw out the vote of North Carolina or New York; it enables the House of Representatives to do the same thing. What is the provision? When you come to look at it, it is monstrous. It is astonishing how that rule could ever have been adopted. The two houses are assembled to count the votes, and a formal objection is made, if you please, to counting the vote of New York, entirely formal; there may be no sense in it, no foundation for it, but if anybody objects, then the two houses must separate and they must vote upon this objection, and unless it is overruled by both houses the vote is rejected. If the Senate sustains the objection, the vote of New York is thrown out. If the house sustains it, the vote of New York is thrown out. It enables either house without debate—they must not debate without adjournment—they must not adjourn to consider, but they must decide summarily; it enables either house to throw out the vote of any or of all the States.

We had an illustration of that the last time the votes were counted. A formal objection was made to receiving the vote of Arkansas. The houses separated and voted. What was the result? What was the objection to receiving the vote of Arkansas? When you came to look at the seal upon the certificate it did not appear to be the seal

of the State. Upon close examination it was found to be the seal of the secretary of state and not the great seal of the State. Upon that technicality the vote of Arkansas was lost, the people of Arkansas were disfranchised in the presidential election. It turned out, I believe, that the State had no other seal, and that the seal was put to that certificate that is put to all papers required to be certified by the executive department of Arkansas: and yet upon that objection the vote of Arkansas was lost. The House overruled the objection, but the Senate sustained it. Suppose it had been New York, the vote of New York—the vote of five millions of people—would have been thrown out upon the mere technical objection by one house. There would be more sense in it if it required the concurrence of both houses to throw out the vote of a State, but by this rule one house may reject the vote of a State. And so it may reject the votes of all the States, and you may in every case throw the election of President into the House of Representatives.

To show you some of the objections offered upon that occasion, I want to refer to the proceedings that took place at the time. For example, a motion was made to reject a part of the vote of Georgia cast for Horace Greeley upon the ground that he was dead. It would have been very important in determining the question of the majority if the election had been close. The Senate overruled that motion, and decided that the votes cast for Horace Greeley must be counted, so that they would count in making up the majority of all the electoral votes. The House sustained the objection, and the vote of Georgia in part was lost simply because the House of Representatives sustained the objection. There the two houses disagreed. They disagreed in the case of Arkansas. Now we come to the case of Texas. Objection was made to receiving the vote of Texas. I will read what the objection was, to show the character of it. Mr. Trumbull, a very able lawyer as you all know, objected on this ground:

“Because there is no certificate by the executive authority of that State that the persons who voted for President and Vice-President were appointed as electors of that State, as required by the act of Congress.”

The certificate was informal, had not been made out correctly. That was Mr. Trumbull's objection. It was afterward re-enforced by Mr. Dickey, of the House:

“Mr. Dickey objected to the counting of the electoral vote of the State of Texas, because four electors, less than a majority of those elected, undertook to fill the places of other four electors, who had been elected and were absent.”

The two houses separated and voted. We overruled the objection in the Senate by a vote of 34 to 24; I believe the vote in the House was still closer; but a change of six votes in the Senate would have thrown out the vote of Texas. Luckily nothing depended upon it; but if the election of one candidate or the other had depended upon it, what would have been the result in that case? Then we come to the vote of Mississippi. A formal objection was made to the vote of Mississippi. We overruled it; the House overruled it by a small majority; but it happened that nothing depended upon that vote. It was not very important; but it shows the possibility of doing the thing. Now let me suppose a case where the Senate belongs to one party and the House to another, in point of majority, and we come to count the votes. If you please a democratic State is called. We look at the certificate. It is informal in some respect; some little objection may be made to it in the nature of a special demurrer. We separate and vote. The Senate being republican, we throw out the vote. The next State called is a republican State. Some little objection is found to that, because a good lawyer can always pick some little flaw in a certificate. The two houses separate, and the House of Representative throws out that vote. And thus we throw out first on the one side and then on the other, till they are all gone, and the election goes for nothing.

This is not only possible but it is probable. Here we have a rule—not a law, but a simple rule agreed upon between the two houses—by which either house, against the other, may throw out the vote of every State in this Union for President and disfranchise the people and throw the election into the House of Representatives. There could not be a grosser violation of the Constitution of the United States. It was not intended to give Congress any power over the electoral votes: but here by a simple rule, never passed as a law, never approved by the President of the United States, either house of Congress is enabled to disfranchise any and every State in this Union and throw the election into the House of Representatives. If that is not full of danger, I cannot conceive what is. You take a time when parties are bitter, when party spirit runs high. The election of President is a great prize; the office commands vast patronage and vast power; and here is a rule which enables either house to cast out the vote of any or of all States, disfranchise the people, and throw the election into the House of Representatives. It makes Congress a canvassing board, a thing that the Constitution expressly prohibited, not in words but in effect, by various provisions. While the Constitution attempted to withdraw the election entirely from Congress, here is a rule that puts it in the hand of either branch. It does not require a joint vote to disfranchise New York, but enables either the House or the Senate to disfranchise New York, Mississippi, or Indiana.

Now, sir, I come to the question of an election by the House of Representatives. We have a rule that enables either house to throw the election there. What is an election by the House of Representatives? There they vote by States. They do not elect the President by a majority of the members of that house, giving it some sort of a popular character, but they vote by States. Nevada has one vote; New York has one vote. Nevada with forty-two thousand people has the same vote as New York with five million—one hundred and fourteen times the population of Nevada.

There was some calculation made as to the possibility of an election by the House, and I want to read it from the report, as being better stated than I can do it now. Let me call the attention of the Senate to the possibility of an election by the House of Representatives. In the election of a President by the House of Representatives under the present apportionment, each State having one vote, forty-five members out of two hundred and ninety-two can make the election. For example:

“Delaware, Nebraska, Nevada, and Oregon have each one member, and four members would cast the votes of those four States; Rhode Island and Florida have each two, and four members would cast the votes of those States; Minnesota, New Hampshire, West Virginia, Vermont, and Kansas have each three members, and two votes in each, or ten members; in all five, would cast the votes of those five States; Arkansas, California, and Connecticut have four members each, and three in each, or nine in all, may cast their votes; Maine and South Carolina have each five members, three of whom in each, or six in both, may cast their two votes; Maryland, Mississippi, and Texas have each six members, and four in each, or twelve in all, may cast the vote of those three States. This makes nineteen States, or a majority of the States in the Union, and forty-five members may cast their votes and elect a President of the United States against the wishes of the other two hundred and forty-seven members of the House of Representatives.”

This may not be likely to happen; but this can be done under the election of a President by the House of Representatives. Why, sir, to call that republican or to call it democratic is to make nonsense of it. It is as far removed as possible from what may be considered a democratic or republican election of a President of the United States. And see how it is done: The voting is by members elected two years before. Members elected two years before on different issues, when the politics of the country were entirely different from what they are when the election takes place, are to choose the President of the United States and do it by States.

The election of a President by the House of Representatives is full of danger. It has been tried twice, and each time we came near making shipwreck. Can this Government stand the strain of another election by the House of Representatives? The monstrous injustice of giving forty-two thousand people in the State of Nevada the same voice in electing a President that New York with five million has is too great a strain for the Constitution of the United States. In 1801 it came near making shipwreck. They balloted until nearly the 4th of March, and then an election was secured by a change brought about under circumstances that I will not now state, not reflecting great credit upon the parties engaged in that change. In 1825 John Quincy Adams was elected by the House. The election was said to have been brought about by the action of Mr. Clay in securing for Mr. Adams the vote of Kentucky. Mr. Clay was afterward appointed Secretary of State. He never recovered from it. It was too great a power. I do not believe that Mr. Clay was guilty of corruption; I think that is not the general opinion; but the fact that Mr. Clay caused the vote of Kentucky to be cast for Mr. Adams, and that Mr. Adams afterward appointed him Secretary of State, ruined the prospects of Henry Clay; he never recovered from it. And now think of the grand opportunities for corruption. Take those States where one Representative casts the vote of the State; take the State of Nevada, or any other State that has but one member; that one Representative has the same power as all the Representatives of the State of New York. The patronage of the President is ample enough to reach every member of that House. You cannot conceive of grander opportunities for corruption than with a Representative from a State where there is but one Representative, or where a Representative may cast the casting vote in the delegation of a State and determine the vote of it. It is not only anti-republican essentially; it was the result of a compromise; but it is full of danger; and in these days, when there is so much said about the danger of corruption, we cannot contemplate without horror the idea that the election may be placed in the House, where a few members of the House by the sale of their votes or the promise of office to themselves or to their friends may determine the election and elect a President for forty or forty-two millions of people.

We ought never to have another election by the House of Representatives, and when we look back to the reasons that brought about the adoption of that provision of the Constitution, we find they have wholly failed; they are all gone; and the convention, if assembled now to adopt the Constitution, would never think of providing for an election by the House of Representatives, each State having one vote. If there was a tie-vote, as suggested a while ago by the Senator from California, and it was provided that both houses of Congress might assemble in joint convention, each Senator and

each Representative having one vote, that would come much nearer to an equality among the people and to making the election of a popular character than to give to each State one vote in the House of Representatives, because then each State would have a vote in the joint convention somewhat according to its population; and the number of men necessary to be corrupted in order to control the election would be much larger than under the present system. Therefore we should not tolerate the longer continuance of this provision in the Constitution of the United States.

Mr. President, to sum up the points which I am making against the present provisions of the Constitution and in favor of the proposed amendment, I will state that the theory of the electoral college grew out of a distrust and unwillingness to allow the President of the United States to be elected by the people; that the theory was that the election should be committed to a body of men who should be made entirely independent, who should meet and deliberate and vote secretly, so that they might be independent; that their action should never be known, they should vote by the ballot, but all of that has been reversed by pledging them in advance to vote for particular candidates; that by the general-ticket system the vote is by States, it is an election by States, it is not national in its character; that a few States may control the election, so that now attention is paid only to the votes of the larger States; the votes of the small States have very little consideration, but under the plan proposed each district must be counted by itself, and it is the same thing whether it is in a large State or in a small State; that under the present system a small minority of the people of the United States may elect a President against a very large majority for the defeated candidate; that under the present system the electoral vote has never approached within 10 per cent. of the popular vote, and has varied from it several times from 30 to 35 per cent.; that under the present system an election may be had by the States in the House of Representatives in defiance of the popular vote and in defiance of the plurality vote of the electors.

General Jackson in 1824 had the largest popular majority that any President has ever received in the United States, and he had a large plurality of the electoral votes also; but there were four candidates, and he did not get a majority of all the electors. The election went to the House of Representatives, and Mr. Adams, who did not receive one-third of the popular vote, was elected over General Jackson. What has been done may be done again.

Then there is no method now of contesting a fraudulent election of electors. Though the fraud may be so open that the world knows it, yet that vote must be counted unless the President of the Senate shall take the responsibility of withholding the vote on the day when it is to be counted. I say further that there is no power in Congress, that there is no room left to the States, in point of fact, to contest the election of electors; that under an election in the House, the vote being taken by States, forty-five members of that house may elect a President against the wishes of two hundred and forty-seven; that the States casting the vote may have a population of only one-fifth of the entire population of the United States.

Mr. President, the original theory that the people could not be intrusted with the election has failed. We now understand that large constituencies are safer than small constituencies. The patronage of the President is ample to reach every elector; it is ample to reach every member of the House of Representatives, but it is not ample enough to reach the people of the United States where they vote directly for the candidate of their choice. We are in danger of a collision at any time. In a closely-contested election, to be decided by fraudulent votes, to be decided by arbitrary conduct on the part of the President of the Senate, there is danger of revolution. Our forefathers were wise, but they seem never to have contemplated the possibility that there might be two sets of electors or that electors might be chosen by fraud or by violence. The debates do not show that these things were ever contemplated, and there is not one word in all the debates of the convention of 1787 to show that it was contemplated or expected that the electors would be chosen by the people; on the contrary the expectation was that they would be chosen by the legislatures of the States, and the power was put into their hands, and when the legislatures have committed this power to the people they have done a thing that was never contemplated by the framers of the Constitution, but they have done it under circumstances under which revolution or insurrection may arise.

Now, I submit to the members of the Senate that this question is too important to be passed over. It ought not to go over this session without action. You may not be able to agree upon this amendment, but perhaps you can agree upon something by which we can take away all or a part of the dangers by which we are surrounded; and I submit that the Senate ought never to give up the consideration of this question until something has been decided that we may send to the House of Representatives for their concurrence.

It is more important than any other measure that can possibly come before us. It is not new. For more than seventy years attempts have been made, at different times, to change the Constitution so as to avoid some of these dangers. Amendments have

passed the Senate and the House four times by a two-thirds majority to avoid some of these evils, and yet finally failed. The question is not new. The remedy proposed is not new, it is almost as old as the Constitution. Seventy years ago some of the ablest men in the Senate of the United States foresaw these dangers, but they have been allowed to sleep along. But shall we allow them to sleep along until the danger comes, until the actual collision takes place? If we are patriots, without distinction of party, without regard to our party differences upon other questions, we will address ourselves to the great work of so amending our Constitution as to avoid the great dangers that lie at the very threshold.

Mr. President, I have spoken longer than I intended, but the subject was so important that I could not forbear so much.

Mr. THURMAN. Mr. President, more than two years ago I submitted some remarks to the Senate upon the question which has been to-day discussed by the Senator from Indiana, and when afterward the Senator from Indiana brought the subject formally before the Senate by the introduction of a resolution of instructions to the Committee on Privileges and Elections, I was very much rejoiced that he did so, and I voted for the instructions with the greatest pleasure, as I believe every member of the Senate did; and I hoped for a report from that committee with which we might all agree.

The dangers to which we are subjected have not been exaggerated by the Senator from Indiana; the difficulties under which we labor have not been exaggerated at all; but it does seem to me that the remedy proposed by the committee in the resolution now under consideration really fails to meet the very danger which is most menacing. That there may be frauds in the election we all know. That there may be fraudulent returns in the States and a fraudulent count of returns, with the experience of Louisiana before us, needs no proof. But the greatest difficulty, the most menacing of all, is the count of the electoral votes here in Washington. If the result of the presidential election had depended on the votes of Arkansas and Texas at the last count that was made, we might have seen this country plunged in civil war. And before that we once witnessed the most extraordinary spectacle when the votes were counted in February, 1869, when the President of the Senate, or the acting Vice-President as he was called, announced that under a resolution passed by the two houses of Congress the vote of the State of Georgia should be counted if it did not change the result; but that if it should change the result it was to be rejected.

With these dangers menacing us, liable at any moment by this mode of counting the vote to see this country convulsed from one end to the other, not in a sectional way, but in a way that may reach every hamlet in the land, I must confess I was a little surprised when I looked at this report to find that it provides no sufficient or safe mode of counting the electoral vote.

Mr. MORTON. Will the Senator allow me a word just there?

Mr. THURMAN. Certainly.

Mr. MORTON. I intended to speak of that part of the amendment providing a tribunal for the decision of contested elections. It was a subject of grave consideration in the committee. Some were in favor of constituting the Supreme Court of the United States the tribunal to decide questions of contested elections; others thought the circuit courts or the district courts of the United States should be provided; others again thought there ought to be a special tribunal created by Congress. It was then thought better to place the whole matter in the decision of Congress to provide this tribunal. If we should put any special tribunal into the Constitution, it might not work well, and it might be difficult to change it. It was thought better, therefore, to leave the whole subject to Congress, believing that Congress would come to a safe and wise conclusion, because the subject was necessarily not of a party character, but one upon which men would differ or act together simply as they were patriots and lovers of their country, and we therefore inserted this provision:

"The Congress shall have power to provide for holding and conducting the elections of President and Vice-President, and to establish tribunals for the decision of such elections as may be contested."

We could therefore establish, if Congress thought proper, the Supreme Court as the tribunal, or the circuit courts in the different parts of the United States, or we could establish an independent tribunal for this very purpose. The whole power is left to Congress, where it did not rest before.

Mr. SARGENT. Does the Senator think that the use of the word "establish" there implies "new?"

Mr. MORTON. Not necessarily. We thought it would apply to any tribunal that might be selected.

Mr. THURMAN. Mr. President—

Mr. CONKLING. Will the Senator from Ohio allow me to ask the Senator from Indiana a question?

Mr. THURMAN. Certainly.

Mr. CONKLING. Was it the opinion of the Committee on Privileges and Elections that, under the Constitution as it stands now, Congress has not the power to dispense

not only with the twenty-second joint rule, but to put in its place a mode safer for ascertaining and counting the electoral votes?

Mr. MORTON. I cannot speak for all the members of the committee. I think there can be no doubt that Congress can dispense with the twenty-second joint rule; and that if nothing else be done that ought to be done. But it was my opinion, and I think the opinion of other members of the committee, though I will not undertake to speak for them, that Congress has no jurisdiction over the question; that the question of appointing electors and determining who are appointed is a question that belongs to the legislatures of the several States, and that the other provisions of the Constitution show that it was intended to take the whole subject out of the hands of Congress, except in regard to two things, which are specially mentioned: first, the time of choosing the electors by the legislatures; and, second, the time when the votes shall be cast by the electors, which shall be on the same day in all the States. My own conviction is that Congress has no power over the subject whatever, and that the power of the Vice-President results, *ex necessitate rei*, from the absence of any power to control him. He is the depository of the electoral votes; they are not to be opened by him, not to be inspected, until the very moment when the vote is to be counted, so that there is no room or time for correcting informalities in the vote that may have been made by the electors, and the electors being *functus officio* on the day they cast their votes, the first Wednesday in December, they cannot be called together for any purpose. It is a *casus omissus*, where no provision has been made at all on the subject.

Mr. THURMAN. I was aware that in the resolution reported by the committee there is a provision that Congress shall have power to provide for counting these votes, and indeed for much more than that; but I for one am not willing to confide that power to Congress. I want the tribunal that shall count these votes to be provided for in the Constitution. Whether it be the Supreme Court or whether it be some tribunal created for that specific purpose, whatever it may be, I want it provided for in the Constitution. I do not want the laws that are to affect these great privileges, that are to operate on this great subject, to be at the mercy of the dominant faction for the time being in Congress, whatever party that faction may be. I want it fixed in the fundamental law, so that every party shall be compelled to obey it. Therefore, with great respect to the committee and to the able chairman of it who has devoted so much patriotic labor on this subject, I do say that in my humble judgment the report is manifestly defective in this particular; that it will not do; it will not cure the evils, and the greatest of all the evils, that attend this subject.

Nor, while I am up, I may be permitted to remark, do I agree with the Senator from Indiana that the counting of the votes and the declaration of the result belongs, under the Constitution of the United States, to the Vice-President alone. That is not the interpretation that has been placed on the Constitution heretofore. If so, you never would have the joint rule on the subject which now exists. The Constitution does provide that the President of the Senate shall open the returns in the presence of both houses of Congress, and that the votes shall be counted and the result declared. It does not say in so many words that the Vice-President shall count them; it does not say that he shall decide any question; it does not say that he shall even declare the result. What, then, is the natural interpretation to be placed on the Constitution? It is governed by that great and general rule, that when a duty is to be performed under the Constitution, and no specific mode of performance is pointed out in the Constitution, it is remitted to the law-making power to provide the mode. That is a rule of universal application. Where a power is conferred upon the Federal Government, and no officer or Department is specifically charged with that power, then that power is to be regulated according to the dictates of the law-making power, the Congress of the United States. Therefore I am not at all prepared to say that those who have gone before us, who have for so long a time interpreted this provision of the Constitution to authorize a joint rule on the subject, have interpreted it wrong. My own impression is that they have rightly interpreted it. At the same time I do not wish to be understood as exactly approving the present rule. I think it would have been better if the rule as originally advocated had been adopted, that the vote of every State should be counted unless both houses of Congress agreed to reject it. Now the rule is just the other way. Every presumption is in favor of the regularity of the returns, every presumption is in favor of the legality of the vote, and yet, assuming really that *prima facie* the return is not regular or that the vote is corrupt, it is put in the power of either house of Congress under this rule to reject the vote of a State. I do not think it should be so. I think the rule should be as it was very near being—for the vote was exceedingly close upon it—that the vote of every State should be counted unless both houses concurred in rejecting it.

But I must say that the rule, in my judgment, is defective in another particular. It prohibits debate absolutely, and the ruling was so strict on that subject at the last count of the returns that the Vice-President ruled out of order anything in a resolution offered on this floor that contained the slightest recital, because, he said, that was argument. He would not allow a resolution that had any preamble; he

would not allow a resolution in the body of which was contained any recital or any statement of positions of law. He ruled them all out as being in their nature argument, and we were compelled to vote here blindly upon every question that came up before us. Take the very case of Texas, if I am right about the State; I think it was Texas. The Senator from Indiana will correct me if I am wrong. There the objection was that the return was under the seal of the secretary of state.

Mr. CONKLING. Arkansas.

Mr. THURMAN. I thought it was Texas.

Mr. SARGENT. Texas was where four electors were chosen by the other four.

Mr. THURMAN. Take Arkansas. It matters not which State it was. There the objection was that the return was under the seal of the secretary of state, and not under the great seal of the State. It was of the utmost consequence to know whether the State of Arkansas had a great seal, or whether the seal of the secretary of state was the only seal that was used in that State. I remember perfectly well when questions were asked on that subject objection was made that they should not be answered, for that would be in the nature of debate; and we had to go up and look at that seal and see whether it was the seal of the State of Arkansas or only the seal of one of the departments of government in that State. And that was not all, sir. We had then to hunt up the constitution of Arkansas, those who had time to do it, to find whether that State has a great seal or not, and then were not at liberty to communicate the result in open debate. I know we did violate the rule by communicating the result. It was spoken of. Members from their seats spoke of it; others spoke of it in one way or another; but it was all decided by the Vice-President to be out of order; and for what reason, pray? That you might decide on the election of President of the United States between the rising and the setting of the sun on that day. It was wrong. Sufficient time to have discussed every one of those questions fully and to have them decided correctly should have been given, but your rule did not permit it.

I mention this for the purpose of showing that we have in our own hands the power to remedy some of those evils which have existed in the count before and which may have operated unjustly. I remember that I voted to reject the vote of one of those States—I forget whether it was Arkansas or whether it was Texas, one or the other—and I never cast a vote that gave me more pain in my life, for it looked like casting out the vote of a State on a mere technicality; and yet I could not get rid of the positive act of Congress and the provision of the Constitution, as I then thought, upon the light I had before me. Possibly my doubts might have been removed if we could have had the whole facts before us and discussed the question; but your iron rule prevented all debate. Even information on the subject is cut off by that rule. I hope, therefore, to see that rule amended so that we shall not have everything like information to enable us to exercise one of the highest functions of Congress debarred from us and not considered by us.

Mr. President, there is another matter in this resolution that requires the gravest consideration. It proposes a sweeping change in the mode of electing the President of the United States. I will not refer to the abolition of the college of electors. I do not think that is a matter of so much importance; but I refer to that change by which the President is to be elected by a plurality instead of by a majority. That is a sweeping change, that is a mighty change, I may say, in our mode of electing the Chief Magistrate of this country; and when we come to consider the power that that Chief Magistrate exercises in the country, when we come to consider the tendency to increase his power, when we come to look at the facts that show the mighty growth of executive power in this country, it behooves us to take care that we move slowly in the direction of so fundamental a change as that proposed by the report of this committee. I will not say that under no possible circumstances might such a change be undesirable, but I want to amend the Constitution of this country, when it is amended, with the utmost care. It is not a thing to be lightly dealt with. It is not a by-law, or an ordinance, or an ordinary act of legislation that is to be changed every day with every tide of public sentiment or according to the notion of any party that happens to be dominant in the halls of Congress. Changes in it should be made with the utmost care by every one engaged in making those changes, from their inauguration in either house of Congress to the final votes of the people or of the legislatures by which amendments are to be ratified or rejected. Therefore, it does seem to me that a proposition so sweeping as this deserves, and must receive before it can be acted upon, the most ample consideration of the Senate.

Mr. President, I did not rise to make a speech on this subject. I only rose to express these views and ask the Senator from Indiana to consent that this resolution may be laid over to some other day sufficiently remote in the session to give Senators a chance to consider it. This is the first time it has been brought to the attention of the Senate. The report, it is true, was made at the last session, but nothing was done with it except to print it and let it lie on the table. The Senator has now brought it up for consideration for the first time, and for the first time we have his views in its support. Let its further consideration, unless some Senator wishes to speak on it now, lie over

to some convenient day, which will give us all an opportunity to study it and to study the report more carefully than we can yet have done.

Mr. CONKLING. Mr. President, the Senator from Ohio has not failed to say several things in which I concur. Just before concluding his observations, he said that a subject like this required very full and ample consideration. In that I agree, and I should more immediately agree with the remark had the Senator extended it to others, as well as ourselves, by whom this proposition must be considered. It cannot become one of the ordinances of the Constitution until it has been so much considered by the States that three-fourths of all the States shall ratify it; and that fact at this moment outweighs all the other facts that occur to me connected with it. A presidential election is to occur in about two years, without stopping to be accurate.

Mr. OGLESBY. Less than two.

Mr. CONKLING. My friend reminds me "less than two," but I speak in round numbers. If there be an emergency, if there be serious importance in this subject, all Senators will agree that its gravity is as likely to be illustrated at the next presidential election as at any election we can now forecast. A remedy, therefore, for the evil, a mode of avoiding the danger, if danger exists, could be commended by nothing more than its timeliness, by nothing more than the fact that it would take effect on that occasion, that first occasion, that, for aught we know, most important occasion, when the need of purity of legislation will be felt. Can any Senator hope that this proposed amendment will become a part of the Constitution by the action, first of the two houses of Congress, and then by the action of three-quarters of the States, in season to enable Congress, proceeding under the sixth subdivision of this article, "to establish tribunals for the decision of such elections as may be contested?" Surely such a result is not only improbable, it is impossible, or next door to it; and I think the honorable Senator from Indiana, commending warmly as he does this proposed amendment, does not expect from it that which will put an end to these difficulties in season for 1876. If I am right in that, we are brought not so immediately to the question when, or how, or with what result this amendment shall be considered, as with the question what we should do now, if we should do anything during this fast-ebbing session, to establish safe and certain modes of ascertaining the next presidential election.

I do not intend at this time, or probably at any time, to detain the Senate upon that subject. I venture, however, to ask the attention of the Senate, and especially of the Senator from Indiana, to the language of the Constitution upon which some comment has been made by the Senator from Ohio. We find in the Constitution as it stands these words:

"The President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates"—

That is his function—

"and the votes shall then be counted; the person having the greatest number of votes for President shall be the President, if such number be a majority of the whole number of electors appointed."

That language is very spare. The words are very few. It is certainly wanting in many an amplification which would be convenient to a student of the Constitution and convenient to a legislator looking for ways in which it might be enforced; but, as the honorable Senator from Ohio very seasonably reminds us, there are certain canons of construction which help out these words. There are familiar rules, found even in the Constitution itself, but more especially rules in the light of which all written instruments, even constitutions, are to be read, which assist and aid in effectuating this provision. I will not at this time ask the Senate to listen to an opinion from me as to power conferred by the Constitution to adopt this twenty-second joint rule, but if I read article 12 with so much latitude as to convince me that the twenty-second joint rule is within its permission, I think I should be willing to rely even upon my own ingenuity then to devise ways and modes, under a reading of the Constitution as broad as that, which would go very far to avoid and guard against the danger that surrounds the count. Certainly I think few lawyers will study the twenty-second joint rule and deny that some of its provisions are at least questionable in respect of the power given by the Constitution thus to direct and govern the counting of the votes.

Returning for a moment to these words in the Constitution, we find that the President of the Senate is to do but one thing, which is to open, and of course manually to present and be the custodian of, the returns upon which the election is to depend, which are called in this provision of the Constitution "the certificates." Then we find the language changes, and it ordains in most mandatory phrase that "the votes shall then be counted." There, I submit, is appropriate domain for legislative discretion, either by legislation or by a joint rule, if concurrent action between the two houses rather than legislative action be preferred. I find added:

"The person having the greatest number of votes for President shall be the President."

Those are not superficial words. They do not relate to the *modus*; they are not confined to the count; but they go to the ultimate result, and declare that the person having the greatest number of votes shall be the President. Stopping where I am, as I do not mean to detain the Senate, I cannot doubt, until some Senator shall adduce reasons which have never been given in my hearing, that there lies within the limits of that provision an opportunity not only to dispense with the twenty-second joint rule, but to put in its place a rule or a statute under which those words can certainly be enforced, under which the votes can be counted, and counted in the presence of the two houses, and under which the person for whom a majority of them has in truth been cast shall be the President. Of the details I say nothing; of the merits of the proposed constitutional amendment I say nothing; but I do say, and had I the power to do it and believed it to be necessary I would bring it home to every Senator and impress it upon him, that we shall fall short in an urgent and imminent duty if the 4th of March witnesses a dissolution of these two houses without their having devised some mode better than the twenty-second joint rule of ascertaining and recording and establishing the will of the people expressed by elections in the States as to the choice of a Chief Magistrate; and whenever any committee, whatever may be the fate ultimately of this or another constitutional amendment, will propose legislation (upon which we can act at once, and which need not be postponed to the distant by and by of ratifications in States) looking to this end, I hope it will be the pleasure of the Senate to address itself very promptly and diligently to that legislation.

MR. EDMUNDS. There is great force in what the Senator from New York has said touching the doubts that may arise respecting the twenty-second joint rule. I think myself that there is constitutional power in the legislative branches of the Government to regulate the exercise of the power conferred in the Constitution respecting the election of President and Vice-President, just as in all other powers granted in the Constitution Congress has always exercised and must always exercise the authority to regulate the methods and manners through which the ends looked to in the Constitution are to be reached. We have always done that as to the courts, in many respects as to elections, and in fact respecting the exercise of almost every one of the powers granted in the Constitution. But whether it is competent for the two houses, not acting in a legislative capacity, but each acting for itself, to provide a rule by which it is in the power of either house to prevent the counting of every vote that may be returned from a State is open to very grave question indeed.

It is plain enough, I think, that Congress cannot by a law declare that the Vice-President of the United States, or rather the President of the Senate, whoever he may be, should not open and count the returns made from the various States; but the manner of such a count, what should be regarded as in law a vote of a State, the means of ascertaining whether it is the legal vote of the State, it appears to me must be the subject of legislative provision. And so also I think it safe to say—perhaps safer than what I have already said—that Congress may provide by law a tribunal which, in case of a dispute after the function named in the Constitution has exhausted itself of this opening and counting of the votes, shall have the power to decide who is legally elected President of the United States; not to review the action which the Constitution declares the Presiding Officer of the Senate shall take in the presence of the two houses, but to ascertain in a method pointed out by law what are the votes that the States have given, and who therefore is the person who has received, in the language of the Constitution, the greatest number of votes.

If I am not mistaken in my recollection, I at one time prepared and presented a bill on that subject, and I have given considerable attention to it, because no man, no matter what party he belongs to, (after the experience we have had, when the candidates of a certain party received a large majority of the votes, of the disorder, the excitement, the difficulties, the disputes that arose in respect of what were called the votes of States, which, if counted or not counted, would produce no difference in the result,) can fail to see that when the counting of the vote of a particular State, or of a paper that is presented as the vote of a particular State, is to make A or B the President, there will necessarily result an excitement, a difficulty, and a disorder which every lover of his country would greatly regret, and which every legislator, so far as he has the power under the Constitution to do it, ought to provide against. I concur, therefore, most heartily in what the Senator from New York has said, that there ought to be a very careful investigation of this question, in order that, so far as we have the legislative power, if we have it at all—and I think we have—we may provide in the constitutional way for ascertaining what the will of the people of the various States may be from time to time in respect of the election of a Chief Magistrate.

January 22, 1875.

The Senate, as in Committee of the Whole, resumed the consideration of the joint resolution (S. R. No. 16) proposing an amendment to the Constitution prescribing the manner of electing the President and Vice-President of the United States; the pending

question being on the motion of Mr. Thurman, that the further consideration of the joint resolution be postponed until the first Monday in February.

Mr. ANTHONY. I ask the Senator from Ohio to withdraw his motion for a short time.

Mr. EDMUNDS. The motion is debatable.

Mr. MORTON. I hope the Senator from Ohio will withdraw his motion.

Mr. EDMUNDS. The merits are open to debate on this motion.

Mr. ANTHONY. I suppose I can as well speak on the motion pending.

Mr. THURMAN. I understand the Senator from Rhode Island is prepared to speak on the proposed constitutional amendment. I therefore withdraw the motion for his accommodation.

The VICE-PRESIDENT. The motion to postpone is withdrawn.

Mr. ANTHONY. Mr. President, this subject has been so thoroughly discussed in the elaborate and exhaustive report, for which we are indebted to the industry and learning of the chairman of the Committee on Privileges and Elections, that nothing remains to be said upon the inconvenience and danger of the present system of electing the President of the United States and the desirableness of a change. Nor, on the whole, considering the varied rights and interests and traditions to be consulted, does there appear a better mode of reform than the one proposed. Agreeing with the conclusion of the report, although not fully with some of its reasoning, I shall briefly consider the subject particularly with reference to the smaller States of the Union, one of which I have the honor, in part, to represent.

But first, while I fully appreciate the peril of the existing system, in some respects, I apprehend no danger from the election of a President, in the last resort, in the mode in which the Constitution provides, the mode which the people ordained, the mode to which every State has solemnly assented, and which has been twice tried, and the President thereby elected has exercised, undisputed, all the authority of his office. The people of the United States are a law-abiding people. They must be a very restless and unreasonable people who would revolt at a mode of election which themselves had ordained, and had twice consented to, and which they have the power to change. There are reasons sufficient for the change proposed, there is danger sufficient in the present system, without supposing one which could arise only from the insubordination of the people to their own law, changeable, at their pleasure, in the mode which they have provided. That an election illegally or fraudulently forced through the House of Representatives might endanger the stability of the Government is just as probable as that an election illegally or fraudulently accomplished in any other way might produce that result. In either case, the dissatisfaction would be, not with the provisions of the Constitution, but with the perversion, the violation, of those provisions. In the case of James K. Polk, who was thought by the friends of Henry Clay to have been elected by the naturalization frauds in New York and by the Plaquemine frauds in Louisiana, the people submitted, because there was no legal remedy, and because all the forms of law had been complied with. And moreover, although the supporters of Mr. Clay believed that a majority ought to have been returned for him, it was undeniable that the difference in the legal votes of the two candidates was small. It was not as though a President had been forced on the people against the wish of the great majority.

In the case of John Quincy Adams, although there was a good deal of partisan talk about not submitting to the election by the House of Representatives, there was never any real danger to the public tranquillity; and the talk was not against the constitutional mode of the election, but against the agencies by which it was alleged to have been accomplished. That these allegations of fraudulent or improper agencies were the suspicions or the inventions of heated partisanship history has well established. But they had, at the time, a great effect; indeed to them was due all the apprehension, real or imaginary, of danger from the unusual but constitutional mode of the election. There was no proper cause of complaint, certainly none of indignation. There was no outrage upon popular rights. The people had divided their votes among four candidates, and neither having a majority, the election came into the House of Representatives. Jackson received 99 electoral votes and Adams 84, and there were 78 against both. With so small a plurality, and in so decided a minority, the candidate who received the highest number of votes had no right to claim from the Representatives, on whom the election devolved, the subordination of their own judgment to that of a minority of the electors, who had cast their votes for the highest candidate. To claim this would be to claim an election by a simple plurality, and to make the election by the House less than a ministerial office, a mere farce. It was on no such ground that the friends of Jackson denounced the Representatives who had exercised their constitutional right and their constitutional duty. It was on the pretense of corrupt bargaining in the election, a pretense that deceived many well-meaning men.

The previous case of the election of Jefferson presented a much more serious cause of alarm. Yet this did not arise out of the mode of the election, but out of the singular complications which threatened to prevent an election of either President or Vice-President, and to bring the Government to a stand-still. It was reported that the

opponents of Jefferson had gone so far as to determine that, rather than submit to his election, they would prevent an organization and drive the country to revolution. No such purpose was entertained, unless by a few hot-headed men, who are found in every party, and for which no party should be held responsible. Hamilton disapproved even of the initial proceeding, and frankly and earnestly declared that it was more than a mistake, that it was full of danger, and that its success would threaten the very existence of the Government. Jefferson, who naturally listened with credulity to these reports, said that while he would have joined in armed hostility against any act of usurpation, he would have cheerfully yielded to the election of Burr and taken the place of Vice-President, "because, however it might have been variant from the intention of the voters, yet it would have been agreeable to the Constitution." The crisis did not grow out of any unfairness in the mode of election by States, but out of an apprehended abuse of that mode of election, as any other mode might be abused. Had the same dead-lock occurred by the equal division of the electoral or of the popular vote, a similar danger might have occurred. The danger was not in the system, but in the party madness which strove to pervert to party uses the mode appointed for continuing the Government, and to do this at the risk of destroying the Government itself. There was not, in either case, just cause of complaint of the equality of the States in the election by the House. And in the result it proved that patriotism was too strong for party, and some of the strongest federalists—and these, it must be remarked, were from the smaller States—took the course which Hamilton advised from the beginning, and voted for Jefferson, or cast blank votes, which amounted to the same thing.

The lead in that patriotic act was taken by the grandfather of the hereditary Senator who has just been re-elected from Delaware and whose name has been borne in this Chamber by three generations, *sans peur et sans reproche*.

Moreover, there is great advantage in keeping constantly in view the federal character of the Government and the power of the States out of which the Republic grew. We have been compelled, in the great struggle for national existence, and in re-organizing government on the principles which prevailed in that struggle, to transfer to the General Government power and authority which had hitherto been exercised by the States, and which we had been educated to believe could be best exercised by them. While the necessity of this sacrifice was to be regretted, no patriotic man regrets that it was rendered. In that way alone could the rights, the existence of the States themselves, be preserved.

Nor do I agree in all that is said about the unfairness of this mode of election. If the election were made originally by the State, each State having one vote, the objection urged to it would be unanswerable; but as the choice is confined to the three candidates who have received the highest number of electoral votes, the only power of the House is to select which one of three men, high in the public confidence and favor, shall exercise the office which must be exercised by somebody, and the people cannot decide upon whom to confer it. The action of the House is very different from a free election; it partakes of a judicial as well as of a political character.

In yielding my assent to the proposed amendment, I am not therefore influenced by apprehension of resistance to the election of the President by the House of Representatives in the mode provided by the Constitution. But the existing system is an acknowledged failure of the expectations with which it was adopted. Nothing is perfect. The more we study the Constitution of the United States, the more we admire the wisdom with which it was framed, and the elasticity with which it adapts itself to enlarged limits, multiplied population, and altered conditions of society. But in respect to the election of President and Vice-President, it never once fulfilled the intention, which was that the electors should be unpledged men, not appointed for a mere ministerial office, but chosen for their character, their wisdom, their patriotism, to perform, according to their own judgment, the highest and most responsible duty that could be delegated by the constituents of a representative government to their most trusted public servants. Instead of that, the electors, as we all know, have been selected to vote for candidates already designated, and the character of the electors does not even enter the consideration of the voters by whom they are chosen. The cumbersome machinery which interposes between the people and the candidates of their choice performs no real service, and is only a needless obstacle and delay. But more than this, it restricts the choice of the people; and instead of leaving their selection open to the whole body of the citizenship, confines it to those who have a sufficient following, in the State in which the voter lives, to receive the nomination of a full college of electors. And even should a candidate have a considerable support in the aggregate, it is all wasted, unless it can be concentrated in sufficient number in one State. A candidate may have powerful support and large minorities, scattered among five or six States, but, unless he has a plurality in some one State, every vote for him is thrown away. Practically, the chance is limited to two, or at most to three candidates; and these must be the candidates of a recognized party, strong enough to perfect an organization, and to put an electoral ticket in the field. As the voter cannot vote for his candidate personally, he must vote for a number of candidates equal to

the number of electors to which his State is entitled, and must find that number who are precisely of his way of thinking, and who will consent to serve if elected; and moreover they must be distributed all over the State. Nor can the voter select the President of one party and the Vice-President of another; he cannot vote for his choice, for one of these offices, unless he accepts the candidate associated on the ticket with him. At the last election, the choice of every voter was practically restricted to Grant and Greeley. If he desired a man other than either of them, he had no way of making his choice effective, even to the extent of his own vote. Nor could he vote for Grant and Brown or Greeley and Wilson. He was obliged to vote for Grant and Wilson or for Greeley and Brown, or to throw away his vote, which he would do just as effectually by voting for any other candidate, or for any two of them, except on the ticket on which the two were associated.

A great evil of this is that it strengthens and perpetuates, indeed it makes quite necessary, the caucus or convention, which has grown to be almost as much a part of our political system as though it were embodied in the Constitution, and which crushes the individuality of the voter, and makes him only a part of a great partisan machine, his only choice being to which party he shall surrender his rights of private judgment. How this opens the way for intrigues and disreputable combinations and for conspiracies to obtain power for personal objects, how it pledges in advance, and as the price of support in the convention, that great patronage which the President wields, I need not point out. It would greatly purify our elections if the voters could select their candidates from the whole body of their fellow-citizens, uncontrolled by convention or caucus, and responsible only to their own sense of right. It would not, indeed, supersede the convention, but would deprive it of its tyranny, and make it responsible to a patriotic public opinion. The voter, if he did not like a candidate, would not be obliged to vote for him because there was no other way to vote except for one that he liked still less. And this consideration would compel the nominating conventions to greater prudence and wisdom in the selection of candidates.

All the machinery of the existing system is absurd, and is an obstacle rather than a facility, on any other theory than that upon which indeed the Constitution was adopted, but which has utterly failed, that the electors should be unpledged men, charged with the duty of choosing a President, according to their own judgment, and to what they might consider the public good, not controlled or in any way directed by the popular voice, which it was supposed that they would guide, not follow. Every one argues that the system should be abandoned, that the theory of the election should be conformed to the practice, and that the machinery should be better adapted to the purpose which it is intended to accomplish.

At the same time it is very much better to make the change with as little violence as is practicable to the traditions of the Government, and to retain, as far as possible, all of the original intentions of the Constitution, except where the intention has manifestly failed in practice. Especially is it necessary to preserve the recognition of the States, in the two electors which belong to each equally, beyond those to which they are entitled on the basis of population. Not only is this right, but no amendment which failed to recognize this equality could obtain a two-thirds vote in this body, or receive the requisite assent of three-quarters of the States.

The amendment proposed happily secures the right of individual selection, without infringing upon the rights already secured to the States. It permits every voter to vote for the candidate of his choice for President and for Vice-President, and yet preserves to the States the equivalent of the two electoral votes to which, by the original compact, they are entitled, in addition to those which are based on population. It presents the natural mode of election, and abolishes the unnecessary formalities which separate the people from the candidates. While it is desirable that the Chief Executive of the country should be elected by a majority of the people, and that his authority should rest on the broadest basis of the popular will, yet since so desirable result can only be attained by the general concurrence of opinion which must be left to its own free expression, it is a matter of necessity that some expedient be resorted to, in the failure of such concurrence. To require an absolute majority to elect the President might practically prevent an election; and if there be no one whom a majority of the people prefer, then the natural expedient is to elect that one whom the greater number prefer. In the first instance, absolute unanimity would be desirable; but that is practically impossible; so a majority is accepted; and by the same natural conclusion, if an absolute majority be unattainable, a plurality is next best. So plain is this, that, in nearly all the States, a plurality elects the State officers, executive, legislative, and, when they are chosen by the people, the judicial; in some States a majority is required for members of Congress on the first trial; but in all, a plurality elects on the second. Nor does the present mode of election secure a majority of the people to the election of President. It may happen, and has happened, that the candidate receiving a majority of the electoral vote is in a minority of the popular vote. On the whole, it must be admitted that, next to an absolute majority, a plurality presents the most natural and the fairest mode of election, and that the other expedients, however well planned, have not commended themselves in practice.

Although, therefore, I do not object to the election by the House of Representatives, for the reasons that have been stated elsewhere, I freely agree that it should be abandoned. It may seem, at first, that the smaller States make some surrender of power by changing the system which gives them an equal suffrage in the last resort. This might be true if the smaller States had some interest apart from the larger ones and opposed to them. If it were so, I should recognize a deep if not a fatal defect in our political system. I see no such opposition of interests. Experience has shown that the questions which have organized parties and divided the country pass over State lines without noting them, and invade alike the large and the small States. There is nothing in the disparity of the geographical limits which makes it probable that New York and Rhode Island shall separate on political questions, or that Delaware and Florida shall unite. The smaller States are distributed in all parts of the Union, East, West, North, South, and Middle. They have no purposes that are not as likely to be common to the larger States as to each other. All the apprehensions of a combination of the larger States, to the disadvantage of the smaller, have proved groundless. There is nothing for them to combine for or against. The great interests of the country are common to all the States, and where there have been separate interests, real or imaginary, they have not been based on the territorial limits of the members of the Union. I do not, therefore, regard the surrender of the equal suffrage in the election by the House of Representatives as an important concession. But I can plainly see that in the mode proposed of election by districts the overshadowing power of the great States is destroyed. They will no longer cast their solid vote for President, bearing down four or five of the smaller States, each of which may possibly cast a greater popular majority the other way. New York may cast thirty-five votes for one candidate, while the popular majority is less than that which Delaware, with but three votes, gives for the opposing candidate. The present system gives immense power to majorities, however small, in the great States, and disfranchises the minority, however near it rises toward the majority. Thus the State of New York outside the city may give a majority one way, and the overwhelming vote of the city, not the purest and most authentic, may reverse it, and carry, not only the force that properly belongs to the city, but the entire State, leaving to the rest of the State, to the great inland cities, to the rich rural districts, to the prosperous and enterprising communities, from the Hudson to the great lakes, no voice in the election, for which the heterogeneous and often the corrupt masses of the city speak, not for itself alone, but for the State. By the system proposed, the minority in each State will be represented, and a great State, divided nearly equally, will have no greater preponderance than a small State united upon one candidate. The greater fairness of this, its nearer approximation to the expression of the popular will, need not be illustrated, certainly cannot be better illustrated than it is in the report of the committee from which I copy:

"An examination of the working of the electoral college for the last fifty years will prove beyond all question that in a number of cases the will of the majority has been completely defeated; that if the majority is represented in the result of a presidential election it is quite as much the result of accident as of the natural working of the machinery; that the final result produced by the electoral machinery has not within fifty years approached as near as within 10 per cent. of being a true representation of the will of the people as expressed in their votes, and in a number of instances has departed from it over 30 per cent.

"The following statement of the result in the different presidential elections from 1872 back to 1844 will establish the truth of what we have said:

"In 1872 General Grant received 55 per cent. of the votes of the people; in the electoral college he received 81 per cent.

"In 1868 General Grant received 52 per cent. of the popular vote, and 73 per cent. of the electoral vote.

"In 1864 Mr. Lincoln received 53 per cent. of the popular vote, and 91 per cent. of the electoral vote.

"In 1860 Mr. Lincoln received only 40 per cent. of the popular vote: he received 59 per cent. of the electoral vote.

"In 1856 Mr. Buchanan received only 45 per cent. of the popular vote; he received 59 per cent. of the electoral vote.

"In this election Fillmore received 25 per cent. of the popular vote, and only 2 per cent. of the electoral vote; but fourteen of his friends were elected to Congress.

"In 1852 Pierce received 51 per cent. of the popular vote, and 85 per cent. of the electoral vote.

"In 1848 General Taylor received 47 per cent. of the popular vote, and 56 per cent. of the electoral vote. At this election Mr. Van Buren received about 10 per cent. of the popular vote, and received no electoral vote; but three of his friends were elected to the House of Representatives.

"In 1844 Mr. Polk received not quite 50 per cent. of the popular vote. He received 62 per cent. of the electoral vote.

"To illustrate the operation of the district system, we will consider the comparative

results of the elections for President and for members of Congress, in the four States of Pennsylvania, Ohio, Indiana, and Illinois, from 1860 to 1872.

"These States voted solidly for Mr. Lincoln in 1860, casting 74 electoral votes. At the same election they returned 66 members of Congress, of whom 24 were democrats.

"In 1864 the same States cast 76 electoral votes for Mr. Lincoln again, and elected the same year 65 members of Congress, of whom 16 were democrats.

"In 1868 the same States threw 76 electoral votes solidly for General Grant, and elected 68 members of Congress, of whom 22 were democrats.

"In 1872 the same States again voted solidly, giving 85 electoral votes to General Grant, and elected 77 members of Congress, of whom 25 were democrats.

"In these four States the democratic strength, as compared with the republican, has been about as 9 to 10, but under the operation of the general-ticket system they had been wholly unrepresented in the electoral college; but in the House of Representatives, under the district system, they have had an average of nearly one-third of the members.

"Take the State of New York alone for the same period. In 1860 New York cast her 35 electoral votes solidly for Mr. Lincoln. At the same time she elected 33 members of Congress, of whom 9 were democrats. In 1864 she again cast her 33 electoral votes solidly for Mr. Lincoln, and at the same time elected 31 members of Congress, of whom 11 were democrats. In 1868 she cast her 33 electoral votes solidly for Mr. Seymour. The State was carried for Mr. Seymour by his overwhelming majority in the city of New York, about the character of which grave charges were made, but of which the committee expresses no opinion; but the rest of the State, unaffected in their districts by this large majority in the city, returned 18 out of the 31 members of Congress, who were opposed to Mr. Seymour, thus showing conclusively how the voice of the people of New York outside of the city had been stifled in the presidential election by the city majority, operating through the general-ticket system. In 1872 New York cast her 35 electoral votes solidly for General Grant, at the same time electing 33 members of Congress, of whom 9 were democrats."

The frauds which in 1844 carried the 36 electoral votes of New York for Polk, under the present system, would, under the amendments proposed, have carried only the 4 votes in the city, and the inducement to the frauds would have been wanting, for the honest vote of the city was for Polk, and the frauds were perpetrated only to over-balance the suffrage of the interior. Thus the purity of the election would be greatly promoted by the change. The motive to fraud would be much diminished, and the effect of fraud would be much lessened.

The danger of a disputed election for President, in a State whose electoral vote would decide the contest, is a most serious one. There is no tribunal for the verification of the votes, and although the election may be carried, notoriously, by fraud or by violence, the electoral votes must be returned and counted. The fraud or the violence may be punished, but the wrong that they have committed remains, and there is no redress for it. And the appointment of the electors being left entirely with the legislatures of the States, there would be no mode or power of appointment, if a State legislature should repeal the law directing the manner of the election. The Federal Government has no power to perpetuate the executive authority. In the exciting election which resulted in the choice of Jefferson by the House of Representatives, the legislature of Maryland was federal, and it was supposed that the popular vote would be for Jefferson. It was seriously contemplated that the legislature should repeal the law under which the electors were chosen by the people, and should choose them by the legislature; and this on the avowed ground that it was necessary to defeat the candidate whom it was supposed that the majority of the people preferred. This was recommended on no less authority than that Charles of Carroll, of Carrollton. When a man so pure, so patriotic, and so conservative could see his way clear to make such a recommendation, what might be apprehended from heated partisans and selfish aspirants for political power. If that suggestion had been carried out, and the 10 electoral votes of Maryland had been given wholly for Adams, he would have been elected. They were divided equally between the two, each receiving 5. Jefferson's total vote was 73, Adams's 65. Had all the votes of Maryland been given for Adams, his total would have swelled to 70, and Jefferson's would have shrunk to 68; and the election would have been strictly and unquestionably legal and constitutional. The legislature of Maryland would have executed no power but that which the Constitution clearly conferred upon it, and confers upon it still, and there was no authority to review its doings. Such a proposition, although not carried to the extent of a precedent, yet was urged on such authority as gives to it almost the weight of a precedent.

And be that as it may, it might have been done then, and it might be done now; and those who resisted it would place themselves against the law, and expose themselves to the penalties of the law. A President thus elected, however he might lack the moral support which should underlie his great office, would be "every inch" a President, would command the Army and the Navy, and must have the solemn judgment of the Supreme Court.

From all the difficulties of the existing system, from all the evils and the dangers which experience has developed in it, the proposed amendment appears to offer a mode of relief; and while it commends itself to all the States, I think that it is especially desirable to those, if any there still be, who apprehend the danger to the smaller members of the Union, from the ambition or the aggression of the larger.

Representing, in part, one of the smaller States, but one of those which brought its original sovereignty into the compact, and which required no vote of the other States for admission into the Government, which she had done her full share to establish, I give my cordial assent to this important change, which is so clearly for the general good; and which, by dividing all the States into single electoral districts, yet preserving to each the equal votes that she has enjoyed, in recognition of her equal membership in the Union, breaks down the unhealthy if not dangerous preponderance that the larger States possess.

Further consideration of the joint resolution was postponed until January 27.

No further action was taken.

REPEAL OF THE TWENTY-SECOND JOINT RULE.

IN SENATE, February 4, 1875.

The Senate proceeded to consider the following resolution submitted by Mr. Morton on the 27th of January, 1874:

"Resolved by the Senate, (the House of Representatives concurring,) That the twenty-second joint rule of the two houses be, and the same is hereby, repealed."

MR. MORTON. Mr. President, the abolition of this rule of course would follow as a result of the constitutional amendment which I had the honor to report from the Committee on Privileges and Elections; but I am satisfied that, from the want of time and other causes, that amendment cannot be passed and adopted before the next presidential election; and as, in my opinion, the existence of this rule imperils the peace of the nation and subjects the Government to great danger, I think it is our duty to repeal the rule or to so amend it at once as to avoid this approaching danger. After consulting with a number of Senators in regard to this matter, I ask leave to submit this as a substitute for the resolution already offered, which is to amend the rule instead of repealing it:

"That the twenty-second joint rule of the two houses be so amended that no objection to the reception and counting of any electoral vote or votes from any State shall be valid unless such objection is sustained by the affirmative votes of the two houses."

Under the rule as it now exists, when the votes for President and Vice-President are counted, any formal objection, no matter how trifling or insufficient or even contemptible in its character, has the effect to separate the two houses, and they are to vote upon this objection, and unless both houses concur in voting it down the electoral vote of that State is lost. In that way, by the dissent of either house, any State may be disfranchised; the vote of the State of New York or of Indiana may be rejected by the most foolish and trivial objection unless both houses shall concur in voting down that objection. The vote of every State may be rejected in this way. It requires no argument, therefore, to prove the absurdity, the unconstitutionality, and the danger of this rule; and, as I have had the honor to argue this question before the Senate on several occasions, I think it is not necessary to say anything further now.

THE PRESIDING OFFICER. The question is on the amendment proposed by the Senator from Indiana.

MR. BAYARD. I do not know, Mr. President, that there is any rule beyond that of convenience and comity between members of the Senate that should control the disposition of this measure. At the same time I am not aware that any reasons have been urged, any explanation given, by the Senator from Indiana for the rescission of this joint rule or for its amendment as he has proposed. Without having given the examination or consideration to this subject that its importance demands, yet I have for a long time been of opinion that the constitutionality of this rule altogether may well be doubted. I do not think that anywhere in the Constitution can be found language in any degree constituting the Senate of the United States a factor or an actor in the election of the President of the United States. The office was in the design of the Constitution to be controlled by an electoral college directly voted for by the people. The practical workings of our Government have made the office in effect subject to direct popular election. The electoral college has been a mere screen, which did not conceal in any way from the people the individual for whom their votes were cast, and in substance therefore and practical effect the President and Vice-President of the United States have been elected directly by popular vote. Although the form of the electoral college is still maintained, it is nevertheless but a thin veil between the popular wish and the result which follows its expression. Also, I may say, failing to receive a majority of all the votes cast as required by the Constitution, the House of Representatives, the popular branch of Congress, is authorized and directed immedi-

ately to proceed to ballot for a President and for a Vice-President. But will any Senator show me any clause of the Constitution, any implication which can be argued from any clause of the Constitution, which gives this Senate one particle of lawful power in controlling the choice of a President or a Vice-President of the United States?

This joint rule was passed in 1865. There is much to be said in criticism of it independently of the graver objection which I have sought to state, and to which, it seems to me, it is obviously open. The language of the Constitution providing for the office of President of the United States and vesting in him the executive power is contained in the first section of the second article. A portion of that article, what may be termed the third clause of the first section, has been superseded and annulled by the twelfth amendment, but a portion of the section still remains. It is in these words:

"Each State shall appoint, in such manner as the legislature thereof may direct, a number of electors, equal to the whole number of Senators and Representatives to which the State may be entitled in the Congress; but no Senator or Representative, or person holding an office of trust or profit under the United States, shall be appointed an elector."

The twelfth article, superseding the remaining clause of that section, provides:

"The electors shall meet in their respective States and vote by ballot for President and Vice-President, one of whom at least shall not be an inhabitant of the same State with themselves; they shall name in their ballots the person voted for as President, and in distinct ballots the person voted for as Vice-President; and they shall make distinct lists of all persons voted for as President, and of all persons voted for as Vice-President, and of the number of votes for each; which lists they shall sign and certify, and transmit sealed to the seat of the Government of the United States, directed to the President of the Senate. The President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates, and the votes shall then be counted. The person having the greatest number of votes for President shall be the President, if such number be a majority of the whole number of electors appointed; and if no person have such majority, then from the persons having the highest numbers, not exceeding three on the list of those voted for as President, the House of Representatives shall choose immediately by ballot the President. But in choosing the President the votes shall be taken by States, the representation from each State having one vote; a quorum for this purpose shall consist of a member or members from two-thirds of the States, and a majority of all the States shall be necessary to a choice. And if the House of Representatives shall not choose a President whenever the right of choice shall devolve upon them, before the 4th day of March next following, then the Vice-President shall act as President, as in the case of the death or other constitutional disability of the President. The person having the greatest number of votes as Vice-President shall be the Vice-President, if such number be a majority of the whole number of electors appointed; and if no person have a majority, then from the two highest numbers on the list the Senate shall choose the Vice-President; a quorum for the purpose shall consist of two-thirds of the whole number of Senators, and a majority of the whole number shall be necessary to a choice. But no person constitutionally ineligible to the office of President shall be eligible to that of Vice-President of the United States."

Now, Mr. President, this joint rule is the rule under which the electoral votes have been counted since February, 1865, including the election of Mr. Lincoln, the election of the present President of the United States in 1868-'69, and again in 1872-'73. I confess that I do not see where the power can possibly be found which is assumed by the joint rule, either as it now stands or as it is proposed to be amended, giving the two houses of Congress right to say whether votes shall be counted or not counted. The Constitution declares that the electors of the States, chosen in such manner as the people in those States shall see fit to direct by law, shall have their certificates of election signed and certified *by themselves*; and when they have been so signed and certified shall then be sealed and transmitted to certain officials of the Federal Government. The duty of the President of the Senate is simply ministerial. He is not vested with discretionary or judicial functions. There is no discretion whatever vested in him. The language of the Constitution is simply mandatory, that he "shall," in the presence of the Senate and the House of Representatives, open the certificates. He cannot even count them. He cannot even inspect them, except in the incidental and casual manner that is implied by the fact that his hand shall open the sealed envelope which contains the list of the electoral vote. Then the votes "shall be counted" in the presence of the two houses.

Mr. MORTON. Counted by whom?

Mr. BAYARD. There is no distinct provision as to that. They shall be simply counted in the presence of the two houses; but I apprehend from the fact of their being counted and the result declared that the members of each house are simply witnesses to the count and tally of that vote. That you could not delegate that power to another body I cannot doubt.

Mr. ANTHONY. If the Senator will allow me—I do not wish to interrupt him but I wish to have his view on this question, and perhaps he was going on to the point which I will bring to his attention. Suppose the Vice-President receives two packages, each purporting to be the electoral vote of a State?

Mr. CONKLING. Being different from each other.

Mr. ANTHONY. Being different from each other?

Mr. BAYARD. I can understand the great difficulty of dealing with a question of that kind, and it was in deprecation of the haste with which this question was being disposed of—called up here, read by the Senator from Indiana, and the question immediately called for in the Senate—that caused me to rise and make the objection I do to this inconsiderate method of dealing with it. I have been trying since this question was suggested by the Senator from Indiana some days ago to find, as well as I could, some method to escape from these difficulties, such as are suggested by the Senator from Rhode Island, and the truth is that all my theories of government come just about to this: that if they are not to be honorably, honestly, and fairly administered, any laws that you make will be perfectly worthless to procure that justice and certainty, that proper record of the will of the people, which our scheme of government was intended to produce. I apprehend that there is no rule which you can frame that will not be open to defeat by some supposititious case. There cannot be the same villainy practiced in regard to the electoral votes of the various States of this Union as are alleged, and I believe truly, to have been practiced in regard to the returns before the returning board in the State of Louisiana, where I have seen the statement made that advantage was taken of the adjournment of the board for a public holiday by the clerks who were the custodians of those returns to unseal the packages, to forge false returns, to seal them up, and then have them counted by this returning board. What law can we ever have to meet such atrocities as that, should such a class of men ever be admitted in sufficient numbers in the Senate and in the Congress of the United States to do such acts as are alleged, and I believe truly, to have been committed by the returning board of Louisiana? There is no cure for that except a public opinion that shall make it impossible for a man to hold public station without possessing those private virtues upon which society must depend for its existence. You may carry a case to the Supreme Court of the United States, you may carry it to any tribunal you choose, you may invest your judges with every responsibility that penalty can secure, and if they be not honest and honorable men your laws will be mockeries, and their decisions will be simply cunning and corrupt evasions of public justice.

Mr. ANTHONY. If the Senator will allow me, perhaps I did not make myself understood. I wish his judgment upon this question. I understand him to say that the Vice-President is simply a ministerial officer; that he has simply to perform a specific duty prescribed by the Constitution in receiving the votes and in opening them and handing them to the tellers to be counted. Suppose the Vice-President receives two packages, each purporting to contain the electoral vote of the State of Louisiana, for instance, how is he to decide which one he will place before the two houses?

Mr. THURMAN. He must place them both.

Mr. SHERMAN. Then who decides?

Mr. ANTHONY. Yes; who is then to decide?

Mr. THURMAN. The houses.

Mr. ANTHONY. Not if the rule is repealed.

Mr. BAYARD. I apprehend that all the votes which are received must be counted, and I do not suppose that he can be expected to know what they are, except from the superscription of the sealed envelope containing them, until they shall have been opened.

Mr. ANTHONY. Then, if I understand the Senator aright, the Vice-President is to deliver two, three, four packages, each purporting to contain the electoral vote of a State?

Mr. BAYARD. Let me see what the Constitution says on the subject. I do not think it is sufficiently clear and satisfactory on that point. It provides for the meeting of the electors in their respective States. It provides for a vote by them by ballot for President and Vice-President; and after that vote is taken in distinct ballots for the President and the Vice-President, it provides that they, the electors, shall make distinct lists of all persons voted for as President and of all persons voted for as Vice-President, and the number of votes for each. It provides that the electors in the several States shall themselves make up these lists and communicate the result, certified and signed by them, and transmit it sealed to the seat of the Government of the United States, directed to the President of the Senate. Then it provides that these sealed papers, which have been directed to the President of the Senate, (and as we all know are by special messengers placed in his hands and in his custody,) shall on a certain day, in the presence of the two houses of Congress, be opened by him, and the votes shall then be counted. As a matter of fact the only knowledge that the Vice-President of the United States can have of the contents of those envelopes must be derived from the count on the day when he is instructed and compelled to open them in the

presence of both houses. I do not believe that there is any discretion given to him to open one package and not another package; but if they come to his hands purporting to be the certificates, signed and sealed by the electors in the various States, he is to open, in the presence of the two houses, all such papers which come to him with the import of verity usual to such papers.

Mr. FRELINGHUYSEN. I desire to ask the Senator from Delaware whether he has in his investigation of this subject examined to see what the practice was before the adoption of the rule in 1855; whether prior to that time, on a question arising as to the count of votes, it required the concurrence of both houses to admit the vote, or whether the presumption was in favor of the votes, and it required both houses to reject them?

Mr. BAYARD. There never was a question of contest before, as I am informed.

Mr. MORTON. I will state to the Senator that in 1857, before the adoption of this rule, when the votes were counted, objection was made by a member of the Senate to receiving the vote of Wisconsin, because the votes of the electors of that State had not been cast on the day fixed by law, the Constitution requiring that the votes should be cast in all the States on the same day, and there being an act of Congress made in pursuance of that provision. The objection was made that the vote of the electors of Wisconsin had not been cast on that day, but on the next day. Mr. Mason, who was the President of the Senate, decided that the objection was not in order, that nothing was in order but to count the vote. He refused to entertain the motion, and the vote was counted.

Mr. BAYARD. The case stated by the Senator from Indiana does not touch the question raised by my friend from Rhode Island. That Senator asked me, where two sets of electoral votes, two certificates from different sets of alleged electors, came from the same State, which of the two should be counted. I said to the Senator from New Jersey that I knew of no such case until the casting of the last presidential vote. I think the experience of 1872 was the first in the history of this country, and no case ever arose in the presidential election where there was what may be termed conflicting votes or the attempt to have two sets of votes from the same State for the same office.

Mr. President, it was not my object to discuss this very grave question, for I have not had the opportunity, with the various measures which have been pressing on the attention of this body, properly to prepare myself to discuss it. I am fully aware, however, that the cause of difficulties in regard to the election of the President of the United States, as the election of any other officer under the Government of the United States, is the deplorably low tone into which public and political morals have fallen. Unless there is to be a higher plane of political morality and action in this country, you may make your rules as often as you please, you may change and repeal them as often as you please, but you will find that fraud will defeat constantly your efforts to repress it. I heard the Senator from Indiana the other day speak of the manner in which the votes have hitherto been counted in the presence of the various Vice-Presidents of this country. The last that he named, I think, was Mr. Breckinridge, and he bestowed praise upon those high officials because the vote had been honestly counted. When the time shall come that a Vice-President of this country, or the Senate or the House of Representatives of this country, shall, from any passion moving them, act otherwise than honestly, of what use are your laws or your safeguards of statutes and Constitution? They will be of no value, and the Government will have failed, and another will take its place, because in all human experience there is one thing that will be necessary, no matter what form of government may exist, and that is, that honesty and truth shall be its foundation-stone and enter into the administration of its affairs.

I would prefer that this matter should be further considered and that time should be given for its better examination before we adopt this proposition of the Senator from Indiana. He himself has changed his views. He first proposed, a few days ago, to repeal the whole joint rule. Now he simply proposes to modify it. If in the mind of a Senator who has given so much attention to this subject as the Senator from Indiana there can be this fluctuation of opinion in a few days, surely it would be wise and right to allow those of us who have given less attention, and perhaps are less competent to consider these points than himself, some opportunity to see which of his two propositions is the better one. He proposed at one time the outright repeal of the whole rule. He now proposes a mere modification. I desire time and opportunity to study as well as I may the effect of the Senator's various propositions. I cannot believe that such propositions, touching so grave a matter as this, are produced for temporary and party effect. If they are, then they are very short-sighted. We all know the condition of parties at the time this rule was framed. We also know well the present condition of parties and what will be their condition in the Forty-fourth Congress, the Congress to whom will be committed the count of the electoral vote in 1877, on the 20th day of February. I should not only think it unworthy but I should think it extremely unwise to attempt to frame a rule in regard to so difficult a subject as this, based upon the accidental condition and relation of the two great political par-

ties of the country. Depend upon it, sir, schemes founded on such theories will only return to plague the inventor and disappoint those who originate them for such very uncertain and, I must say, unworthy ends. I do not say for an instant that has been done in the present case; I have no right to say it; but I wish to say that I desire time to consider this very difficult question, and if my vote can obtain it it shall, to consider the true relation of this rule to the subject and whether it is a transgression of those limited powers which the Constitution of the United States has vested in the Senate especially and in both houses, in regard to counting and declaring the result of the election for President and Vice-President of the United States. I hope the Senator who has this measure in charge will permit it to lie over for a reasonable time. He has shown to-day that he has at his back in the Chamber a majority, who will permit this measure to be considered whenever he desires. Having then this secured, I suggest, and I shall move if this debate is not to be continued, that the present measure lie over.

Mr. THURMAN. Does the Senator make a motion?

Mr. BAYARD. I shall not make the motion myself, if the present debate is to be continued. If it is not to be continued, I shall make the motion myself that the consideration of this resolution shall be postponed for at least one week; and I think it had better be sent to some committee meanwhile.

Mr. THURMAN. I ask that the resolution and the substitute may be read.

The PRESIDING OFFICER. The Secretary will report the resolution and the substitute.

The Chief Clerk read the resolution and the amendment.

Mr. THURMAN. That resolution was offered by the Senator from Indiana, and the substitute is offered by him. Neither the one nor the other has received the consideration of any committee of this body. I am glad that the Senator has offered the substitute, for the original resolution seems to me to be palpably wrong. Should the original resolution be adopted, we would have no rule whatsoever upon the subject; we would have nothing but the provisions in the Constitution, and those provisions, as we know from opinions expressed on this floor, receive in the minds of different Senators very different interpretations.

In the carefully-prepared speech of the Senator from Indiana delivered at this session on his proposed constitutional amendment, he asserted his opinion to be, if I understood him correctly, that the decision of the question who has received the votes of a State for President and Vice-President rests with the President of the Senate; that the members of the two houses who are present are but witnesses of a count to be made by the President of the Senate; thus vesting in that officer, and he perhaps a candidate himself, the power to determine who is elected the Chief Magistrate of this Republic. I expressed on that occasion my dissent from that interpretation of the Constitution. I fancy that a large majority of the Senate do not concur in that view of the Constitution. I have no idea that a majority of the Senate agree with the Senator from Indiana in interpreting the Constitution so as to require that the Vice-President shall count and the Vice-President shall be the judge of all objections that may be taken to the validity of any return. That has not been the interpretation placed on the Constitution in the history of the country, otherwise the twenty-second joint rule never would have had an existence. The interpretation placed upon the Constitution has been that as it is a duty devolved upon the Government to count the votes for President and Vice-President, and there being no express provision in the Constitution who shall count them, but an implied provision that they are to be counted by the two houses, the matter is remitted to the legislative department of the Government to provide by law for that count, consistent always with the express provision in the Constitution that the count shall be made in the presence of the two houses and the result declared. Therefore it would be an insuperable objection to the resolution first introduced by the Senator from Indiana that it would remove all legislation upon the subject from the books; that there would be nothing at all to determine how the votes should be counted; that we would proceed to the Hall of the House of Representatives in February, 1877, without any rule whatsoever or any statute whatsoever to prescribe what should be done after we got into that assembly. That would never do, Mr. President.

But now the Senator proposes to change the rule and to provide that no vote shall be rejected unless by the concurrent judgment of both houses, thus quite reversing the rule. The rule now being that no vote shall be counted unless both houses vote to count it where there is an objection made, he proposes to reverse that and say that no vote shall be rejected unless both houses concur in its rejection. I have on a former occasion, I have more than once, I believe, declared my opinion that that ought to be the rule, that every return ought to be considered as *prima facie* correct, and ought to be counted unless both houses concur in rejecting it. I am aware that there is a difficulty in a case that may arise, and it is a difficulty that might arise under the present rule too, although the result would be different. For instance, take such a case as occurred at the last count—the case of Louisiana—where two sets of returns

came up, each of them purporting to be the returns of the votes cast by the electors for President and Vice-President in that State. There manifestly the question was who were the electors. They could not all have been electors. Both bodies could not have been electors. One body were electors and the other body were not electors. The question therefore really to be decided was which one of those bodies was the electoral college for President and Vice-President in that State. Under our rule, when one of those returns was presented and objection made, unless both houses concurred, the vote would be rejected. When the other return was presented, unless both houses concurred, it was to be rejected. Suppose the rule had been changed and the substitute now suggested had been adopted; a return is presented, an objection is made to it, and thereupon the houses vote upon it separately and one house votes to reject it and the other house votes not to reject; then, according to the rule as now submitted by the Senator from Indiana, in a case of that kind that return would have to be counted. Then suppose the next moment the other return is presented, the return of the election of the other body of electors, as was the case with Louisiana at the last count, and then one of the houses votes that that shall be rejected and the other votes that it shall be received; then you would have to count both returns under that rule as the substitute now stands. You see, therefore, that the substitute will not do just as it is, but must go further and provide for such a case as that, or at least leave it to be decided when the case shall arise.

This is not an impossible case at all. It was the case in regard to Louisiana at the last count, as I have said. There were returns from Louisiana which purported to be the votes of the electors who cast the electoral vote of that State for Greeley. There were other returns that purported to be the returns of electors casting the vote of that State for Grant. Under this modification suggested by the Senator from Indiana, without any provision for such a case, if you take it literally, if the two houses had been of different politics, as they will be at the next count, the result would have been that the vote of that State would be counted twice and would be nullified, for one return would be for one candidate and the other return would be for another. That shows that the substitute offered by the Senator from Indiana, although in my judgment right in principle, that both houses ought to concur in rejecting a return before it can be rejected, requires some modification that shall apply to a case where there are two returns from a State. That is certainly necessary or we get into this difficulty that I suggest.

It has further been asked here by the Senator from Rhode Island, what are you to do when there come up two returns from a State? He seemed to think, by the question he put to the Senator from Delaware, that in a case of that sort it was the duty of the President of the Senate to determine which return he would lay before the two houses. That certainly is an impossibility. He cannot have looked at the law, or he would never have asked such a question as that. What does the law require? Section 2 of the act of 1792, on the subject of the election of President and Vice-President, provides—

“That the electors shall meet and give their votes on the said first Wednesday in December, at such place in each State as shall be directed by the legislature thereof; and the electors in each State shall make and sign three certificates of all the votes by them given, and shall seal up the same, certifying on each that a list of the votes of such State for President and Vice-President is contained therein, and shall, by writing under their hands, or under the hands of a majority of them, appoint a person to take charge of and deliver to the President of the Senate,” &c.

Then the third section provides—

“That the executive authority of each State shall cause three lists of the names of the electors of such State to be made and certified, and to be delivered to the electors on or before the said first Wednesday in December, and the said electors shall annex one of the said lists to each of the lists of their votes.”

You see, then, that the evidence that the persons voting are electors of President and Vice-President is to be annexed to their votes and of course sealed up with them, and the President of the Senate, when the returns come to him, has no knowledge in the world, can have no knowledge whether return A or return B is the correct return from that State, the return of the votes of the legal electors of that State. He cannot know anything about it. He gets two packages. Upon the back of each one of them is this certificate: “This is the vote of the electors of President and Vice-President of the State of Rhode Island.” There is nothing to show that it is except that bare indorsement, and the indorsement is as regular upon the one as it is upon the other. It can never be found out, then, which is the true return until you open them and see whether the evidence of the title of these electors is contained in the return, to wit, the certificate of the executive of the State, under the great seal of the State, that they are the electors. Therefore it is not for the President of the Senate to decide this question in the first instance at all. He must open the returns, all that come to him in that way. If there are two from one State, he must open them both; if there are three, he must open them all, for one may be a forgery or two may be forgeries, and

the third one may be the lawful and the only lawful return. So, then, you see that the question asked by the Senator from Rhode Island in no wise tends to prove that any judicial power over this subject is vested in the President of the Senate.

Now, while in my judgment no vote that is regular on its face and that has been given by the true electors, that is to say no certificate of these electors which is substantially correct, ought to be rejected unless both houses concur in the validity of the objection to it, and therefore the main purpose of the substitute offered by the Senator from Indiana is correct, yet the substitute is defective for the reason I have already stated. It does not provide for a case in which two returns may come from the same State, as has been the case heretofore. Some provision ought to be made for that case. It ought to be provided that where that is the case the houses shall decide between those returns, and how they shall decide, and such a provision as that requires great care in drafting it.

But, sir, the defect that has been pointed out is not the only defect of the twenty-second joint rule. I appeal to the experience of every Senator who has ever been at the count of a presidential vote, and especially to every Senator who was present at the last count that was made, and I ask him whether he did not find himself embarrassed beyond measure by the provision in this rule that there should be no debate in either House? The rule expressly provides that. It provides for deciding upon the returns. It provides that the Senate is to retire and decide for itself; the House of Representatives is to decide for itself; they are to meet together, and the result is to be announced, and there shall be no debate in either house. Now, I put it to the Senate the other day, and I beg leave to remind Senators again of the fact, that at the last count of the votes the question of the reception of a return from Arkansas depended upon the question whether the certificate of the governor that the persons voting were the electors of that State, was under the great seal of the State or not. It was said that it was not the great seal, but was the seal of the secretary of state alone, and one of the Senators from that State at first thought that the State had no other seal than that, but it turned out upon an examination that the State had a great seal; and yet no Senator was allowed to rise in his place and state to the Senate or to offer any resolution embodying the statement of the fact that that State had a great seal. The very question upon which the reception of the returns depended was to be decided without knowledge of the fact, and the only knowledge that could be communicated of it was by conversation with each other on this floor before the vote was taken. That ought not to be the case.

Take again the case of the vote from Georgia, where there were votes for Greeley cast after he died. The House of Representatives decided that they should not be counted; the Senate decided that they should be counted. There was a great question of law. It was not a question whether or not you could elect a dead man; that was not the question, as they seem to have considered in the House; but the question was whether votes cast for a man who was not *in esse* at the time, but honestly cast for him, supposing him to be alive, were not to be counted upon the inquiry whether any other candidate had a majority of all the votes cast. That was the question. Nobody pretended that you could elect a dead man to office, but it was a very serious question indeed to be considered whether you could reject votes that had been cast for him, votes honestly cast for him in the belief that he was in being, and declare elected a man who had not received a majority of all the votes cast for the office. And yet upon that great question, upon which I admit much may be said, and which required the most thorough investigation, we were compelled to decide without one single word of argument or reference to anything whatsoever that might enlighten us. Why, sir, it was monstrous.

The truth about it is, that never in my public life (not very great, it is true, but yet extending over a very considerable portion of time) have I seen anything so unsatisfactory, so unreasonable, as was the count of the votes for President and Vice-President cast at the last election. I concur in the remark made by the Senator from Indiana the other day, that it is well for the peace of this country that General Grant had so large a majority that it did not matter whether the contested votes were counted or not, for there might have been a very different state of things if the election had turned upon the objections that were made.

There is another case to be provided for and to be considered. But at the same time that I say this provision that there shall be no debate is a monstrous provision, yet it would not do to have unlimited debate. That certainly would not do, for too much time might be occupied, and would probably be occupied; a factious minority might almost speak out the whole time up to the 4th of March. But this rule will never be worth anything, but an injury and a wrong, until some provision is made that shall allow a restricted debate upon this great question; and therefore I had hoped that when the Senator from Indiana turned his attention to it, he would provide for something of this sort, so as to allow a reasonable debate upon the objections that were made to a return.

There are other considerations, Mr. President, that I would urge against the adop-

tion of the substitute as it now is without any farther amendment; but it is my purpose to move that this resolution and the substitute be referred to the Committee on Privileges and Elections, in order that they may mature a rule which shall meet the exigencies of the case, that they may mature it not here in open Senate, which is no place carefully to consider any such thing, but that they may mature it in the privacy of their committee-room, conferring with each other, and choosing the most apt and proper language to express their views. This is not a subject to be disposed of in open Senate in this way. An open Senate is not the place to frame such a rule. It requires great care in the use of language and great reflection upon the provisions that shall be inserted in the rule. That can only be done in the privacy of a committee-room or of a library or a closet; it cannot be done here. Therefore while I favor the adoption of the idea contained in the substitute, yet as I feel that it is imperfect, that it ought to go further, that further provisions are absolutely necessary, and I have perfect confidence that the Committee on Privileges and Elections can in a short time frame a proper rule, and believe that when it shall have framed it it will meet with no serious opposition but can pass, and pass both houses at the present session, I move to refer the resolution and substitute to the Committee on Privileges and Elections.

MR. FRELINGHUYSEN. Mr. President, the different views which have been expressed on this subject show the importance of its present consideration. In fact, the difficulty which arose at the count of the votes of the last election should satisfy every one that it is indispensable that Congress take some action on this subject. I agree with the Senator from Delaware that we should take no partisan action—that we should so build as to secure the best interest of the nation for the future. And that we are not influenced by partisan motives, is evinced by the fact that the proposition coming from the Senator from Indiana meets the qualified approval of the Senator from Ohio, and I think I in the main agree with the view that Senator has taken. But in the expression of opinion on a subject of this nature where partisan considerations have no place, every one should hold himself at liberty to modify or change his views as more light is cast on the subject.

I can see that in determining the electoral vote for President a great many questions may arise. A State may claim a larger representation than has been assigned her and may appoint more electors than she is entitled to, and all their votes may be returned. A State may vote for persons as President and Vice-President who both reside in the same State; a State may send here two sets of votes; a State may send up a vote for persons who are not, in the language of the Constitution, "natural-born citizens."

Who is to decide these questions? Is the presiding officer of the Senate, who may be a mere member of this body temporarily presiding and who has not been elected by the people? Is he because by the Constitution he is made the medium of communicating the vote to the Senate and to the House to have the power to receive and count these votes, and is there no power to control him? His duty is ended, sir, so far as the Constitution imposes it, when, "in the presence of the Senate and House of Representatives, he opens the certificates." That is all he is authorized to do by the twelfth amendment to the Constitution. Who then is to decide the important questions I have suggested as possible? The Constitution does not expressly say. But what is the implication? The Constitution says that the votes shall then in the presence of the Senate and House of Representatives be counted. The language of the Constitution is that when the votes are so counted, "the person having the greatest number of votes for President shall be the President, if such number be a majority of the whole number of electors appointed."

Now it is very certain that the presiding officer of the Senate, or the Senate and House of Representatives, must decide the questions that arise. One or the other must do it. The Senator from Delaware said he understood that the Senate and House of Representatives were present as mere witnesses, and it would hence follow there is no one authorized to decide these questions. Mr. President, that cannot be. The very counting or not counting of the vote is a decision, and is the only decision that there is to be made. So when the Constitution says the vote shall be counted, it says that a decision shall be made by some one, and it must be made either by the presiding officer of the Senate or by the Senate and House, who are required to be present. The Senator from Delaware very properly says that the presiding officer of the Senate has a mere ministerial duty to perform.

MR. BAYARD. I ask the Senator from New Jersey does he consider that there is any discretion vested in the two houses of Congress, or either of them, to say that the vote shall not be counted; or does he not consider the language of the Constitution plain and mandatory that "the votes shall then be counted?" Does he think that either house, or both houses, could prevent the counting of the votes, or if they did, would it not be an act of revolution?

MR. FRELINGHUYSEN. Mr. President, if a State should send as votes a larger number than it was entitled to, or if it should send persons voted for as President and Vice-President who both resided in the same State, it would be a direct violation of the Constitution and an act of revolution for any one to count them. The House and the

Senate are to determine what are votes; that is the very question they are to decide in order that the votes may be counted.

Why, sir, are the House and the Senate present? It is because they represent the sovereignty of the Government at that most critical moment when the executive power is to be transmitted, and they are there that the transmission may be under their watchful guardianship.

Mr. President, from the character of the two bodies, from the requirement that they shall be present, from the necessity that there is for a decision at the time, from the mere ministerial character of the presiding officer, it is clear that the decision as to what are votes and what shall be counted must be made not only in the presence of but by the Senate and the House. The power of the presiding officer ceases when he has performed his ministerial duty of breaking the seal and opening the certificates, as directed by the Constitution.

Mr. EDMUNDS. May I ask the Senator whether he means that the two houses are to act in their separate characters or in some consolidated character as one body?

Mr. FRELINGHUYSEN. I will answer presently.

Mr. President, from this conclusion that the Senate and House are to decide what are votes and how they are to be counted, it follows as a matter of course that the Senate and House of Representatives have a right to adopt a rule regulating their action in the premises. I had drawn up a rule which, in most respects, corresponds with that of the Senator from Indiana. I would make the present rule read thus:

"That no vote shall be rejected except by the concurrent vote of the two houses."

This is reversing the existing rule, which is that no vote shall be counted excepting by the concurrent vote of both houses in its favor. I had also adopted the idea expressed by the Senator from Ohio and provided to strike out that clause which directs that "there shall be no debate in either House when they withdraw for consultation," and insert instead—

"That no person shall speak more than twice, or more than ten minutes in all."

In answer to the Senator from Vermont, let me say that I understand that the votes must be counted in joint convention, the House and Senate being together; but that they deliberate separately on any question that may arise.

Mr. EDMUNDS. That is not an answer to the question.

Mr. FRELINGHUYSEN. I thought it was. The advantages of changing the rule and making the vote of both houses requisite to reject the vote of a State, rather than leaving it as it now is, that either house may reject the vote, are these: If you make the concurrence of both houses necessary to the rejection of a vote, you give a proper presumption in favor of the validity of the vote of the State.

Mr. WRIGHT. I have a question that I beg to submit to the Senator here, exactly in the line of his argument. He says that he thinks the amendment is proper—without stating his proposition at length—because of the presumption that there is in favor of the correctness of the return. Suppose it so occur that there are two returns from the same State, either by two persons, as in Louisiana, for instance, claiming to be governor, and the seal of the State shall be attached to each; or that they come in such manner or method as not to conform to the law, and the two houses are unable to agree? That is the case that occurred to me, and it presents difficulties.

Mr. FRELINGHUYSEN. Of course when there are two sets of votes coming from the same State each duly authenticated, if that is possible, there can be no presumption in favor of the one over the other. That difficulty was presented by the Senator from Ohio when the Senator from Iowa was not in his seat; and it seems to me as to the Senator from Ohio that for such a case and for one or two others the rule must make specific provision. It cannot come under the general terms of the rule we are considering. Specific provisions being made for such cases, we should require the concurrence of both houses to reject the votes sent from the States; and this we should do, first, because we thus give proper presumption in favor of the vote of the State; second, we thus show due confidence in the integrity of each of the houses; third, we secure reasonable, though not absolute, security against clearly unconstitutional votes; and lastly—and this is a most important consideration—we adopt a rule under which there will be much less temptation for the House by a disagreement with the Senate to take the election from the electoral college and cast it into the House of Representatives. This I consider a strong reason in favor of changing the rule and making the concurrence of both houses necessary to reject the vote. Even this rule would not remove entirely the temptation; for the House by not joining the Senate in rejecting improper votes might so affect the result that no one would have a majority of the whole number of electors appointed, and thus the election would go to the House. But with the rule changed, the temptation would not so often occur; and we must have confidence.

Mr. MORTON. Mr. President, I believe that no Senator upon this floor advocates the rule as it now stands. All acknowledge its danger and its absurdity. But the Senator from Ohio says that the amendment proposed by me may operate badly in a case where there are two sets of returns; that both returns must be counted unless both houses agree in rejecting one set. Now, what provision can you make to meet such a case?

As the rule now stands, either house can reject the vote of a State. A law cannot be passed to appropriate a hundred dollars without the concurrent vote of both houses in the form of a law. You cannot pass any law, however trifling, without you have the concurrent votes of two houses. The theory of the Constitution of our Government is that the judgment of two houses is safer and better than one; therefore we have two. In France they have only one now, but they are trying to get two. But we are all agreed upon the fact that a government with two houses in its legislative department is better than a government with one. As I said before, you cannot pass any law without the judgment of two houses; but you have now a rule under which one house can reject the vote of the State of New York and disfranchise five millions of people and change the result of a presidential election. Such a thing needs only to be stated in order that it may be universally condemned, it seems to me. The danger of it cannot be exaggerated.

Now I will take the case of two returns from the same State. They come before the two houses under the rule as we now propose to amend it. We must presume something in favor of the honesty and of the integrity of the two houses. I would rather leave it to the two houses to determine which is the forged and the spurious return than than to leave it to one house. We must presume that in that case it would be safer to refer the determination of that question, the selection of the true return and the rejection of the false return, to both houses than to refer it to one house; and, in the very case that the Senator puts, how else can you decide it? You cannot make any specific rule for a case of that kind. Here are two returns. The first is opened and read. It is objected to. The houses separate and vote upon that question. They both agree that it is forged, that it is spurious in some form. The next one comes. That is the true one; still an objection is made, and the two houses vote. You would not allow one house to reject both returns because one house may do it now. Take it as the rule now stands, one house may reject both returns; or, take it as the rule now stands, one house may reject one return and the other house may reject the other return, and so the State gets no vote at all. Is it not safer, if this matter is to be referred to Congress at all, that it shall be made to depend like a law upon the concurrent vote of both houses instead of leaving it to one house, without debate, without consideration, and without adjournment, to reject the vote of Massachusetts, or New York, or in fact of all the States?

Mr. President, see what a fearful temptation is presented to throw the election into the House of Representatives. I will not presume there is any purpose of that kind or that any House would do it, but I ask you to notice the fearful temptation. At the very next election the House will be democratic and the Senate will be republican. An objection is made to the vote of a State; the two houses separate and vote upon it. The vote of that State may elect a republican candidate for President. By rejecting the vote of that State the election will be thrown into the House, and the House is democratic and will elect a democrat for President. The responsibility of that action is divided between two hundred and ninety-two men in the House. The responsibility of each one is comparatively small; there may be something in the objection, enough of form or enough of substance to make an irresponsible majority willing to reject the vote of that State; and the House, by its own action, against the vote of the Senate, may reject the vote of that State and take away from that candidate enough votes to reduce his vote below a majority of all the electoral votes, and the result is that the election goes into the House.

Suppose, if you please, as in the case of Arkansas or in the case of Georgia or in the case of Louisiana two years ago, as the rule now stands, the two houses being different in politics, an objection is made; we come back into the Senate and we honestly think that the objection is a good one, and we reject the vote of that State. Our vote does it. The House takes a different view of it, just as it did in the Arkansas case only two years ago. They say the objection amounts to nothing. But the House being democratic and the Senate having rejected the vote of a democratic State on a frivolous ground, as the House think, the House under excitement—and men are the same at all times and everywhere—will then throw out the vote of the next republican State upon some frivolous objection. Thus it goes tit for tat until the votes have gone out and the election goes to the House.

That is the operation of the present rule. Can any one fail for a single moment to see the danger of this and the necessity of changing it? It is above all party considerations. It is trifling to talk about party, in my opinion, on such a great question as this. If we are to have a rule at all, if Congress is to interfere, let it be upon the ground on which a law is passed or a resolution is passed. It requires the vote of the two houses to pass a law, no matter how small or unimportant that law may be. Therefore let it require the concurrence of the two houses to reject the vote of a State, whether it is the vote of Nevada, the smallest State in the Union, or of New York, the largest State in the Union. Every presumption ought to be in favor of receiving the vote of a State. There should be no technical objection sufficient to throw it out. It is a great thing to reject the vote of a State. The presumptions ought to be all in favor of

it, and there should be the vote of both houses as an evidence of the importance of the objection, or else the vote of that State should be received. The temptation is too great to leave in the pathway of any party, of my own party, of the democratic party, or of any party that may come after us.

Sometimes an objection may be made where the houses divide in good faith, just as they did on the Arkansas question. There the two houses divided in good faith. The Senate rejected the vote of Arkansas; the House received it. Both acted in good faith. It was unimportant; but suppose the two houses had differed in politics, then would have come a very different and very grave question; and suppose the rejection of the vote of that State should decide the result of the presidential election? All can see that it might precipitate the country at once into a civil war.

Now, sir, the amendment which I have offered is only intended or expected to go to one single danger in the method of electing a President, and that is in regard to the twenty-second joint rule. There is another great danger lying behind all that which we cannot provide for except by a constitutional amendment. The electors in a State may be elected by fraud or by violence, but if they come up here properly certified there is no power here to examine the vote in the State below. There is no time for it. There is no opportunity. It was not the intention that Congress should have that power. That was placed with the States; and it was the theory that the election of President should be left to the States and taken away from Congress. You cannot provide for that except by amending the Constitution of the United States. An amendment has been brought forward, but there is no time to act upon it. That is one of the dangers still left behind which we cannot provide for now; but so far as this twenty-second joint rule is concerned we can provide for it.

Upon the question of the power of Congress to adopt this rule I entertain very great doubts. I do not believe myself the power exists; but there is a divided sentiment here. We cannot act upon any other position except that the power does exist. I myself do not see how the power does exist, or from what provision it can be inferred; but we have got the rule. The rule in its present condition is a magazine that may be exploded at any moment. Let us therefore relieve it of its danger. It is much safer for this country—and that is the ground on which I put the whole thing—to say that the vote of a State shall be rejected only by both houses and not by one house; and you take from one party, where the houses are divided in politics, the power to change the result by rejecting the vote of a State. It will be in the power of our friends on the other side in the next House of Representatives—and they might act in good faith, but we take a different opinion—it will be in their power if an objection is made in the joint convention to the votes of republican States, the two houses separating, to throw the election into the House, no difference what the votes may be. Under the rule the republican party cannot elect a President. They might carry every State in the North; but they cannot elect a President. Why? Because it is in the power of the House of Representatives, under the operation of the rule, to throw out the vote of every republican State. We, on the other hand, could throw out the vote of every democratic State; but the result would be that the election would go into the democratic House. I am casting no imputation upon any party or any body of men. I am only speaking about the possibilities; about the fearful temptation spread in the pathway of men. I am only speaking about what may take place under such a rule; and no rule which admits of such things ought to stand for one moment.

I do not understand that this rule, in its present form or in the new form proposed to be given it, takes away what I believe to be the power of the Vice-President. The Constitution says that the votes of the electors shall be sealed up and sent to the President of the Senate, and he shall open them in the presence of both houses, and the votes shall then be counted. Now, suppose there are two packages sent to him; there are two sets of returns; he brings forward one set and keeps the other; how will you get the other set out of his hands? What power have you? He is only required to produce the set that does represent the vote of the State; he is not required to produce both packages; he is only required to produce that package which does contain the true electoral vote of the State. Therefore he may exercise his judgment upon that, and you have no power of correction. You cannot go behind him. That shows the necessity for an amendment of the Constitution. This rule cannot change that. It does not undertake to change it. It simply provides for objections on such papers as he does present and as are opened to be counted. That is all there is of that.

Suppose there are two governments in a State, one is a usurpation, the other is the true government, and each calls on the President of the United States for aid against violence. What has the Supreme Court said. The Supreme Court has said that in that case the President must decide which is the lawful government of the State, and that decision must stand until it is reversed by both houses of Congress. The Vice-President is simply required to produce the return of the electoral votes of the State, and where there are two packages, it is for him to determine which is the correct one, and not to produce the other. It was not intended to give him this great power. It merely results in that way. Why? Because the debates show that there was no

apprehension or expectation on the part of the framers that such a thing could ever happen, that there would be two sets of electors from the same State. It was a thing that was not contemplated; they never provided for it; they did not seem to think that there might be fraud in the electoral colleges which would require some tribunal to determine or pass upon it. They took it for granted that all would be fair. It just stands thus: The President of the Senate is to produce the electoral votes, and they shall then be counted; and if there are two or three packages in his possession and he produces one, you have no power to compel him to produce the others. But that is not important now. As I said before, I do not believe in the constitutional power of Congress to pass upon these questions. But we have a rule. There is a difference of opinion upon the constitutional point. I would say change the character of that rule to relieve it of its danger, and put it out of the power of one house to disfranchise any or every State in this Union.

MR. EDMUNDS. Mr. President, I am rather surprised to hear the Senator from Indiana say that he does not believe Congress has any power to regulate this subject at all, if I correctly understand him, because that would lead us to this conclusion: that the two houses, acting by a concurrent rule, have a constitutional power to regulate the exercise of functions conferred by the Constitution which the law itself cannot regulate. I do not understand the Constitution of the United States in that way. The Constitution of the United States vests powers and duties in all the three great departments of the Government. It then provides that Congress shall have power to pass all laws necessary to carry into effect the provisions of the Constitution and the powers invested in any of its several departments. I am not quoting the exact language.

MR. THURMAN. "In the Government of the United States, or in any department or officer thereof."

MR. EDMUNDS. That is it. It appears, therefore, clear to me that whatever constitutional power exists at all to do anything upon the subject between the two houses rests in the law. I, of course, do not include in that the mere method of meeting together, fixing the hour, or anything of that kind; but so far as exercising the primary duty, if there be any at all under the Constitution, which they have to perform, then certainly the Constitution has said that Congress—not the Senate, not the House of Representatives, not both acting together without the President, but the law-making power—shall pass all laws that are necessary to give full effect to the exercise of every duty which the Constitution has reposed in any department of the Government. The result of my friend's argument, as it appears to me, would be, if he is right, that the same rule which holds that you cannot regulate by law the exercise of this constitutional function, assuming that it is to be exercised by the Senate and by the House of Representatives, would apply to the Supreme Court, to the President of the United States, to all the executive officers, because it is the same grant of power, it is the same direction to the legislative body, as in all theories of government it always is, that the Constitution is to be carried into force and its powers and its functions put in operation by the force and power and form of law. No constitution that ever I heard of has been able to execute itself. No system of government having a fundamental law that ever I heard of has been thought to be at all perfect unless it has had also the law-making power to put into execution the rights and the duties and the operations that are reposed by the people in the frame-work of their government in their representatives. With what propriety, then, can it be alleged that the law cannot touch this question at all and provide how these votes shall be counted, when the electors shall meet, (because that is just such a case,) how they shall transmit their votes, where the two houses are to meet if you please, when they are to be opened?

In the original discussions about this business, the draught of the Constitution once stood before it was finally adopted that the votes were to be opened in the Senate-house, but that was stricken out. If you say that the law cannot touch these things at all, you must say that the Constitution has not vested in the law-making power the function of providing for the due exercise of any of the powers that the Constitution has granted to the various departments of the Government. There is nothing more sacred in the constitution of the Senate and House of Representatives as such than there is in the executive department or in the judicial department. And if under your general power of regulation which the Constitution gives you of carrying into effect its powers you may provide how the Supreme Court shall exercise its functions, how the Executive shall exercise his functions carrying out the duties that the Constitution has imposed upon him, may you not also do the same thing when, assuming that to be the true construction of the Constitution, the two houses are to meet and witness the counting of these votes and to decide upon them? It seems to me that no man can considerably answer that question in the negative.

No distinction is made in the Constitution between regulating by law whatever function is appointed by the Constitution to be performed by the two houses and in regulating by law the function which any of the other departments of the Government are to exercise; and such, so far as I know, has been the continuous history of

this Government without dispute by any party. Take the highest possible case where you could suppose by the Constitution that there was no legislative power at all; and that is in the judging of the elections and qualifications of the members of the two houses. There have been laws for a great many years, passed without party disputes or questions of doubt as to constitutionality, providing for the methods of contesting elections in the House of Representatives, the kind of notice that should be given to entitle a man to make a contest, the kind of evidence, and the method of its taking, which the party must produce in order to maintain his right or to counteract the opposition on the other side. It is true, you may say, that the House of Representatives is not bound to regard that when it comes to act; that it has absolute power. So it has; so has the Supreme Court absolute power; and yet the Supreme Court does not exercise that power upon its caprice; it exercises it according to the regulations which the law has imposed.

It is no argument, therefore, against the constitutional power of Congress by law to regulate the performance of a constitutional duty to say that the party who has that duty to perform may disregard the law and set up for himself. The law may say, if you please, that the President of the United States shall only hold his office for two terms; that he shall not be eligible for more. Suppose he happens to be elected for a third time, and takes possession of the office; what is to be done about it? It is a plain violation of the law, and you must turn him out by revolution, I suppose, or by some judicial process, or in some other way. So, then, it does not at all follow, because in the case I am supposing the House of Representatives is the supreme tribunal which has it in its physical power to disregard the law which regulates its procedure, that therefore it is not bound in the sense that we speak of the binding obligation of the law to follow it.

But, Mr. President, this question goes a great deal deeper, it seems to me, than the proposition proposed by the Senator from Indiana. The question is not merely whether the Vice-President of the United States or the presiding officer of the Senate is to open the votes, and there his function ends, as my friend from New Jersey supposes; but the fundamental question really is, what is a vote? Does the Constitution mean that anything that purports to come from a State is a vote in the legal sense which is to determine in a case you may suppose who shall be the Chief Executive of the nation for four years? I do not think anybody would contend for that. A vote, therefore, must mean a legal vote, a vote which is in accordance with the provisions of the Constitution of the United States and in accordance with the laws which have existed for so many years respecting the method by which and the time within which the vote of each State is to be expressed and returned. I take it that is what the Constitution means by a vote. If it does not, then we are in a state of chaos and anarchy, as it seems to me.

The question then follows who is to determine whether the given document forwarded is a vote in the sense I have described. This rule does not determine it, as it stands now; it does not determine it as it will stand if the Senator's proposition is agreed to. You have the fundamental question, and in order to reach that question you must determine one of four things: First, that the presiding officer of the Senate is the judge as to what is a vote; and that seems to be the idea of the Senator from Indiana, because he says the President of the Senate, if there are two sets sent to him, is not obliged to put in more than one, and therefore that there must be implied in him a power to determine which is the one.

Or, second, you may take the idea of my friend from New Jersey, if I correctly understand him, that the two houses of Congress, in their separate capacity acting as judges, like a judge on the bench, not acting in a consolidated form as one body, giving one determination, but acting as two independent bodies, are to determine what is a vote. That, on ordinary principles of judicial procedure, would lead to the result that, if a question be raised, nothing is determined judicially unless both the judges agree; and therefore if they disagree there is no vote at all. That is the judicial theory. Nothing is declared, and the document in question, as in a judicial case, cannot be entitled to any validity until the judges give it validity. That is the present rule. Now, it is proposed to reverse that, and to say that unless the judges agree that a document is invalid, a disputed paper, it shall be valid. That is this proposition.

The third would be to provide by law some method of determining by one body, for the time being at least, so that it would not require a concurrence, except of a majority of a particular chosen body, what is a vote.

The fourth would be to leave the Constitution exactly where it is, and provide no rule about it; or if you did have a rule, give it no effect, as indeed we cannot except for the time being, and then leave it, as in most of the States it is necessarily left, to the judicial tribunals to determine the title of a given man to an office. I know it is very often said that this office is so high, the title to it is so important, that the judicial function does not extend to it. I do not see anything in the Constitution which, if it authorizes the judicial courts of the United States to try the right of a man to be the judge of a district court or a collector of customs, does not in like manner authorize

the judicial courts of the country to determine the title of a man to the office of President of the United States. Certainly there are no exceptions; but I do not intend to go into that.

There are these four ways by which, either right or wrong, constitutional or otherwise, the topic may be reached. Now which of them are you to take? It appears to me that you ought to take that one which on the whole is open to the fewest objections. I think in stating that proposition everybody will agree.

Mr. THURMAN. May I interrupt the Senator for a moment?

Mr. EDMUNDS. Yes, sir.

Mr. THURMAN. The Senator from Vermont says that the rule as it now stands is in consonance with judicial action, that where there are two judges constituting a court and they divide in opinion, they can render no judgment. I submit to him that that statement is scarcely correct. These certificates or returns are evidence of the votes that have been cast. If an objection be made to them, that is to be determined; and when a piece of testimony is offered in a court composed of two judges, and an objection is made to its reception, in case the judges divide in opinion, the objection fails and the paper goes in.

Mr. EDMUNDS. Is that the law?

Mr. THURMAN. That is the law.

Mr. EDMUNDS. I shall be glad to have the Senator produce a little other evidence for it besides his statement. I did not know that that was the law; but I must assume that it is for this afternoon, because my friend from Ohio says so.

Mr. THURMAN. I am sure it is.

Mr. EDMUNDS. I always had the impression that when a piece of evidence was offered in a court where there were two judges and they disagreed, the evidence did not go in.

Mr. THURMAN. No; the objection fails and the evidence goes in.

Mr. EDMUNDS. But that does not touch the point. The Senator assumes that the certificate, as he calls it, is a certificate; but take the case proposed by my friend from Indiana; one party says it is a forgery; or suppose it does not bear the seal of the State at all; suppose there is to the mind of every intelligent man no evidence on its face that it is what it purports to be. What are you to do then? You do not get ahead any at all by any such proposition as that; you are bound to take it without any regard to what may be its character upon its face. The Senator may say you must presume that Senators and Representatives will exercise a conscientious and deliberate judgment. Then if they do exercise a conscientious and deliberate judgment, there is no occasion for the fears and suppositions he has expressed about where the two houses may be opposed in politics, if that had anything to do with it, as it ought not, as to their throwing off all the votes under the present rule. You cannot presume such a case.

Mr. MORTON. Will the Senator allow me a moment?

Mr. EDMUNDS. Yes, sir.

Mr. MORTON. As the rule now stands if an objection is made to counting the vote of Vermont, it may be of the most trifling character, because some *t* is not crossed or some *i* is not dotted, the two houses separate and vote; if one house sustains the objection and the other house overrules it, the vote of Vermont is lost. The effect of that is that the presumption is against the correctness of that vote, because it requires the affirmative vote of both houses to admit it. But if you change the rule and require the affirmative vote of both houses to reject it, then the presumption of law is in favor of the certificate; so that the illustration made by the Senator does not apply.

As I understand the law to be, where a piece of original evidence is offered in a court below where there are two judges presiding and the judges are divided in opinion, there is no court there to admit it, it is rejected; but if you take an appeal from the court below to a superior court where there are two judges and these judges are divided upon it, then the presumption stands in favor of the opinion of the court below and the evidence goes in.

Mr. EDMUNDS. The Senator is right in his conclusion that the judgment is affirmed, but not for any such reason as he gives, if he will pardon me for stating it quite so early, for I do not mean to be curt. On an appeal, where the appellate court is divided the judgment below is affirmed, not on any presumption, but on the theory that the judgment of a competent court stands until it is reversed, and unless there is some special law for a *supersedeas* it goes into execution even if it is appealed from or a writ of error is brought; and therefore when a writ of error is brought to the judgment of an inferior court and it is brought before the superior court, the judgment is affirmed if the court be equally divided, not on the ground of any presumption, but because that judgment stood all the time, and perhaps was executed when the case was heard, and it cannot be reversed until there is a majority to reverse it.

Mr. MORTON. I think the presumption in law is in favor of the decision of the lower court until it is reversed.

Mr. EDMUNDS. There is no such proposition that the Senator can find in any law-

book. There is no presumption about it; it stands on fact, and that fact is that the judgment of the court below is a competent and conclusive judgment until it is reversed, not upon presumption but upon the existence of a judicial order by a court of competent jurisdiction. If I am wrong about that, I shall be glad to be corrected.

Mr. MORTON. It is a difference in words.

Mr. EDMUNDS. It is not a difference in words; it is a difference in ideas. But take the case that the Senator supposes in his interruption. He says take the vote of Vermont; if the two houses must concur in receiving it, then one house, if a *t* is not crossed, may reject it, and the vote of Vermont is lost. That would be very bad. That goes upon the presumption that one house would be sticking in the letter, sticking in the bark, and overlooking the substance. Let me suppose another case. Suppose the paper that the Vice-President receives and opens to be counted according to the Constitution is not the vote of Vermont at all; that it has been sent as the vote of Vermont from the State of Indiana; nevertheless, on the Senator's rule, unless both houses concur in saying that they will not have the State of Indiana vote for Vermont, she votes. That illustrates both sides of the rule.

All this matter was a good deal discussed when this rule was adopted, and has been somewhat discussed since. There is great difficulty, I agree, in having the rule either way, and it forces me more and more to the conclusion that, whatever doubts Senators may have in respect to the constitutional power to pass a law to carry into effect a constitutional function, we ought to try the experiment of having the two houses and the Executive, making the sovereign power of the United States, provide a rule that is a law, which shall point out precisely what shall be done. I should much prefer to stand in a constitutional sense upon a law which should state exactly what the rule does as the Senator proposes to amend it, supposing that were right, than to stand upon the rule. I know of no power in the Constitution which gives the two houses, concurrently by a joint rule, power to regulate anything whatever which affects the interest of the people of the United States. That is a legislative power. They may regulate their intercommunications, the relations that they bear to each other, but when they come to exercise a function which the Constitution is said to have reposed in them—I do not say it has—which touches the interests of the people of the United States, then I submit that they have no more power to regulate their action in respect to that by a rule than they have to pass laws by a rule.

It seems to me to-day, and I have heard it expressed by Senators who are older and wiser than I am in the nine years I have been here, and I am very glad the Senator from Indiana has brought forward this topic, for it is most interesting and important. We ought all to be obliged to him for that; but it is so important, and involves so many difficulties, real or supposed, that I think we ought to take some little time to consider it. Considering it diligently, bringing it up again to-morrow, or the next day, or very soon, I think we ought to have a little time to look into it. I move, with that view, to refer it to the committee of which the honorable Senator is chairman, who can examine the subject, and other Senators, it being now brought up, may devote their attention to it.

The PRESIDING OFFICER. That motion is pending.

Mr. EDMUNDS. Very well.

Mr. MORTON. I have no objection to this reference. I do not desire to press the matter prematurely on the consideration of the Senate; but our business has now become a question of time; we have but twenty-five working days left; and I think we should commit a crime against the country if we suffer this Congress to adjourn without modifying or repealing the twenty-second joint rule. There is danger of this thing being jammed off without having any action taken upon it at all. That is the only objection I have to the reference.

Mr. FRELINGHUYSEN. I think a reference would facilitate action.

Mr. MORTON. If it be the understanding that it shall again claim the attention of Senators on its being reported back, without delay, I have no objection to the reference on my part.

Mr. CONKLING. That is the understanding.

Mr. MORTON. Then I am willing that the reference shall be made if it is thought best.

The PRESIDING OFFICER. The Chair hears no objection, and the reference will be made. The resolution is referred to the Committee on Privileges and Elections.

Mr. THURMAN. I do not believe there will be the slightest delay. All I hope is that the committee will consider it fully.

The PRESIDING OFFICER. The resolution is committed to the Committee on Privileges and Elections.

IN SENATE, February 25, 1875.

The VICE-PRESIDENT. The bill (S. No. 1251) to provide for and regulate the counting of votes for President and Vice-President, and the decision of questions arising thereon, is before the Senate as in Committee of the Whole and open to amendment.

The following is a copy of the bill :

A BILL to provide for and regulate the counting of votes for President and Vice-President, and the decision of questions arising thereon.

" Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the two houses of Congress shall assemble in the hall of the House of Representatives, at the hour of one o'clock, on the last Wednesday in January next succeeding the meeting of the electors of President and Vice-President of the United States, and the President of the Senate shall be their presiding officer ; one teller shall be appointed on the part of the Senate, and two on the part of the House of Representatives, to whom shall be handed, as they are opened by the President of the Senate, the certificates of the electoral votes ; and said tellers, having read the same in the presence and hearing of the two houses then assembled, shall make a list of the votes as they shall appear from the said certificates ; and the votes having been counted, the result of the same shall be delivered to the President of the Senate, who shall thereupon announce the state of the vote, and the names of the persons, if any, elected, which announcement shall be deemed a sufficient declaration of the persons elected President and Vice-President of the United States, and, together with a list of the votes, be entered on the journals of the two houses. If, upon the reading of any such certificate by the tellers, any question shall arise in regard to counting the votes therein certified, the same having been stated by the presiding officer, the Senate shall thereupon withdraw, and said question shall be submitted to the body for its decision ; and the Speaker of the House of Representatives shall, in like manner, submit said question to the House of Representatives for its decision ; and no electoral vote or votes from any State, to the counting of which objections have been made, shall be rejected except by the affirmative vote of the two houses. When the two houses have voted, they shall immediately re-assemble, and the presiding officer shall then announce the decision of the question submitted. And any other question pertinent to the object for which the two houses are assembled may be submitted and determined in like manner.

" SEC. 2. That if more than one return shall be received by the President of the Senate from a State, purporting to be the certificates of electoral votes given at the last preceding election for President and Vice-President in such State, all such returns shall be opened by him in the presence of the two houses when assembled to count the votes ; and that return from such State shall be counted which the two houses acting separately shall decide to be the true and valid return.

*" SEC. 3. That when the two houses separate to decide upon an objection that may have been made to the counting of any electoral vote or votes from any State, or for the decision of any other question pertinent thereto, each Senator and Representative may speak to such objection or question ten minutes, and not oftener than once : *Provided*, That after such debate has lasted two hours, it shall be in the power of a majority of each house to direct that the main question shall be put without further debate.*

" SEC. 4. At such joint meeting of the two houses, seats shall be provided as follows : For the President of the Senate, the Speaker's chair ; for the Speaker, immediately upon his left ; the Senators in the body of the hall upon the right of the presiding officer ; for the Representatives, in the body of the hall not provided for the Senators ; for the tellers, Secretary of the Senate, and Clerk of the House of Representatives, at the Clerk's desk ; for the other officers of the two houses, in front of the Clerk's desk and upon each side of the Speaker's platform. Such joint meeting shall not be dissolved until the electoral votes are all counted and the result declared ; and no recess shall be taken unless a question shall have arisen in regard to counting any such votes, in which case it shall be competent for either house, acting separately, in the manner hereinbefore provided, to direct a recess not beyond the next day at the hour of ten o'clock in the forenoon."

MR. THURMAN. Mr. President, in line 8, section 1, I move to strike out the words "one teller" and insert "two tellers." The bill provides for one teller on the part of the Senate and two on the part of the House. I see no reason for that. The Senate and the House stand on an equal footing in respect to the count of the votes. This bill goes on the theory that they stand on an equal footing. Although they meet together to witness the counting of the votes, that does not make a joint assembly in which a majority present can control the minority. The houses do not lose their individuality, but each house is equal to the other in the functions that are to be performed. There is no propriety, therefore, in giving two tellers to the House of Representatives and only one to the Senate. On the contrary, there ought to be a teller of each party, and in order to do that there should be two tellers of the Senate and two of the House. I move that amendment.

MR. MORTON. The bill is as the present rule is, providing one teller for the House and two for the Senate, but I make no objection to the amendment. I think it is well enough.

MR. CONKLING. I wish to make an inquiry of the Senator from Ohio before we vote

upon this amendment. In constituting committees in all parliamentary bodies, an odd number is the rule, for the obvious motive of securing action ; in other words, to prevent a tie. Without stopping now to consider the length and breadth of the function of these tellers, suppose it occurs that they stand two to two. I ask the Senator from Ohio whether it is wise to so adjust the numbers that an equal division may occur.

Mr. THURMAN. What the Senator from New York says would have significance if these tellers had any ultimate power of decision ; but as the power of decision, and in fact everything but the mere ministerial duty of reading the returns and footing them up, is reserved to the two houses, there is no necessity whatever for constituting a majority of the tellers of one political party or the other. All questions that arise for decision must be decided by the two houses. The tellers have certain ministerial functions to perform. They read the certificates ; and if there is no objection then they put down on sheets, which are already ruled and prepared for them, the votes. That being done, when the work is completed, they add up the figures and hand the papers to the presiding officer, who declares the result. Their duties being ministerial only, there is no necessity for having a majority of one opinion or of another opinion : but in order to preserve the rights of the Senate, its individuality, and in order to avoid any errors that might creep in by the superior vigilance that might be exercised by two over one, it is but right and proper that there should be two tellers on the part of the Senate.

Mr. CONKLING. The only fault of the argument of the Senator from Ohio is that it proves too much. If really these tellers have nothing to do but foot up a column of figures and state it, the Senator will see that there is little substance in contending that there should be two rather than one on the part of the Senate. I am not going to oppose this amendment ; but I still think that if there be any use for the suggestion made by the Senator from Ohio, it would be a better suggestion if he would so fix a number that it should be an uneven number and should insure an opinion from those who are to give an opinion, even though it may be upon a question so ministerial in the function called for as that prescribed by the Senator from Ohio. If he says there is no significance about this one way or the other, then one teller is as good as forty. If any contingency should arise in which numbers might be important, then I submit that it ought to be as in the case of a committee so fixed that there may be a majority.

Mr. BAYARD. Does the honorable Senator say that as to the function of tellers and the report made by them provided by the joint rule, the votes of two from one house might overrule the vote of the one from the other house ?

Mr. CONKLING. I am inclined to think it would.

Mr. BAYARD. I think not.

Mr. CONKLING. I only say as a proposition at large, assuming that they have anything to do, the idea should be to constitute the body in such wise that there would be a controlling part by reason of having the whole body an odd number, rather than so adjust it that there might be an equal difference with no product from the process.

Mr. BAYARD. In this case the tellers are appointed on behalf of each house, act for each house, and not together.

Mr. CONKLING. That is true ; and now will the Senator from Delaware tell me what reason occurs to him for having two tellers instead of one on the part of the Senate ?

Mr. BAYARD. I confess I have not thought on the subject.

Mr. BOUTWELL. I agree with the proposition of the Senator from Ohio, that there should be two tellers from each house, that each leading opinion in each house may be represented by the tellers. The tellers have no positive ultimate authority. If we desire to do anything different, I think it should be in the direction of having an uneven number of tellers from each house, as three or five, for example, that each house might be advised by a majority of its committee of tellers as to what should be done. But plainly the tellers of the two houses cannot act together, inasmuch as the two houses themselves cannot act together. Therefore, if any opinion from the tellers were desirable by the respective houses, it could be ascertained by having one teller or three tellers or five tellers from each house, and in no other way. For one, I am content that there shall be two from each house, that the leading opinions of each house may be represented.

Mr. THURMAN. My object in making this motion was that the Senate might maintain its right to a perfect equality of power in this important business, and I have but a few words to say in reply to the suggestions of the Senator from New York.

Now, what are the duties of these tellers ? The President of the Senate takes up a return, opens the envelope, does not read it himself, but hands it to the tellers. For what purpose is it handed to the tellers ? First, that they may read it ; and having read it, then, if no objection is made, the vote of that State is put down in the blanks which have been previously prepared. But it is the duty of the tellers, when they read such returns, to announce to the joint assembly any defects that they may find. We had an example at the last count where the tellers reported that the returns were all in due form except that one of the seals did not appear to be the great seal of the State.

That was a thing which could not appear by mere reading; it could only appear by inspection, and every member of the Senate and House so assembled, to the number of between three hundred and four hundred, could not make that personal inspection at the moment. The consequence was that that was a duty which devolved upon the tellers. Now, if you have four, you are more likely to have a careful inspection of the returns than if you have a less number.

Then, in the second place, the return having been accepted, or not rejected, and the votes being put down, it will be necessary to be careful to see that they are put down in the right column, and footed up that the footing is correct, and it is more likely to be correct where four perform the duty than where a less number do. Still I do not say that three might not perform it or that two might not perform it; and I would prefer one from each house rather than two from the House of Representatives and one from the Senate. What I insist upon is the absolute equality of the Senate in the functions that are to be then performed. I therefore insist that the motion I have made ought to be adopted.

MR. BAYARD. Mr. President, if some gentleman who was in either house of Congress in February, 1855, when this rule was adopted, when I presume there was discussion on the subject, can tell us why the precedent was established, we could better see whether we should change it. If there were good reasons for it then, it might be well to continue it; and I must say that I cannot see any very important results in any way from this change. I thought there were reasons why originally the House of Representatives should have two tellers and the Senate should have one. Those reasons must continue. If they never had an existence, I might as well take the suggestion of my honorable friend from Ohio and insist, for the sake of dignity, or whatever you may please to call it, upon the equal representation of the Senate upon this tally board with the other house. I confess, however, that if we are there represented by a teller, his report will be quite as sufficient for the Senate as if there were two or three or any other number. It so strikes me. But there might have been reasons why there was that disproportion between the houses. It might have grown simply out of the numerical difference between the two bodies. Something of that kind might have been in the minds of those who drew the rule, and the rule was a joint rule which of course both houses were consulted about. I can apprehend that it will be no loss to the Senate if it is represented by an additional teller, nor can I see any harm done by increasing the number. Perhaps it might be some assistance in the arithmetical feat of recording the vote.

MR. CONKLING. Mr. President, without referring to the debates, a considerable portion of which were printed I believe in a pamphlet at the time, which pamphlet is still within reach, I will state to the Senator from Delaware one consideration, growing rather out of usage than necessity or fundamental reason, why the number of three tellers in all was fixed. The custom has been, speaking now of the two tellers on the part of the House, for the tellers representing the sentiments of a particular State from which electors came to count the vote. Speaking more plainly and exactly, a State had cast its vote for the democratic nominees for President and Vice-President. The usage has been for the democratic teller in the House to announce to the House the returns, to read them at large, as has sometimes been done, or to announce the result of them. A State having voted otherwise, the teller representing the other party read its returns to the House; and when the announcement in gross of the result came to be made the teller on the part of the Senate usually did that. So the work has been apportioned rather, as the Senate will see, as a matter of comity or courtesy among the tellers than otherwise; and the one teller on the part of the Senate has been held sufficient to represent the Senate. How far the numerical difference between the two houses, to which the Senator has referred, entered into it, I do not know; but I rather think that the adjustment fell to that number of tellers because the usage had been to apportion the process, as I have endeavored to state.

MR. BAYARD. I am obliged to the Senator for this statement. He has given me now a suggestion in favor of the amendment of the Senator from Ohio, to which I referred before. I wish that no other feeling than that of most gracious comity may prevail between members of the Senate or House in any performance of public duty; but still there is the fact which was recognized in the reasoning which caused the rule to be adopted, that when the vote of one party was to be read from a State in which that party had been successful with its candidate a gentleman associated with that party read it aloud, and when the arithmetical computation of a vote was to be announced on the other side his political opponent rose and read it. That rule was, I think, a wise one. It was satisfactory to all. It was courteous and it was substantially just and protective.

Just so, Mr. President, will the same reasoning apply to the reading of the votes on the part of the Senate. I think from the fact that there can be a representation of both political parties in counting the votes in the board of tellers created by the joint rule, who act for that purpose, there is something that will be satisfactory to the country at large as well as to the representatives in the two houses of Congress. There-

fore I wish now that there would be not only no objection to, but, for very palpable reasons, cause for giving the Senate two tellers, so that each party of the Senate should proclaim the vote and make it perfectly satisfactory, so far as that proclamation is concerned, to both sides. I think there is force in the suggestion of the Senator from Ohio, and I trust his motion may prevail.

The PRESIDING OFFICER, (Mr. Ingalls in the chair.) The question is on the amendment of the Senator from Ohio, [Mr. Thurman.]

The amendment was agreed to.

Mr. THURMAN. After the word "votes," at the end of the eleventh line of the first section, I move to insert—

"Which certificates shall be opened, presented, and acted upon in the alphabetical, order of the names of the States, beginning with the letter A."

Mr. President, this bill goes upon the theory, which I believe to be the correct one—that the function of the President of the Senate is simply to open the returns; that it is not his function to count them; that they are to be counted in such manner as shall be provided either by a joint rule of the two houses or by law, whichever is the proper mode of providing for their count. His function then being simply to open the returns and to deliver them to the tellers, it ought not to be left in his discretion to select the returns that he will first present. They should be presented in some prescribed mode, and I conceive of no one less liable to objection than the alphabetical order of the names of the States. It would be impossible to select any other method that I am aware of, unless you were to call the States in the order of their coming into the Union.

Mr. BAYARD. Or in the order of their adopting the Federal Constitution.

Mr. THURMAN. In the order of their adopting the Federal Constitution, or of the original thirteen and the subsequent admission of the States; but that is not so convenient a mode as the alphabetical mode. The alphabetical mode requires no research, can give rise to no possible discussion, is perfectly simple, and is perfectly fair.

I therefore propose this amendment, which I consider to be correct and to be in perfect harmony with the whole idea of the bill. Manifestly it ought not to be left in the power of the presiding officer to select at his pleasure what returns he will first present. There ought to be a prescribed mode that should settle that question, if for no other reason, to relieve him from any responsibility on the subject or any suspicion as to improper motives in his presentation of the returns. But for much higher reasons than that it is proper that these returns should be presented, opened, and acted upon in some prescribed mode. I hope, therefore, there will be no opposition to this amendment.

The PRESIDING OFFICER. The question is on the amendment of the Senator from Ohio. The amendment was agreed to.

Mr. THURMAN. I now move to strike out the last sentence of the first section on page 2 of the bill.

The PRESIDING OFFICER. The Secretary will report the words to be stricken out.

The SECRETARY. On page 2, beginning at line 34, it is proposed to strike out the following words:

"And any other question pertinent to the object for which the two houses are assembled may be submitted and determined in like manner."

Mr. THURMAN. The previous part of the section provides that when a question shall arise in regard to "counting the votes therein certified"—that is, certified in any certificate which shall have been opened and presented as provided in the section—the Senate shall withdraw, and the two houses shall act upon the objection or question separately; and then, when each house has made its decision, they shall convene again and the decision shall be announced. Then come in at the close of the section these words:

"And any other question pertinent to the object for which the two houses are assembled may be submitted and determined in like manner."

I do not know why these words are put in. I can conceive of no necessity for them. I can conceive of a construction put upon these words that would lead to irremediable mischief. I would be glad, if the Senator from Indiana is not willing that the amendment should be adopted, that he will give us his view as to the effect of these words. If he is willing that the amendment shall be adopted, I will not trouble him.

Mr. MORTON. I find that these words are embraced in the original rule, and form a part of the rule to which perhaps no exception was ever taken. The original rule providing for the counting of the votes says:

"And any other question pertinent to the object for which the two houses are assembled may be submitted and determined in like manner."

It simply provides for the determination of any question that it may be necessary to determine which shall require the concurrence of both houses, to be determined in like manner, subject to the same restrictions. There may be other questions arising. I could not now anticipate one; I do not know that I could mention one; but other questions may arise, the determination of which may be essential; and this clause simply provides for their settlement in the same way.

Mr. THURMAN. It seems to me obvious that these words in section 1—the last sentence in the section—should come out. The previous part of the section provides all that is necessary for the counting of the votes. All that can properly be done by the two houses is already provided for. I was aware that these words were in the twenty-second joint rule, and I can conceive some reasons why they were put in that rule; but I can conceive no good reason why they should remain. The Senator from Indiana and I think that the twenty-second rule is a bad rule. It is proposed to abolish it. I do not think it is necessary to preserve this part of it which to my mind is in the highest degree objectionable. Let the whole of it go, if any part of it is to go. There were very peculiar circumstances in the first counts of the votes under that rule. The rule was adopted in 1865, I believe.

Mr. MORTON. February 6, 1865.

Mr. THURMAN. It does not say in my copy when it was adopted. It was adopted in 1865. There were very peculiar circumstances under which that rule was adopted. Several of the Southern States were not reconstructed as it was then said, as some Senators and as the majority of both houses of Congress thought. I shall not go into the question whether they needed reconstruction at all. They were not reconstructed and the question whether they should vote for President and Vice-President was a mooted question. It was a question whether in point of fact they were States of this Union. That was the question. If they were States of the Union they were entitled to vote, but a majority of Congress refused to consider them as States of the Union.

Mr. BAYARD. Not so early as 1865?

Mr. THURMAN. I am speaking now of 1868, not at the time this rule was adopted. The war had not closed at the time the rule was adopted in 1865, and what States would be in the Union in 1868 was a question that no one could then absolutely foretell. The war still existed, and no one was able to foretell what would be the result after the war should close upon the autonomy of the States that had been engaged in the rebellion. Under those circumstances this rule was adopted, and it was enforced. It was enforced in the count of 1869, and that most extraordinary of all announcements ever made was made by the President of the Senate, that the vote of Georgia should be received if it would not change result, but if it would change the result it should be rejected! It was in that state of the country that this provision crept into this rule. No reason of that kind exists any more. There is no longer any question what are the States of this Union. Fortunately for the country, every one of them is a State in the Union. There is no longer any expelled sister. On the contrary, you have taken in a couple more yesterday, although they are very young and very feeble. There is no question, therefore, as to what are the States of the Union, and no necessity for this provision being in this rule. On the contrary, if it is left in the rule it may give rise to claims that are utterly inadmissible. We have no provision for contesting the elections of President and Vice-President. This bill does not propose to provide for any such contest. If it did it would be lamentable, nay, wholly, utterly defective. There is no reason, therefore, for opening the door to questions over which we have no jurisdiction; and unless we intend to invite questions and the exercise of a jurisdiction we do not possess, these words should be stricken out of the section.

The PRESIDING OFFICER. The question is on the amendment of the Senator from Ohio, [Mr. Thurman.]

The amendment was agreed to.

Mr. THURMAN. Now, Mr. President, in order to make the bill consistent with the action just taken by the Senate, I move to strike out the words in section 3, lines 3 and 4—

“Or for the decision of any other question pertinent thereto.”

That follows as a matter of course after striking out the last sentence in section 1.

The amendment was agreed to.

Mr. MERRIMON. As this seems to be a very important bill, I take it that it is well to have the phraseology used as correct as possible. Therefore in line 3 of section 1 I move to amend by striking out the words “the two houses of Congress” and inserting the words “the Senate and House of Representatives.” There is no such phraseology in the Constitution as “the two houses of Congress.” The phraseology used in the Constitution is that which I propose to insert, “the Senate and House of Representatives.”

The PRESIDING OFFICER. The question is on the amendment.

The amendment was agreed to.

Mr. MERRIMON. I move to amend in line 4, section 1, by inserting after the words “one o'clock” the letters “p. m.”

The amendment was agreed to.

Mr. MERRIMON. In line 15 of section 1, after the word “counted,” I move to insert the words “by them.”

Mr. MORTON. What does the Senator say?

Mr. MERRIMON. After the word “counted,” in line 15, section 1, I move to add the

words "by them." As it now reads it does not indicate who is to count. It will make it more precise to say "the votes having been counted by them;" that is, the tellers.

Mr. FRELINGHUYSEN. Is the Senator from Indiana quite sure that that would be right?

Mr. MORTON. I scarcely understood the Senator from North Carolina. I think those words hardly necessary.

Mr. FRELINGHUYSEN. I do not object to them if they are merely unnecessary, but the question is whether the votes are counted by tellers.

Mr. MERRIMON. Then we ought to settle it. That is the very thing we ought to settle. I understand the tellers are to count the votes. They are to read the certificates and then cast up the votes; and having done so, they hand the result to the President and he announces it to the joint meeting.

Mr. FRELINGHUYSEN. The tellers certainly perform the ministerial duty of counting the votes, but whether that is the counting spoken of in the Constitution I think there is very grave question.

Mr. MERRIMON. Then, I ask the Senator, who is to count? The statute will not then provide for that.

Mr. STEVENSON. I do not think there can be any doubt from the language of the rule that it was intended that the tellers should do the counting. The language is:

"And said tellers having read the same in the presence and hearing of the two Houses then assembled, shall make a list of the votes as they shall appear from the said certificates; and the votes having been counted, the result of the same shall be delivered," &c.

Now it seems to me those words would be useless. If these gentlemen are to make a list of the votes, unless they count them how can they be ascertained?

Mr. FRELINGHUYSEN. I would recall the language of the Constitution to my friend: "The President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates."

Mr. CONKLING. "And the votes shall then be counted."

Mr. FRELINGHUYSEN. "And the votes shall then be counted." I understand that that counting is really done under the supervision and in fact by the two houses. I think the bill is a good deal better leaving it as the Constitution leaves it, without saying "being counted by the tellers."

Mr. MERRIMON. Then it seems to me a wrangle might spring up at once as to whether the tellers should count the votes or somebody else. I do not see how the joint meeting could count them unless through some instrumentality.

Mr. FRELINGHUYSEN. The bill is in the language of the Constitution now.

Mr. MERRIMON. I understand the object of this act is to execute the provisions of the Constitution. I submit the amendment to the Senate.

Mr. LOGAN. I merely wish to ask the Senator if it is not at least sufficient to use the language of the Constitution? This is precisely the language of the Constitution. The mere addition of the number of votes, done merely as a clerical duty by these persons, certainly is subject to the supervision of the two Houses of Congress, the same as, for instance, in many States, where the State constitution refers the counting of the votes for governor to the house of representatives and the senate of the State. They are to count the vote; that is the language of several of the State constitutions; but the vote is never actually counted by the legislature; it is counted in their presence by the secretary or clerks, as may be. But the meaning of it evidently is that they count the vote. The clerks merely are those persons designated by the bodies to count the vote. Should they make a miscount of the vote there in the presence of the two houses, the two houses would have jurisdiction over it certainly. Hence it certainly means the counting of the vote by the two houses of Congress, although the mere enumeration of the number is done by persons who are selected for that purpose. I think it is well to leave the language in the bill just as it is.

Mr. MERRIMON. The whole statement of the vote is prepared under the supervision of the joint meeting, but who is to cast up the vote? Is it by the tellers or by the Clerk of the Senate or the Clerk of the House? Somebody must do it. The object of this statute is to execute a provision of the Constitution upon which all legislation is to rest. Of course when the tellers cast up the vote and hand it to the President of the Senate the whole is done under the supervision of the joint meeting. My object is to make it specific.

Mr. MORTON. I submit to the Senate that these words are not necessary. It is possible that something more may be involved in the counting of the votes than the mere addition of the figures. It seems to me it is entirely safe to leave it in the language of the bill.

Mr. THURMAN. I wish to say one word on this question. Somebody must do the ministerial function of counting these votes. They must be counted either by the tellers, or by clerks, or each member must take his turn and count them for himself, which is simply impracticable. Nor do we propose to devolve that duty upon clerks. We appoint tellers and take care who they shall be, in order that the count

may be accurate. I think that the bill as it now stands without the amendment implies that the tellers shall count the votes. They are to make a list of them. "The votes having been counted;" I think the implication is that they are to be counted by the tellers. In order to make this bill exactly conform to the Constitution, the word "then" ought to be in before the word "counted." The Constitution is "and the votes shall then be counted;" that is, shall be counted right there, in the presence of the two houses. That is what the Constitution requires, and it ought to be so, perhaps, here. They are not to be counted elsewhere. They are to be counted then and there.

Mr. MORTON. That is implied from the preceding part of the section.

Mr. THURMAN. Perhaps it is. I should think it was; but I suppose the Senator will have no objection to inserting the exact words of the Constitution, the word "then" before the words "be counted." The language of the Constitution is:

"And the votes shall then be counted."

I suppose the word "then" ought to go in; and perhaps it would relieve all difficulty to insert after the word "counting" the words "in the presence of the two houses."

Mr. MORTON. The previous part of the section presupposes that.

Mr. LOGAN. The meaning is just the same although the words are not the same. "The votes having been counted" is just the same precisely as the language in the Constitution. I do not mean that it is *verbatim*, but the meaning is just the same.

Mr. THURMAN. I think the amendment of the Senator from North Carolina ought to be adopted to make it perfectly clear. I think that is exactly what the bill now means, and I think it would relieve all difficulty if those words be put in.

Mr. LOGAN. Will the Senator from Ohio allow me to ask him a question? On reading the rest of that portion of the section it is:

"And the votes having been counted, the result of the same shall be delivered to the President of the Senate, who shall thereupon announce the state of the vote, and the names of the persons, if any, elected, which announcement shall be deemed a sufficient declaration," &c.

Now suppose you put the language in that the Senator suggests, so as to read, "counted by them," and an error shall occur. They hand the vote to the Vice-President. Have the two houses then any control of the counting if you put in the words "counted by them?"

Mr. THURMAN. The bill as it now stands I think implies that the votes must be counted by them.

Mr. LOGAN. That is as a matter of course, it seems to me.

Mr. THURMAN. If the Senator thinks that such an error is likely to occur, where there are four men to one, then that is a defect in the bill.

Mr. LOGAN. I do not think it is likely to occur, but such things are possible.

Mr. THURMAN. It might; and that only shows that further amendment is necessary.

Mr. LOGAN. I do not think so. I think the bill as it is is better. The idea is that the two houses count the vote. Of course they designate some person to do the mere ministerial office of counting the vote and making the addition, but it is, in fact, constructively done by the two houses. Now, if you put in the words "by them," they refer to the men selected as the persons to make the count, and leaves them the persons to count the votes, instead of the construction that the Constitution certainly bears, that the houses count the votes.

Mr. THURMAN. There is a good deal of force in what the Senator says.

Mr. LOGAN. I think that certainly would be the construction. Therefore I do not think the amendment ought to be made.

Mr. CONKLING. The Senator from Illinois has stated so exactly and so fully the view I have of this matter that I am content to give my vote upon the presentation he has made. But yet I venture to suggest to the Senator from North Carolina that his amendment would confound together two things different in law and in substance. The office to be done by these tellers, as has been said, is purely ministerial. As my friend said a moment ago, they do the work and the two houses in fact make the count. They are mere machines. If you could invent a machine which would foot up exactly these columns of figures and state them, that machine would do everything that this bill commits to the tellers, and would do it as competently and as well if it did it as exactly as arithmetic. So you need not necessarily have members of the two houses to act as tellers. Two of the pages of the two houses could foot up these figures and present them to the houses. But does anybody suppose that when you use the word "count" in the constitutional sense you can delegate to two pages the count of those votes? I take it not; but the mechanical, ministerial function, the mere manual act of presenting a total of a column of figures and hand that to the presiding officer, you may delegate to anybody, to the Sergeant-at-Arms for aught I know. When the Senator from North Carolina comes now to import into the bill words following those which so nearly adopt the language of the Constitution as these, it may be said, I think it will be said, as the Senator behind me [Mr. Logan] has suggested, that the design was to commit to these tellers the whole business, not the mechanical ministe-

rial act of arithmetic alone, but the whole count, with all the attributes of that count as it stands in the Constitution. That is not what we mean. It may well be doubted whether we have power to do any such thing. Congress may do whatever is committed to it or to them: but Congress cannot delegate to anybody else legislative power or any other power which is reposed in Congress, and located there and nowhere else. So we may make a rule which shall commit to the presiding officers of the two houses the duty of scribes and chirographers, to set down and count up and state these figures; but when you come to the last act, to the act accomplished of making the count, in all senses which the Constitution imports, that is the act of the two houses. "The vote shall then be counted," the two houses being there.

As I had occasion the other day to say these words are spare, they are scanty. I am not prepared to say that they deny the power to the presiding officer, for example, to make this count, so that it is done in the presence of the two houses; but it is wholly unnecessary to anticipate that question here or to put into this bill anything under which it might be said that had an erroneous footing been made by tellers it had passed beyond the reach of the two houses to correct, although the discovery might be made before the result was delivered by the presiding officer to the constituent body present. It seems to me that as the bill stands it is entirely unexceptionable in that regard.

The word "then," which is suggested by the Senator from Ohio, seems to me not to be necessary, because we are speaking here in the past tense, but I do not think there is any substantive objection to it. So of the words "in the presence of the two houses." I think they would be surplusage, because the section elsewhere requires the presence of the two houses. It would be abundant caution but I see no other objection to it. Therefore I would vote, if it be the pleasure of any Senator, that the bill should be so changed as exactly to follow the Constitution, which I see my friend from Kentucky [Mr. Stevenson] has in his hand. I have it in my hand—

"Shall in the presence of the Senate and House of Representatives open all the certificates, and the votes shall then be counted."

There is no objection to putting those words in the bill, although I think it sufficiently appears; but when you come to add to the bill words which imply that the whole power of making the count, not merely in a tabular sense, not merely in a clerical sense, not merely that these men are to be authorized as scribes to perform the preliminary process, but that they are to be empowered to consummate and accomplish the whole fact of the count upon which the declaration is to be based, it seems to me that it is an unwise and unnecessary experiment, and may in case of a contest lead to misunderstanding and embarrassment. Therefore I shall not vote for the amendment proposed by the Senator from North Carolina.

Mr. MERRIMON. With the permission of the Senate I will withdraw my amendment and offer another in lieu of it.

The PRESIDING OFFICER. The amendment of the Senator from North Carolina will be withdrawn, if there be no objection.

Mr. MERRIMON. I now propose to add after the word "certificates," in the fourteenth line of the first section, these words:

"And the votes shall then be counted by the tellers under the supervision of the two houses of Congress."

Mr. ALCORN. I ask the Senator from North Carolina if he did not make a point upon the use of the words "the two houses of Congress" a while ago? [Laughter.] I merely suggest this to him that he may not involve himself in any contradiction.

Mr. MERRIMON. In referring to the joint meeting in a statute I thought it better to use the words of the Constitution. Those are the leading words. Those are the words upon which all the balance of the statute turns. I admit that it is more convenient to say "the two houses," and it may well be used for "the Senate and House of Representatives" after those words are first used in the first section of the act.

Mr. FRELINGHUYSEN. It seems to me this amendment offered by the Senator from North Carolina is subject to the same criticism as the last. His amendment now is that the votes then be counted by the tellers.

Mr. MERRIMON. Under the supervision of the two houses.

Mr. FRELINGHUYSEN. Before, it was that they be counted "by them." Mr. President, we have had a bill before us providing how these votes shall be counted, providing that there shall be the interposition of a court to settle questions, and it is argued that that is constitutional because the Constitution provides that Congress shall have a right to pass all laws to carry into effect the various provisions of the Constitution, and that therefore, inasmuch as the Constitution says that these votes are to be counted, Congress may by law provide a tribunal for their counting, to all of which I am entirely opposed. I believe that the tribunal to count the votes is the representatives of the people in Congress assembled, and I am opposed to importing into this bill a provision that that counting, being the only word in the Constitution which regulates the subject, shall be by tellers. I think that the bill is right as it is, "the votes

having been counted." We have provided for tellers. We have provided that the two houses shall be present, the votes having been counted, of course by the two houses, the ministerial duty, the work, being performed by their agents, the tellers, and I think that anything introduced then may embarrass us very much.

Mr. MORTON. I suggest to my friend from North Carolina that I do not think his amendment strengthens the provision or makes it more clear. In reading the whole provision through, the process is so simple that I think it cannot be misunderstood.

Mr. THURMAN. We cannot hear a word the Senator says.

Mr. MORTON. I say I do not think the amendment would strengthen the section or make it more clear or relieve it from any doubt. Reading it as it is here, the whole process is so simple and clear that I think it is hardly liable to misunderstanding. I hope the Senator will not insist on his amendment.

Mr. MERRIMON. Why was it necessary, then, if the whole process is so simple, to provide that there should be tellers? Why would not that follow as a consequence without providing for it in the act? My purpose is simply to indicate, by a provision in the statute, who shall cast up the vote under the direction of the joint meeting of the two houses.

Mr. MORTON. The tellers are to perform the mechanical, ministerial part of the work. They are to make the actual count; and I would not be willing to put anything into the bill which would seem to imply that these tellers had any other functions or any other power than simply to make the count of the vote.

Mr. MERRIMON. I do not give them any more power than that. I do not invest them with any power.

Mr. MORTON. I think that is sufficiently clear from what the bill already contains.

Mr. MERRIMON. The bill as it stands now does not indicate who shall count them. It may be the Clerk, or, as the Senator from New York said a while ago, it may be outside of the joint meeting; it may be the President. My purpose is simply to make it certain, so that no difficulty can arise at any time about whether the Clerk shall cast up the vote or whether the tellers shall do it. Whoever does it does it under the supervision and control of the joint meeting. It is true that the tellers are simply the agents of both houses, and when they cast up the votes they do it without anything being said to that effect in the statute, under the supervision of the joint meeting; but when it is expressly provided that they do it under the direction of both houses, there can be no further question about it; it only indicates who shall perform that ministerial act.

Mr. MORTON. I think that is sufficiently indicated by the appointment of tellers and the statement that "having read the same in the presence and hearing of the two houses then assembled, shall make a list of the votes as they shall appear from the said certificates." It seems to me that involves all the mechanical duties that can be required of the tellers.

Mr. LOGAN. I wish to call the attention of the Senator from North Carolina to the provision of the Constitution in comparison with the language that he proposes to amend. Although this bill comes from a committee of which I am a member, I had nothing to do with framing the bill; but whoever framed it evidently did so with a view to comply entirely and completely with the provision of the Constitution in reference to the assembling of the two houses of Congress and the counting of the electoral votes for President. Passing over it and reading that which relates to the point under consideration, I find this:

"They shall make distinct lists of all persons voted for as President, and of all persons voted for as Vice-President, and of the number of votes for each, which lists they shall sign and certify, and transmit sealed to the seat of the Government of the United States, directed to the President of the Senate. The President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates, and the votes shall then be counted."

What is the obvious meaning of that particular part of the Constitution? It is that the two houses of Congress are to count the votes for President and Vice-President the same as the two houses of Congress pass laws. The business of making laws is in the first instance referred to committees for the purpose of taking it out of the hands of the members of Congress, that the bills may be prepared and put in a condition to be presented for their action. So in this case they may designate persons of their own number or they may possibly designate persons not of their number—to do what? Perform no duty at all, except to take the burden off the House and Senate of making an enumeration of the votes cast for President and Vice-President. Hence they may appoint tellers. These tellers are merely to perform a ministerial office, to make an enumeration of the votes as they are handed to them by the Vice-President and to return to the Vice-President a statement of the count, that he may announce the fact. What fact? As to who has received the greatest number of votes cast for either or both of these offices.

This bill uses this language:

"One teller shall be appointed on the part of the Senate and two on the part of the House of Representatives, to whom shall be handed, as they are opened by the Presi-

dent of the Senate, the certificates of the electoral votes; and said tellers, having read the same in the presence and hearing of the two houses then assembled, and shall make—"

What?

"shall make a list of the votes as they shall appear from the said certificates."

The certificates in the hands of the Vice-President handed to the tellers in the presence of the two houses, or, in other words, handed to the two houses through the tellers whom they have appointed for the purpose of enumerating or counting the votes.

"The votes having been counted." How? The Constitution says, "the votes shall then be counted." Taking the language in connection the words used here have the same meaning precisely. "The votes having been counted" and "the votes shall then be counted" meaning precisely the same. Then what?

"The result of the same shall be delivered to the President of the Senate, who shall thereupon announce the state of the vote."

"Announce the state of the vote" to the two houses as counted by the tellers, for what purpose? That the two houses may be notified of the count made by the tellers. Then it leaves it for them to correct it if it is an incorrect count. The whole thing is under their supervision.

This being the language of the Constitution, and as the votes have always been counted in this way in the presence of the two houses, the construction of that language being perfectly well understood, there is no necessity for any amendment; nor do I believe the language proposed by the Senator from North Carolina corrects anything, but makes the phraseology worse than it is in the bill.

Mr. MERRIMON. I adopt the very language of the Constitution.

Mr. LOGAN. You adopt the language of the Constitution but you add to it.

Mr. MERRIMON. Yes.

Mr. LOGAN. Why is there any necessity for adding to the language of the Constitution when that is perfectly understood by everybody?

Mr. MERRIMON. To designate the persons who are to do the ministerial act under the direction of the joint body.

Mr. LOGAN. This bill designates them in the forepart of the section "that one teller shall be appointed on the part of the Senate, and two on the part of the House of Representatives." They are already designated.

Mr. MERRIMON. Not to count.

Mr. LOGAN. Yes, to count.

Mr. MORTON. That is the meaning.

Mr. MERRIMON. It says they shall make a list.

Mr. LOGAN. Very well. "One teller shall be appointed on the part of the Senate and two on the part of the House of Representatives, to whom shall be handed, as they are opened by the President of the Senate, the certificates of the electoral votes; and said tellers, having read the same in the presence and hearing of the two houses then assembled, shall make a list of the votes as they shall appear from the said certificates; and the votes having been counted"—

Mr. MERRIMON. By whom?

Mr. LOGAN. By whom? By the two houses of Congress, as the Constitution contemplates, through those whom they have designated for that purpose.

Mr. MERRIMON. I propose to designate the persons who shall do it as agents of the joint meeting. That is all.

Mr. LOGAN. Designate the persons who shall do what? Count the votes?

Mr. MERRIMON. Count the votes.

Mr. LOGAN. They are already designated.

Mr. MERRIMON. I do not so understand it.

Mr. LOGAN. I cannot understand the English language if it is not so.

Mr. STEVENSON. I concur exactly in the view of the Senator from Illinois. If my friend from North Carolina will read the whole of the joint rule, I think it will be made apparent that the tellers have only a ministerial duty to perform in summing up the tabular statement of the certificates, and that the word "counted," as used in the Constitution and as used in the joint rule, does not apply to the tellers at all. It appears from the joint rule that the returns are to be opened by the President of the Senate, and "said tellers, having read the same in the presence and hearing of the two houses then assembled, shall make a list of the votes as they shall appear from the said certificates." That is a ministerial duty; "and the votes having been counted"—not by these tellers—and when they have made their certificates, some gentleman rises and says, "I object to the count of such a State." Then that question is to be decided by the two houses, and that is proved by this language:

"If, upon the reading of any such certificate by the tellers, any question shall arise in regard to counting the votes therein certified, the same having been stated by the presiding officer, the Senate shall thereupon withdraw, and said question shall be submitted to that body for its decision."

There is a clear distinction between the word "count" and the mere summing up of

what the certificates show. I concur fully that the bill as it stands now discriminates with sufficient clearness the duty of the tellers and the fact that the votes as certified are to be counted, when the certificates are made out by the two houses. If an objection is made to any fact stated by a teller, the President makes known to the two houses the objection; he says, "the Senator from Illinois objects to the vote of such a State," and then the question of counting the vote of that State is to be decided not by tellers but by the two houses.

Mr. LOGAN. I ask the Senator from Kentucky while he is up if a provision is adopted by which you make the tellers the counters, does it not conflict with the provision that the houses shall separate for the purpose of determining whether a vote shall be counted?

Mr. STEVENSON. I think it throws doubt upon it and renders a conflict of decision more likely to arise than if you leave it stand as it is.

Mr. MERRIMON. I ask who is to do this ministerial service.

Mr. STEVENSON. The tellers.

Mr. MERRIMON. Why not say so?

Mr. STEVENSON. It does say so. I have shown the Senator the rule does say so now, as he will see by a reference to it.

"And said tellers, having read the same in the presence and hearing of the two houses then assembled"—

Read what? Read the certificates which have been delivered to them by the President of the Senate—

"shall make a list of the votes as they shall appear from the said certificates."

Mr. MERRIMON. To make a list does not imply to count.

Mr. STEVENSON. They do not make a list by a count; they make out only a tabulated list of the certificates and then they report those tabulated lists as made out to the two houses in joint session. Then comes the count. Then comes the power to be exercised alone by the two houses from these certificates as reported by the tellers and as counted in one sense, if you please, by the tellers, and then if there is an objection to the counting of any vote shown and tabulated by tellers, the question of whether it shall be counted or not is to be determined by the two houses. That is already provided for.

Mr. EATON. My friend from Kentucky when reading from the joint rule reads from a rule which we destroy by this bill. You find there that the tellers are the counters, but you do not find it in the bill introduced by the Senator from Indiana. It is entirely plain in the old rule, but it is not equally plain in the bill. I think it means so; I think the language will be so construed; but yet it is not as plain as it is in the old rule which is to be destroyed by this bill, which never ought to be passed.

Mr. LOGAN. I think the Senator from Connecticut will see that he is mistaken, if he reads the language. The bill is in precisely the same language as the old rule in this particular. The object of this bill is to destroy the force of one portion of the rule, which provides that an objection by one house shall destroy the vote of a State. This bill requires the concurrence of both houses to destroy the vote of a State; but so far as the mere ministerial part is concerned they are the same, and I will read them to show. The twenty-second joint rule says:

"One teller shall be appointed on the part of the Senate, and two on the part of the House of Representatives, to whom shall be handed, as they are opened by the President of the Senate, the certificates of the electoral votes, and said tellers, having read the same in the presence and hearing of the two houses then assembled, shall make a list of the votes as they shall appear from the said certificates; and the votes having been counted"—

Just the language precisely of this bill—

"the result of the same shall be delivered to the President of the Senate, who shall thereupon announce the state of the vote and the names of the persons, if any, elected; which announcement shall be deemed a sufficient declaration."

The bill is precisely the same, word for word, as the old rule, except that it changes the proposition which allows one house to deprive a State of its vote. Of course there are changes other than that; but that is the main point in the bill. So far as this particular portion of the bill that we are discussing is concerned, it is copied verbatim from the rule.

Mr. MERRIMON. I confess, sir, that what has been said by the Senator from Illinois and other Senators has not convinced me that I am in error in offering this amendment. The object of this legislation is to execute a provision of the Constitution which directs the counting of the electoral vote for President and Vice-President; "counting" I say; simply that. I can hardly conceive a necessity to exist for any statutory provision at all. If you are going to provide for the execution of this provision of the Constitution in one respect, why not do it in all? Why not make your action complete? If we desire to make it complete, why not designate all the agencies which the joint meeting will use for the purpose of ascertaining the result? We provide an agency to open the certificates; we provide an agency to make a list of the certificates for

the convenience of the count and ascertaining the result; but the bill does not provide any agency for casting up the vote. I propose by this amendment to provide that the tellers—and I do not care particularly whether it be the tellers or the Secretary of the Senate or the Clerk of the House, but with a view to put the matter to rest I propose to provide in the bill that the tellers shall cast up the vote, count the vote under the supervision of the joint meeting. That puts it to rest. No question can arise then.

The bill will be, if amended as I propose, thus:

"One teller shall be appointed on the part of the Senate, and two on the part of the House of Representatives, to whom shall be handed, as they are opened by the President of the Senate, the certificates of the electoral votes"—

Now the duty of the tellers begins—

"and said tellers, having read the same in the presence and hearing of the two houses then assembled, shall make a list of the votes as they shall appear from the said certificates.

A list; that is a mere matter of convenience; and then I propose to add—

"And the votes shall then be counted by the tellers under the supervision and direction of the joint meeting."

Then it is plain; then the agency is provided, and the duty of that agency is prescribed, so that there can be no question or further trouble about it. As it is, the joint meeting might direct the Secretary of the Senate to cast up the vote; they might direct the Clerk of the House to do it; they might direct the Presiding Officer to do it; they might direct two of the Senators to do it; they might direct somebody outside of the joint meeting to do it. My object is simply to put the question of who shall cast up the vote under the direction of the two houses beyond any sort of doubt, to make it specific and certain.

Mr. FRELINGHUYSEN. I think that if the Senator would consider the significance of the word "counted" as used in the Constitution he would not insist on his amendment. There must be some tribunal to determine whether a State is entitled to a vote or not. There must be a certain tribunal to determine whether the vote is properly authenticated, whether the proper number of electoral votes are sent.

Mr. MERRIMON. May I interrupt the Senator?

Mr. FRELINGHUYSEN. Certainly.

Mr. MERRIMON. This provision does not interfere with that at all—

Mr. FRELINGHUYSEN. I understand.

Mr. MERRIMON. For I have said that the count shall be made under the direction of the joint meeting.

Mr. FRELINGHUYSEN. All those things are to be determined. Where is the tribunal to determine them, and where does it get its authority? There is but one word in the whole frame-work of this Government that bestows that jurisdiction and authority, and that word is "counted." You may look through the Constitution, and the only thing that settles how this important work is to be effected is contained in that word "counted" in the phrase "the votes shall then be counted." Then somebody is to determine what are votes, who has a right to vote. My friend's amendment is, "be counted by the tellers."

Mr. MERRIMON. Under the supervision and direction of the two houses.

Mr. FRELINGHUYSEN. But they are not to be counted by the tellers under anybody's supervision; they are to be counted by the two houses of Congress, and this bill has gone as far as it can go in defining the duties of these tellers when it has provided that they shall make a list of the votes. That is the ministerial duty they perform, and the counting must be left to the two houses.

Mr. MORTON. I scarcely ever have had any trouble in understanding my friend from North Carolina during the time he has been here, but I confess he is unable to-day to make me comprehend any point to this amendment. I have certainly tried to do so, because I am willing to take any amendment that I think will perfect the bill, and I would accept it in an instant if I thought it would improve it at all. My friend loses sight—

Mr. MERRIMON. I am content to take a vote now. I do not want to debate it.

Mr. MORTON. In a moment. My friend loses sight of the different stages in the proceeding, and I want simply to call his attention to them. The section provides "that two tellers shall be appointed on the part of the Senate and two on the part of the House of Representatives, to whom shall be handed, as they are opened by the President of the Senate, the certificates of the electoral votes." The President first stands up and opens them and then passes them over to the desk to the tellers; "and said tellers, having read the same in the presence and hearing of the two houses then assembled"—having opened the certificates and passed them over, the tellers read them in the presence of the two houses; and after the tellers have read them, then the tellers "shall make a list of the votes as they shall appear from the said certificates." They make out a list, and that list shows how many votes one man gets and how many another man gets. The list must do that; the list implies that.

Mr. MERRIMON. Who is to add them up?

Mr. MORTON. Who adds them up? I suppose all the members of the House cannot stand up and add them together. The list shows how many votes each candidate gets. And now I come to another stage of the proceeding, and this evidently refers to what has taken place after all has been gone through, and the Senator will see that it refers to the conclusion of the matter; I want his attention.

"And the votes having been counted"—

That is, after the whole thing has been gone through with and the houses have separately decided upon any question that may arise—

"And the votes having been counted, the result of the same shall be delivered to the President of the Senate,"

After you have gone through the whole thing, the two houses having separated from time to time and voted, a list is made out, just as our Secretary makes out a list of the yeas and nays.

"And the votes having been counted, the result of the same shall be delivered to the President of the Senate," just as the Secretary here delivers the roll to the President of the Senate at the conclusion of a call of the yeas and nays, "who shall thereupon announce the state of the vote and the names of the persons, if any, elected"—that implies that that is the conclusion of the whole ceremony—"which announcement shall be deemed a sufficient declaration of the persons elected President and Vice-President of the United States, and, together with a list of the votes, shall be entered on the journals of the two houses."

That is the conclusion of the whole thing; and in the mean time, before the votes have been finally counted and the announcement made, what may take place? Objection may be made to the vote of North Carolina, and the two houses separate and vote upon it; and under the rule as it now stands, if either house sustains the objection, the vote of North Carolina goes out, and she is disfranchised—has no more a vote than if she was a Territory. That is what we are proposing to correct. But this is the conclusion of the thing: After having gone through all the stages, determined how many votes shall be counted and how many rejected, the list is handed to the President, and he announces the result; that is, the declaration of who is elected, if anybody is elected. I submit to my friend that his amendment does not tend to make the section any clearer or to improve it. If I thought it did, I should accept it in a moment, so far as I am concerned.

The VICE-PRESIDENT. The question is on the amendment of the Senator from North Carolina.

The amendment was rejected.

Mr. MERRIMON. Now, I propose to strike out in line 15 of section 1, after the word "of," the words "the same" and insert the words "such count." I confess, as the words stand now, I do not know what "the same" refer to. I take it they refer to the count, and to make it more precise and logical I think the words "such count" are better.

Mr. MORTON. I do not think that makes it any more clear. The words are "result of the same," that is, the result of the counting, and nobody can misunderstand it. I submit that his amendment does not make the thing a bit clearer than it is now or improve the phraseology.

Mr. LOGAN. In the old rule which was adopted by Congress after Congress the rule is "the result of the same shall be delivered." It is the language we have followed for years, and it is better than the language the Senator from North Carolina suggests as far as that is concerned.

Mr. MERRIMON. There is only a difference of opinion between us on that subject.

Mr. LOGAN. I admit that.

Mr. MERRIMON. I move to strike out "the same" and insert "such count" to make it logical, to say nothing of beauty of expression.

The amendment was rejected.

Mr. MERRIMON. In line 17 of section 1 I move to strike out the word "state" and insert the word "result;" so as to read:

"The result of the same shall be delivered to the President of the Senate, who shall thereupon announce the result of the vote."

Mr. LOGAN. All I desire to do is merely to read the language of the old rule, "thereupon announce the state of the vote;" just the same language that is in the bill, and it has been adopted by Congress after Congress.

Mr. MERRIMON. That is no reason we should not make it right now. Two wrongs never made a right.

Mr. LOGAN. There is no difference in the language.

Mr. MERRIMON. It is the difference between the "state" of a vote and the "result" of a vote.

Mr. LOGAN. What is it, tell us?

Mr. MERRIMON. The state of the vote may be such that there will be no result.

Mr. LOGAN. Then the result of the vote may be such that there will be no result. Is that it?

Mr. MERRIMON. The state of the vote is the condition of the vote, and there may be

various circumstances affecting it by which there is no result; and if the vote is in such condition that there is no result—

Mr. LOGAN. I will ask the Senator, if there is no result, how can you state a result?

Mr. MORTON. I suggest that my friend now involves himself in the only reason I have heard him give. The language is "and announce the state of the vote." There may be no result to announce as shown immediately afterward by these words, "and the names of the persons, if any, elected." There may be no election. There may be therefore no result.

Mr. MERRIMON. How can he announce that anybody is elected unless there is a result?

Mr. MORTON. There may be a state of the vote in which there is no election. The bill contemplates that. But now I submit to my friend in all earnestness and candor that he does not improve, it seems to me, the phraseology or the rhetoric of the bill in any respect by striking out the word "state" and inserting "result." I hope the word will remain as it is.

The VICE-PRESIDENT. The question is on the amendment of the Senator from North Carolina.

The amendment was rejected.

Mr. BAYARD. Mr. President, from the foundation of the Government up to the year 1865 the American people had managed to conduct the count of the electoral votes for President and Vice-President of the United States without any other aid than the constitutional provision and a single statute that had been passed during the first presidential term of George Washington. In 1792, on the 1st of March, an act was passed "relative to the election of a President and Vice-President of the United States, and declaring the officer who shall act as President in case of vacancies in the office both of President and Vice-President." One thing is observable in this act of Congress, as in all acts of that period of our country's history, that great care was taken to assume no power not distinctly granted or necessarily implied by the terms of the Federal Constitution. Therefore in this law (which is to be found on pages 305, 306, 307, and 308 of the last compilation of the Constitution, Rules, and Manual provided by the Senate) there will be found no attempt to transcend the grant of power of the Constitution as to the reception and count of the electoral votes. It provided the method of certification of the results; and it will be observed that not only was the manner of the election of the electoral college confided to each State, and to the discretion of the legislature of each State, but that the certification, the authentication of the electoral vote, was confided wholly and unreservedly by the Constitution to the States. And nowhere is power given to either house of Congress to pass upon the election, either the manner or the fact, of electors for President and Vice-President; and if the Congress of the United States, either one or both houses, shall assume, under the guise or pretext of telling or counting a vote, to decide the fact of the election of electors who are to form the college by whom the President and Vice-President are to be chosen, then they will have taken upon themselves an authority for which I, for one, can find no warrant in this charter of limited powers. This was the belief, and the action of the country has been in accordance with this belief from its foundation until February 6, 1865; and then, for the first time, did the Congress of the United States assume the authority by the vote of either house to put a veto upon the count of a State's vote. That such a rule was without constitutional warrant, I cannot doubt; and I do not think I am going too far when I say that the unconstitutionality of that rule is generally admitted.

I find in the record of the debates of Congress in February, 1865, nothing to instruct me or any other student of this country's history as to the reasons upon which Congress undertook to frame the twenty-second joint rule. There were no debates that I can discover on the subject. I presume the matter was perhaps, as now, arranged by party caucuses and silently passed, and reason was neither given nor sought in a Congress composed almost entirely of one political party. Nor do I mean to say that the rule in 1865 was founded solely upon party considerations. On the contrary, there was an opposition so feeble as scarcely to be called one at that time, and from that time to this the rule has been deemed good enough to be let alone. For ten years the rule has continued, and two presidential elections have proceeded under it, indeed three, for the votes of the election for Mr. Lincoln's second term and of the present President's two terms were counted under it. Now for some reason it is sought to be changed. The mind of the honorable Senator who has had this matter in charge has undergone some fluctuations on this subject. At first he introduced a resolution for the absolute repeal of the twenty-second joint rule. After the lapse of a week he came into the Senate, and, calling up the subject, moved to amend his own proposition by simply changing that part of the rule which gave to either house the right to reject the electoral votes of a State into a requirement that both houses must join in the rejection or the vote should be counted. Then we were dealing with the rules of the two houses. Upon still further reflection the Senator, by authority of his committee, has brought forward a new proposition in the form of a bill which is to accomplish its object by the act of the two houses of Congress receiving the President's assent, and can then only be repealed by their joint action.

Now, sir, it seems to me that the proper method of dealing with this subject should be by a joint rule and not by a statute. If any action be necessary, as my friend from Connecticut [Mr. Eaton] reminds me, certainly of the two modes a joint rule of both houses is preferable. It has been the one heretofore pursued, and I know of no reason why the form of a statute should now be preferred to what heretofore has been relied upon.

And here, Mr. President, I cannot avoid saying that this subject ought to be entirely separate from the taint of party politics. The passions of party can but obscure and render it dangerous. No man, no party, can be safe in legislating upon the basis of party passion. I do not say that this measure is of that character, but I will say that I am surprised that it should be regarded as essential to be passed at the present session when, as we all know, an opportunity is about to be afforded within one week from the present time of having this important subject passed upon by two houses of Congress differing in their political sentiments, and therefore more fit to agree upon a measure which shall be of party advantage to neither.

Sir, this subject should be raised high above and beyond party; and if it be not, then evil will come from it, and perhaps it may return to plague the inventors and not those for whose defeat it was designed. The subject is one of great difficulty. Contingencies have arisen, may again arise, may their presence be contemplated by this very bill and provision is sought to be made for them, for which the Constitution of the United States has provided no apparent remedy. I can well imagine that in a government depending so entirely upon the active co-operation of all its parts, a government so thoroughly one of consent, and which relied for its real strength and true power upon the voluntary action of its citizens, and to which coercion in all forms was so necessarily fatal, its founders had not have imagined that in the high council of an electoral college and the counting of their votes for the Chief Magistracy of the country the common passions that attend contested elections for minor offices would have had weight or force. I do not know that they based their action in the articles of the Constitution which relate to this subject, upon such an idea; but it is certain they made no provision for facts which we have seen arising unfortunately in our own day, and which this bill contemplates in the future and seeks to provide for. The clause of the Constitution under which the count of the electoral vote is to be made is in the twelfth article of the amendments. It prescribes that—

“The electors shall meet in their respective States and vote by ballot for President and Vice-President, one of whom, at least, shall not be an inhabitant of the same State with themselves; they shall name in their ballots the person voted for as President, and in distinct ballots the person voted for as Vice-President, and they shall make distinct lists of all persons voted for as President, and of all persons voted for as Vice-President, and of the number of votes for each”—

This is the power of the electors in the respective States where they are to make their lists of the number of votes for each—

“which lists they shall sign and certify, and transmit sealed to the seat of Government of the United States, directed to the President of the Senate. The President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates and the votes shall then be counted.”

There is nothing in this language that authorizes either house of Congress, or both houses of Congress, to interfere with the decision which has been made by the electors themselves and certified by them and sent to the President of the Senate. There is no pretext that for any cause whatever Congress has any power, or all the other departments of the Government have any power, to refuse to receive and count the result of the action of the voters in the States in that election as certified by the electors whom they have chosen. That questions may arise whether that choice was made, that questions may arise whether that election was properly held or whether it was a free and fair election, is undoubtedly true; but there is no machinery provided for contest and no contest seems to have been anticipated on this subject. It is *casus omissus*, intentionally or otherwise, upon the part of those who framed this Government, and we must take it as it is, and if there be necessity for its amendment, for its supplement, that must be the action of the American people in accordance with the Constitution itself; and I am free to say that some amendment on this subject should be had. But because there is no machinery provided, no tribunal appointed by which this most important issue and contest may be decided as to who was chosen an elector for President and Vice-President in any State, that certainly does not justify Congress in assuming either by direct formal claim of the power in the enactment of a law, or by adopting rules which shall give them such power as will be equivalent to the control of the subject; that is to say, a power of veto, which, under the present twenty-second joint rule, is given to either house, or under the present bill is to be assumed by both houses acting together. I have been able to find, and I believe there exists, no such power either for one house or for both.

But there was provided, in case of the failure from any cause to ascertain the persons elected from a canvass of the electoral votes as so certified and transmitted to

the President of the Senate, a provision that "immediately"—to use the language of the Constitution—"the House of Representatives shall choose immediately, by ballot, the President." When, therefore, you come to construe a constitution which in the same connection, in the same connected phrases, provided for the subject of counting the votes and election of a President, you are bound to construe it so that a power that is not given shall not be assumed, and if for any cause there be default in the election in one mode pointed out, then you are compelled to resort to the other mode, which is plainly here expressed as supplementary in case of failure of the first.

I will illustrate that by a reference to the second section of this bill, and I am sorry the honorable Senator from Ohio [Mr. Thurman] is not present, because he has intimated to us his approval of this section, which I cannot assent to, which provides that if more than one return shall be received by the President of the Senate from a State "purporting to be the certificates of electoral votes given at the last preceding election for President and Vice-President in such State, all such returns shall be opened by him in the presence of the two houses when assembled to count the votes; and that return from such State shall be counted which the two houses, acting separately, shall decide to be the true and valid return."

And this section you read in connection with section 1, which provides that unless the two houses shall concur in an affirmative vote of rejection, all the electoral votes shall be counted. Now, sir, what is the result of this? Let us suppose that one hundred and fifty electoral votes come from certain States alleged to be regular, but more than one return is received from this same region of country, and one hundred and fifty more electoral votes come up in the same form, the same to the outward eye, certified in the same manner, covered by the same character of envelope and seal, and they are presented. Under this section and the first section all of these votes must be received and counted unless the two houses shall join in an affirmative vote to reject them. What is the result of that? Say, for illustration, that an electoral college consists of three hundred votes; one hundred and fifty votes additional are presented in the manner I have described. They must be accepted under this bill unless the united affirmative vote of the two houses rejects them. Supposing that affirmative vote to be lacking in one House, they must be counted, and you have then an electoral college of four hundred and fifty votes instead of three hundred. What does the Constitution say? The man who has received a majority of the whole number of electors appointed, that is to say, the man who has received one hundred and fifty-one votes out of the three hundred recognized by our present count of electoral votes, as the extent of the electoral college, would be entitled to the office; but you have increased that three hundred to four hundred and fifty by admitting one hundred and fifty other double returns from other districts of country, and then two hundred and twenty-six votes will be required instead of one hundred and fifty-one, so that the provision of the Constitution which entitled the man who has received but a bare majority of the whole number of electors appointed is defeated by this section, that swells the electoral college to a vote that compels him to receive two hundred and twenty-six instead of one hundred and fifty-one.

Mr. President, there may be a flaw in this reasoning; it may be, upon examination, not only open to criticism, but it may be entirely destroyed; but from the examination which the pressing duties in this body have thrown upon me of late have permitted me to give this subject, it does seem to me that by this bill you have virtually required a superior number of votes to elect a man, which the Constitution did not contemplate, but which allowed a certain majority to authorize him to take his seat. Perhaps, as I say, upon examination my proposition may not be found to hold water, and yet at the same time I submit this subject, so important, to the criticism of other gentlemen in this body. If the demonstration can be made differently from what I propose to make it, I presume we shall hear it, because I cannot suppose that any member of the body would vote for a measure that does so materially change the rights of a candidate under the Constitution of the United States to take his seat as Chief Magistrate of the country when the provisions of that instrument have been complied with. If the effect of this bill is to require a larger number of votes for his majority than he would have if the electoral college was lawfully filled and only truly filled, then it seems to me this bill would be the most flagrant violation of the Constitution of the United States.

But, Mr. President, let us look again at the effect of it. We had from the Senator from Rhode Island [Mr. Anthony] the other day a very thoughtful disquisition on this subject. Questions were then asked in the Senate and were not answered as to what should be done where a double vote was returned from a State and where two sets of electors each present their suffrages for different candidates from the same State at the same election. No one gave the answer, because the Constitution had provided no means whereby such a contest could be decided. It will be seen that this bill in its second section proposes to meet this very dangerous and difficult question of a contest between two sets of electoral votes from the same State at the same presidential election. It declares that all of these returns, the false as well as the true,

shall be opened, and I can construe the language of the bill in no other way than that they shall be counted unless there is a concurrent affirmative vote of both houses rejecting them. See then the result. There is here, if not the invitation, the opportunity given to raise a false claim in order to defeat a true election—and in determining such a claim the false and the true shall stand upon the same level and be only defeated by the same means, and if you shall between two houses of Congress sufficiently inflame the passions of party, the two houses of Congress differing in party affiliations—if you shall sufficiently inflame them to warp the judgments of men or to warp the conscience of men and to set party above country and duty, then the false vote will weigh equally with the true vote, and the State will be disfranchised in the result as plainly as though you gave the veto power to either house as now. If you count ten votes for the State ticket and ten votes against the State ticket, what is the result? The one has neutralized the other; the one has annihilated the other; and the vote of the State might as well never have been cast at all. The election would then be an empty form. It is a new and a patent method for the disfranchisement of States where a contested election can be gotten up. That is the result of this second section as I read it. I shall be glad to be instructed to the contrary. I have read the section many times; I have submitted it to the judgment of others whose opinions I value more highly than my own, and have found a concurrence in the belief that this section is an opportunity, if not an invitation, for the annihilation of the electoral votes of States by having the false vote made equal in weight with the true, and forbidding the rejection of either except by the concurrent affirmative vote of both houses of Congress.

Mr. President, I will not anticipate evil results. I only say that we should give, so far as we can give, no opportunity for evil results; that we should not give our consent to a law that would, if carried out, wrongfully make a presidential election a nullity.

Mr. FRELINGHUYSEN. I simply wish to say to the Senator from Delaware that I understand that this second section leaves the rule as it now is. I understand that by this second section if there are two sets of votes sent up from any State, then the concurrence of both houses as to which shall be counted is required, and that is the rule at the present time.

Mr. BAYARD. If that be so, then an amendment which I have had draughted will not be objected to, to insert at the end of the second section:

“And in such case the validity of any return shall be agreed to by both houses, or the same shall not be counted.”

Mr. FRELINGHUYSEN. I had prepared an amendment, which I was going to submit to the Senator from Indiana, to the same effect.

Mr. BAYARD. The honorable Senator from Ohio [Mr. Thurman] remarks to me *sotto voce* that that is what the bill means now. I know that I had not the benefit of his audience when this question was being discussed, and I do not propose to repeat what I have said on the subject; but I cannot conceive that the bill now means that. On the contrary, I believe the bill as it stands now, and if it passes as it stands now, will work the result that I have stated, and I am not alone in this view. Wherever a contest can be gotten up, and wherever public opinion is sufficiently excited, wherever the tone of political morality is low enough, there the contest will be raised and then the votes coming here certified in form must be counted under this section, as I conceive, unless the affirmative vote of both houses shall reject them.

Mr. President, I do not think this second section meets the difficulty. It does not fill the want which we all recognize exists in the Constitution on this important subject. The houses shall assemble; the Vice-President shall open the certificates and a count shall follow; it is not so important by whom that count shall be made, because being made in the presence of the houses they are witnesses to a count, which means a valid, a real, a fair, an honest count; and when the time shall come that a dishonest count of such votes can be made in the presence of the two houses, then your government will be of so little value that the sooner it passes away and makes place for another more honest, more reliable, the better for the people of the country.

But there may well be causes why you should doubt that the ticket which is represented by these electoral votes was not fairly entitled to be so represented as the sentiment of the people of the State from which it comes, and there should be, as there is not now, some tribunal in whom a deposit of power to determine such contests should be lodged. How shall that be reached? Only by an amendment to the Constitution, and certainly by an amendment in which all men, without respect to party results, must join. As I have said before, in dealing with the subject within the powers confided to us by the Constitution, there never was a better opportunity to place it upon a high non-partisan basis than by awaiting the incoming of a new Congress, in which the two houses shall not be of the same political opinion. A rule framed between a democratic House of Representatives and a republican Senate must of necessity be a non-partisan rule; and why, when so golden and valuable an opportunity awaits close at hand for the purpose of accomplishing an amendment so important and beneficial,

should it not be embraced, and why should the regular ordinary business of this body be postponed now to accomplish in hot haste that which should be accomplished only by great care and consideration? Why, Mr. President, it is well known that measures which challenge our closest care and criticism, measures which demand from us laborious and assiduous attention for the next six days, fill the Calendar. The interests of the public without respect to individuals, the interests of individuals to whom our duties are plain and clear as public representatives, ought to require from us all of the attention, all of the care, all of the labor that our frames can stand between now and the termination of the present session of Congress. Why is it then that measures like this, which need calm counsel, which need the abstraction of all partisan feeling from the mind of him who would properly comprehend and address himself to them—why is it that they are pressed? I will admit that their importance cannot well be exaggerated; but for that very reason is the argument strengthened that there should be time for deliberation and that the very circumstance should be allowed to take place which I say is so favorable to their proper decision.

Mr. President, if the matter were left to me, as I am glad that it is not, for I would shun the responsibility, and I have great doubt of my capacity to deal with it properly—if it were left to me to decide how this question of contest shall be settled and where will you deposit the power that is to settle it, I would not be able to give an answer; but I am perfectly clear that the second section of this bill is no answer to such a demand. It provides no such remedy as solves this question. It satisfies no mind asking for decision in a case like this. As I said before, the measure is new; it just saw light in this body less than three weeks ago; and as I said to the Senate, it was a remedy differing in method and substance from that which the same committee had reported as advisable in the month of January. If they change in so few days, if their opinion so vacillate, is it not of itself a reason why we should pause until opinion shall settle and crystallize itself by common agreement upon a proper and final method of dealing with this great and important subject? If gentlemen desire this subject to be considered by the light of partisan feeling, I will admit the present time is propitious. If they desire it settled upon what must necessarily be non-partisan feeling, and the settlement is important to everybody in the country, before the evils shall crush upon us owing to this defect in our law, it will be an evil common to all; no one may hope to escape it more than any other; no party or no individual can assume exemption from suffering in such a case—it is of the last importance that we should settle this properly.

There is ample time for the settlement. No use for such a law can arise for two years to come. It cannot be until the winter of 1876-'77, two years from the time at which I now speak, when the machinery which we seek to provide can be called into requisition. Why not then let this subject rest, so far as it has been mooted, aided by the reflections that have been suggested and expressed in regard to it; why not let the subject rest until you can have assured that which is assured, a non-partisan decision in regard to a subject that should be for the safety of this whole nation, lifted high above the atmosphere and the heat of party? If Senators desire that, they have an opportunity to secure it. If they desire, on the other hand, the decision made in haste, made upon the very heels of and in the midst of doubts expressed by the committee themselves who have reported this measure, then they will vote to press it to a present vote and decision, but it shall not be with my consent.

I know not, Mr. President, whether the reasons for pressing this measure at this time were avowed by the Senator in charge of it. I do not know whether I ought to ask whether, if the incoming House of Representatives were in accord with the opinions of the republican party and not the democratic party, the precious hours of this closing session would be insisted upon being occupied with the consideration of this subject; and yet I believe that we should be relieved from it if such were the case. Sir, not in this measure only, but in others do I certainly mourn that distrust which is thus expressed in the party to which I am attached. I mourn this distrust, not for the sake of the party against whom it is assumed, but I mourn it for the sake of the country. The late elections disclose the fact that there are more than one-half of the citizens of this country who do not approve of the policy of the republican party.

Mr. President, why this haste to take away from them their chance to express their opinion, to come into consultation upon subjects so permanent in their effects and in their nature as that which we are now discussing? Does this distrust felt in this country not, on the contrary, seem to intimate that in the opinion of one-half of the nation another half of the whole country contains a body of dissatisfied and untrustworthy citizens? I would beg the gentlemen who may feel such distrust not to express it. I ask that as much for their sakes as for our own. I beg them not to make so fatal an admission, so insulting and unkind to us and so dangerous to all. I would not have it believed abroad; I would not have it believed at home. I would bear much to prevent such ideas being prevalent. I do beseech Senators not to give credence to them by their votes and by their acts. It cannot be that this country contains any large body of citizens so lost to patriotism, so lost to the instincts of self-respect

and of self-preservation, as to design anything which shall not inure to the credit and the happiness and the grandeur of our nation as a whole; and yet I can read in the haste with which this bill has been prepared, in the haste with which it is pressed, excluding other matters which are essential in justice and in duty for us to attend to—I cannot but read in that expression the fact that the latest expression of the country's sentiment is something inconsistent with the best interests and the safety of the country.

Mr. President, such an admission ought not to be made even if fear or party suspicions should prompt it. As I said before, it is fatal to our common interest. It is unjust to those against whom it is directed. It is utterly inimical to the safety and the prosperity of the country.

Therefore it is in this grave way I close the hasty remarks I have made upon this measure. I believe there is no warrant for the power which is sought to be assumed by Congress over this matter. I believe the bill as it now stands will have the effect of changing that majority which the Constitution entitles a man who has received it to elect him to the Presidency, and of increasing it so that but for the provisions of this bill he might be the duly elected President of the United States, but under the provisions of this bill he will not be because more votes are required by the bill than the Constitution requires him to have received in order to be declared elected.

Mr. THURMAN. I concur with the Senator from Delaware [Mr. Bayard] in the opinion that this bill should not be pressed in hot haste, and I have not pressed it. I agree with him that it would be more satisfactory that this subject should be acted upon at the next session of Congress than now, and for the reason he has suggested. Had the election that took place in this country last year of members of the House of Representatives in Congress taken place in England and resulted in a victory as great over the administration, the administration there would have been changed just as soon as the result was known. Such a victory has not that effect in the United States. The administration remains for a constitutional term. Yet such an expression of public opinion is entitled to great consideration by the majority here, and imposes on it, in my humble judgment, a duty not to press upon Congress matters that it is quite certain would be rejected by the Congress to meet next winter. Whether this is one of those measures or not of course must depend upon its merits, for in respect to it there has been no expression of public opinion. Therefore, while I admit that this measure is not one of the things that have been decided at the polls and that it must be acted upon according to its merits, yet I say that, where there is a serious difference of opinion in respect to it, it would be more becoming and more consistent with the idea of our being governed by the public will that such a measure should be deferred, especially as ample time will be afforded for passing it next winter if it ought to be passed. But a majority of the Senate have determined otherwise. They have determined to proceed with this measure, and we are therefore brought to its consideration; and in its consideration I find the opinions of the Senator from Delaware who has just addressed the Senate and my own on an important section of the bill very far opposed. Knowing as I do the ability, the industry, the research, and the patriotism of that Senator, I never differ with him without doubting the correctness of my own judgment, and yet what he has said has not changed my opinion of the second section of this bill. On the contrary, I think that the point upon which he mainly relies in opposition to that section is not well taken, that the difficulty he supposes can never by any possibility exist.

Suppose the second section were stricken out of the bill and the bill were passed without it, what would be the effect of the bill thus enacted into a law? And here I crave the attention of the Senate, and especially of those who have been impressed by the very grave and forcible remarks of the Senator from Delaware. If that section were stricken out of the bill, then the only provision in the bill for the counting of the votes would be that a return should be counted unless both houses concurred in rejecting it. That would be the bill applicable in every case. Mark it, Senators; in every case a return should be counted unless both houses concurred in rejecting it.

Now, under such a law as that, suppose the President of the Senate to lay the return from a State before the two houses and an objection be made to that return. The Senate retires to its chamber and a vote is taken in the two houses whether that return shall be received. The Senate votes not to receive it; the House votes that it shall be received. The effect would be, under the first section of the bill, that that return must be counted. Remember that. Here is a return, we will suppose, just as there was at the last count, from the State of Louisiana. It is presented, opened by the presiding officer, handed to the tellers. An objection is made to its being counted. The two houses separate in order to decide the question. One of the houses decides to count it; the other not to count it. Then under the first section of the bill it would be counted. If there is another return from that same State, the Senator from Delaware seems to think you would have to go through the same process with that second return that you did with the first, and that if the houses were reversed upon the second return, as there was not a concurrence in rejecting it, both returns would have to be received and Louisiana would be counted at twice the number of votes to which under the Constitution she is entitled. I submit to my friend that by no possibility could such a thing

occur, because when once you have counted all the votes to which a State is entitled you can count no more. It is impossible; the thing is *res adjudicata*.

The moment you have decided, either by the difference of the two houses as to the counting of the returns or in any other manner, that that return shall be counted, the vote of that State is given and no other vote from it can be received. Can there be anything clearer than that? Suppose there be two returns from Louisiana, one of them is presented and an objection is made to its count. The houses separate, and one of the houses decides that it shall be counted? Would it not be counted then? No one will say no. Then suppose the other return is presented. What is the objection to that? "We have counted Louisiana once; we cannot count her again. We have given her all the votes to which she is entitled; we cannot receive any further return from that State." But now, if by our act we make a difference of opinion between the two houses equal to a judgment of both houses in favor of the reception of a return, it is just as plain as that two and two make four that when you have counted one return the matter is *res adjudicata*, and you cannot count another.

Therefore there can be no such thing as my friend from Delaware seems to suppose of heaping up the votes of a single State and giving her twice the vote to which under the Constitution she is entitled, requiring a candidate to receive more votes in order to elect him than the Constitution requires. I beg my friend from Delaware to bear in mind what would be the result. Suppose we are in January, 1877, and this second section is not a part of the law, but the first section alone is the law. Suppose the State of Alabama, the first on the list, is called, and there are two returns from Alabama, returns from two bodies claiming to be electors, as there were from Louisiana and from Arkansas at the last count. Is there any law that says which of those returns shall be first presented by the President of the Senate? No, sir; and you cannot make any law that will meet that case. It is therefore within his discretion which one he will present first, which he will open first, and hand to the tellers first; and just as certain as that he has eyes in his head, so certain will he know which one of those two returns is the return of the republican electors and which is the return of the democratic electors, and just as certain as human nature is human nature the return of the republican electors will be opened first and handed to the tellers first. Then if the House may vote to reject it and the Senate to receive it, under this first section of the bill it is received. Then the vote of that State has been counted, and there is no question upon any other return, and cannot be. So that the effect of striking out the second section of the bill is simply this: that where the two houses are divided in opinion upon a question which shall be the true return, the whole thing is determined by the presiding officer by the simple fact of which return he opens and presents first. That is the result of it. The whole thing is done in that way. Whichever return the President of the Senate shall first open and first hand to the tellers, where the houses are divided in opinion, that return, under this first section, must be received, because both houses do not concur in rejecting it; and that being received, no other return can be considered at all, for the question, as I said before, is *res adjudicata*; the State has been counted in all the votes to which she is entitled.

It does seem to me, then, that to strike out this second section of the bill is to clothe the presiding officer with a power that not one of us I trust will be willing to confer upon him: to confer upon him the power, where there is a division of opinion between the two houses, to count the votes on that side which he shall see fit first to present. That is the inevitable result.

Again, what must you do where there is more than one return from a State, if you leave the present rule to exist? Why, just precisely what took place at the last count. The vote of three States was thrown out, Louisiana, Arkansas, Texas, and the vote of certain electors from the State of Georgia. Suppose we go on under the present rule and the vote is counted in January, 1877, and two sets of returns come from a State. The House of Representatives vote for one, the Senate for the other. Both go out, under the existing rule, and the State loses her vote. Is that right? Is that a performance of our constitutional duty? We are to determine which of the men who cast those votes were the electors in that State of President and Vice-President. That is the duty that devolves upon us. If there are two returns from two different bodies of men, it is our duty to determine between them which is the true body of men. Can we shirk that duty? Have we any right to shirk that duty? Are we not bound to decide it if we can decide it? Under your present rule you do not decide it at all. One house decides that one body of men were not the true electors and their certificate is rejected. The other house decides that the other body were not the true electors, and their certificate is rejected. Thus you come to no decision. You make no effort at a decision between these two conflicting claims.

That is not right. It may be inevitable under any system. The same thing might happen, I grant, under this very second section, but it provides that you shall consider the votes and determine between them. What then is this second section? I feel bound to say this much about it because I suggested this point in the first debate that took place at this session on the resolution offered by the Senator from Indiana, [Mr. Morton,]

to rescind the twenty-second joint rule. I suggested the very difficulty and the remedy, and I supposed that it was in some small respect owing to what I then said that the Senator has incorporated it in his bill. I thought I was right then and I think so yet. Therefore I have felt bound to make these remarks.

I have said that under the first section of the bill there can be no proper adjudication between two conflicting returns, for the whole thing would depend upon the action of the presiding officer, upon the mere fact of which return he opened first. Then something must be done for a case where there are two conflicting returns; and what can you do but to require the two houses to consider each of those returns and then determine which of them shall be received? They can make no decision to receive one unless both houses concur. One house has no superiority over the other. If the two houses differ, one being in favor of one return and the other in favor of the other and are inflexible, of course there can be no decision; but when there are two or more returns from a State, of necessity there must be a concurrence of the two houses in order to receive one of them. Just as an equally divided court can make no decision, in the same way where there are two returns it has to decide between them which is the true return, who were the true electors of that State as appears by the certificates that have been made.

Mr. EDMUNDS. May I ask the Senator a question?

Mr. THURMAN. Certainly.

Mr. EDMUNDS. How is there any different rule of responsibility or right in deciding where there are two sets of papers and in deciding where there is one? The Senator says if there are two neither ought to be counted on principle unless the two houses shall decide which one is to be taken. Now, if one set of papers be presented in respect of which the same question might be made exactly as would be made in respect of one of the two in the case where there were two, why must not both houses decide in the same way to affirm that that paper is what it purports to be, the evidence of the vote of the State for President? That is the point that troubles me.

Mr. THURMAN. I understand the scope of the question very well, and I think it can be very easily answered.

Mr. EDMUNDS. That I should like to hear.

Mr. THURMAN. When there is but one return from a State, sufficient respect ought to be paid to that return that it should not be rejected unless both houses unite in the opinion that it should be rejected.

Mr. EDMUNDS. Yes; but if I do not interrupt the Senator or trouble him—

Mr. THURMAN. No.

Mr. EDMUNDS. Then I think the same could be said where two papers come from the State; only one of them can be the return of the State. One is true and the other is false, unless both may be false. If false, it ought not to be counted; if true, it ought to be. I do not see that the Senator gets out of the difficulty by that suggestion.

Mr. THURMAN. Then it is because my thoughts are very muddy or my expressions are very muddy. When there is more than one return, you are driven to decide between the two returns. If one house says that one return is not the true return and the other says it is, you ought not to count that under the first section in this bill, because upon the very next return the houses might be reversed and the vote be precisely the same upon it, and therefore you are driven, *ex necessitate*, where there are two returns, to an affirmative decision of both houses in favor of one. You cannot apply the rule that you shall take the first return unless both houses concur in rejecting it, without involving the difficulty which I stated before, and which perhaps the Senator did not hear, that that would put it in the power of the presiding officer to definitely settle what should be the vote of the State according to the mere fact of which return he opened first.

Now, Mr. President, if I have made myself understood I have done all that I desired. I have no desire whatsoever that this measure shall be pressed. I certainly have no desire that a bad measure shall be adopted. I do not know any interest that anybody has that a bad measure should be adopted. It is the interest of us all, if we are instigated by what I hope we all are, a desire for the peace of the country and that the Constitution may be obeyed, respected, and executed, to frame such a measure as shall secure its execution according to justice and the right. I know of no other motive that actuates any one of us and I know of no reason therefore why this measure should not be such a work that every man in the Senate can give it his approval. But I do not set up for myself any infallibility of judgment. There may be men who see further than I see in this business, who, perceive difficulties that I do not perceive, and to whose judgment I would defer with the greatest pleasure.

I repeat, therefore, that I am not only willing, but I would prefer, that the decision of this matter should be remitted to the next Congress, where one House will be of one political complexion and the other of another, and where a measure may be matured that would be more likely to give universal satisfaction; for I take it to be almost certain that the twenty-second joint rule cannot stand as the law of Congress.

Mr. EDMUNDS. Mr. President, I do not think that the Senator from Ohio has any just right to say or to imply in what he says that this bill has any reference to parties—

Mr. THURMAN. I have not said so.

Mr. EDMUNDS. If he has not said so or implied so, there is no just ground that I know of for saying that this subject should be remitted to the next Congress, wherein one party will have one branch and the other party will have the other. If this is a bill which appeals to good men of all parties to settle a troublesome and difficult question for the right and according to justice under the law, and is not a party measure, then there is no reason why it should not be considered and disposed of now. I think I am safe in saying that.

The difficulty that meets us under the Constitution, as it strikes me, is this: The Constitution requires that the vote of each State shall be opened by the Presiding Officer, the President of the Senate. When opened the votes are to be counted. The question on which the whole thing turns, to which our legislation is directed, except mere machinery, is what is a vote of a State? We all agree that every vote of every State ought to be counted. We all agree that whatever pretends to be a vote, or looks like a vote but is not a vote, should not be counted. So the thing which we are to provide for by this legislation is a means of ascertaining fairly and truly, according to the Constitution and the law, what is the vote, the will, of each particular State in the choice of a President. I think no man can question that I state the question fairly. That is it. Now, how are we to do it? In almost all cases in ascertaining not only in elections but in a thousand other affairs what has been done, (because what has been done is the business which the Constitution requires in some way to be ascertained,) a tribunal is provided, upon the philosophy of justice and jurisprudence, which is one single tribunal, and whose judgment when pronounced by a quorum of its body becomes one single judgment. The fault of the present rule is that unless both houses concur in counting a particular paper as a vote the paper is not counted at all. If a State should send a vote which should be perfect in every respect, conform on its face to the Constitution and to the law, be certified in the way that the law requires, sealed by the seal of the State, countersigned by the governor and the secretary of state, and all that, it is within the power of either house, as the rule now stands, it is true, to say it shall not be counted at all, and the constitutional right of the State in question is entirely overthrown in the vote for President. But that of course implies that one or the other of the two houses, in such a case, has failed to perform the duty which the Constitution and the law and the rule impose upon it. We cannot presume that either house would object to the counting of a particular paper as a vote unless it should have a lawful reason for doing so, unless it appeared in some way that it did not represent the lawful and constitutional vote of the State, or unless it appeared for want of evidence, in defect of execution or certification, or whatever, that we were unable to say what was the vote of the State.

Now, when you reverse it and take it as this bill is, which provides—leaving out the case of double returns—that everything that comes from a State called a vote, no matter if it be from a revolutionary government, no matter if it be from an assemblage of men who have no shadow of constitutional authority but who have got possession of the great seal, or have made another, as in the Louisiana case one of the witnesses swore that the great seals of the State of Louisiana were as plenty as blackberries and made to order, shall be counted. Here you have a paper which on the face of it appears to be proved by the great seal of the State of Louisiana; I take that merely for illustration. It is signed by somebody who purports to be the governor of Louisiana. Very well so far. Now it may be known to every member of both houses that that particular paper was really gotten up and emanated from an unlawful and revolutionary assemblage of men who, only a week before the time when the electors were to meet, had overturned the lawful and constituted government of that State, had possessed themselves of the public archives and the public seal, installed a man as governor *de facto*, as the modern phrase is. There is your certificate. Now this bill says that those votes shall be counted. The difficulty is just as great if not greater than under the existing rule. The rule as it exists declares that nothing shall be treated as the true voice of the State unless the representatives of the people and the representatives of the States, acting separately, shall agree that it is the voice of the State; and when I say that, I do not mean the voice of the State outside of the law and the Constitution, but upon the papers, following the law as a court do. Now when you turn it over to the other side, without you say, as this bill does—leaving aside the double returns, as I say—that whatever does come which appears to be, purports to be, in form, the voice of the people of the State, shall be counted unless both houses concur in saying that that is not the voice of the State. To my mind the latter alternative is quite as dangerous, if not more so, than the first. What, in my opinion, the Constitution requires is a law which shall provide, for the time being, a tribunal of some sort, which is a single tribunal, which is bound to decide upon the Constitution and the law whether a particular paper which is opened by the President of the

Senate in the presence of the two houses, and which is then offered to be counted under the Constitution, is the vote which the Constitution speaks of.

The Constitution says "the votes shall then be counted." What is a vote? The Constitution does not mean that every paper which a selectman or a justice of the peace may send here shall be counted; but it says the vote shall be counted. What is a vote? The vote, under the Constitution and the law, is the lawful and authoritative expression of the electors of that State, chosen as the Constitution and the laws provide. Nothing else is a vote. That is a question which must be decided. Somebody must decide it. If you are to remit a question of that kind to the decision of two separate bodies, each acting independently of the other, where are you to land? Of course you are forced in that case to one of two alternatives. You are forced to say, as the present rule does, that nothing shall be considered a vote that the two houses do not agree is a vote, or you are to say that everything shall be considered a vote that the two houses cannot concur in saying is not a vote; and there you are. You are at loggerheads at once. You might as well institute a court composed of two judges and hold that no evidence shall be received, as the present rule is, except the two judges concur to receive it. That would not be very bad in administering justice, because you would presume that the two judges sworn to administer the law and nothing else would in some case or other agree that a particular piece of evidence offered was lawful. Then you turn that over and say that all evidence offered shall be received unless each of the two judges of your court say it shall not. Well, you can say it is presumable that they will act according to their duty, that in most cases they will concur in rejecting evidence that ought not to be admitted, but still you do not administer justice very well in either way. You must have one single method of deciding the question. You cannot decide it as you do in the composition of these two houses in the passage of a law, where for public interests the law is not to be changed unless the two houses concur in changing it. That is a mere check upon the hasty expression of public will, and you are left not in a very bad condition if a law does not pass. But here comes the performance of a duty which must be performed in order that the Government may go on. What are you to do? You must in some way, under the Constitution and under the law, have a means of deciding, once for all, what the true law of the case is. Now, in almost all the States, I do not know but that in every one, if a man is reported under the Constitution and the laws and declared elected governor, and another man says that *he* is elected governor and the man so declared is not, the judicial branch of the Government is called into play to decide, under the Constitution and the laws, which of these two persons is entitled to the office of governor; and upon a proper suit brought and a decision made upon it you have reached a decision, be it right or be it wrong. Like every other judicial decision, it is better for the peace of society that it should stand, even if erroneous, than that the community should be thrown into anarchy. That is the theory upon which all judicial determinations are based. Very well; the Constitution has stopped when it says that the vote shall be counted.

There are two theories upon that subject. One is that the Constitution of the United States does not allow a judicial determination by contest or by suit of any question as to who shall be President of the United States, differing from the constitutions and the laws of almost all the States. Suppose that be so, what then? Why, the law must provide in some way for a consolidated opinion, as I think, of the two houses, through a committee or in some way, so as to get a definite decision by a distinct body of men upon the question. The other theory is that if the two houses under the present rule declare that A B is elected President of the United States and C D thinks he is, he has a right to appeal to the courts of his country under the judicial power, which the Constitution declares shall extend to all cases and controversies arising under the Constitution and the laws of the United States, to determine the question.

I believe, Mr. President, as the law now stands and as the rule now stands, that if at the last election it had been declared in the chamber of the House of Representatives that Horace Greeley, if he had not died, was President of the United States, it would have been competent for General Grant to have instituted a suit in the circuit court of the United States having jurisdiction, original jurisdiction of all causes between persons arising under the laws of the United States, to get possession of that office, and I believe that the final decision of the circuit court of the United States, or the final judgment of the Supreme Court upon appeal, would, under our Constitution and laws, have been a judicial determination constitutionally made as to the controversy between those two gentlemen respecting the right to this office. Other gentlemen disagree to that idea. They believe, as I said, that the first branch of the proposition is the true one, and that the two houses, together or separately, or by some consolidated committee, are the final judges. Suppose that were to be so, there would still be under the Constitution the right, as broad as the Constitution can make it, in the courts of the United States to decide any cause or controversy which arose under the Constitution and under the law; and how in such a case could a court refuse to decide, if one man claiming to be entitled to an office brought a suit against another man claiming to be entitled to that office? They could not do it.

But that, perhaps, is a little apart from the present and precise question we have, which goes upon the theory that for the time being, at any rate—of course it does not preclude an ultimate resort to the courts, for an ultimate resort to the courts is a constitutional right under the judicial power conferred by the Constitution; and of course no legislation of Congress could abridge it; but this goes upon the idea, either for the time being or for all time, that the two houses are to decide. If they are to decide, how is the best way to do it? It has appeared to me, after considerable study of the subject—and I state my opinions with great deference, and diffidence as well, in view of the opinions of other gentlemen who differ from me—that the only satisfactory solution of this difficulty, going upon the assumption that the two houses in some way are to determine this question for the time being, that they must determine it in such a way that you get *prima facie* at least a consolidated opinion; and that it is not safe to take either horn of the dilemmas that are presented in leaving it to the two houses to decide separately; either that nothing shall be received that they do not agree to or that everything shall be received that they do not concur in rejecting; that we should provide for what is common in many of the Eastern States, and is the constant and constitutional practice in the State from which I come; that is, on each occasion of a presidential election the appointment of a committee to be named in each house, to be, if you please, equal in number, who should form a single and consolidated committee, the members of which, thus selected and appointed, would presumably be among the purest and best and most skillful in law and in politics of the members of the two houses; that that body of people should be sworn to take the returns when they are opened by the Vice-President of the United States and canvass them, canvass them under the sanction of the Constitution and the law; that they should apply to them the same impartial considerations that they would be bound to apply to them had the Constitution declared that those eight persons should form a court who should finally determine every question; and that that body, call it a committee or whatever you like, but one single consolidated body, a joint committee, not acting separately like a conference committee, each representing one house, but one single body of eight or nine men, should take these papers, with the Constitution before them and the law, as to the method of voting and the method of making returns, and report to the two houses thus assembled what the state of the vote is, and who, according to the Constitution and the laws, has received the majority of the votes. That, as I say, is the constant practice in the State of Vermont.

Mr. MORRIS. What would the two houses do with the report after it gets there?

Mr. EDMUNDS. I was going on to state: It is one of the misfortunes that I labor under that I cannot say everything at once, and I do not want to take time. I should propose that when these eight gentlemen, if you please, so acting and so sworn to act impartially, according to the law, should have made their report, that report should be taken as the guide as to who appeared to be the President of the United States, unless the houses should concur in setting it aside. Instead of saying, as my friend's bill does, that a vote which has not undergone that sworn scrutiny shall be taken, I say that a vote having undergone that scrutiny and being allowed shall be taken, or being rejected shall not be rejected unless the two houses concur in reversing this sworn examination of men who are in an attitude to make an examination. We all know as a practical thing from what we have seen, those of us who have been here through one or two presidential elections, that the difficulty in coming to a conscientious and right judgment upon a question that is presented is very great on account of the haste, the want of time, the inability of sixty or seventy Senators—taking this small body—being able to see precisely what the question is. Every Senator cannot look at the papers at the same time, and we are in haste; we must act without debate under existing rules; or, if under debate, every Senator who is acting conscientiously, as all do, would wish to see precisely what this document is which is drawn in question. We are acting of course in all these occasions upon the papers and upon the papers alone. Very well. The difficulty, therefore, is one which exists in all large bodies where you are called upon to decide suddenly upon a paper which you have never seen before, where a great number of persons cannot take it in hands and inspect it, and they have not time to refer to authority or precedent, or Constitution, in order to come to a right judgment.

Now, if you remit, not by force of the power of either body as a part of the legislative department of the Government, but by force of the law, this power to a chosen body of the members of the two houses, who are small enough to act together, and each one of whom may be able to see precisely what the paper is that is drawn in question, and who may by themselves have time enough, if it be not more than an hour, to study and examine the question conscientiously, and under the sanction of an oath to decide rightly, is there not a greater probability that you reach the true and lawful result than there is in saying that you leave it at large to three hundred men at the other end of the Capitol and to seventy-four at this end? I think it is.

Mr. MORRIS. Suppose the committee disagree?

Mr. EDMUNDS. I will come to that, if my friend will pardon me. I have thought even of that.

Mr. FRELINGHUYSEN. Do I understand that the proposition of the Senator from Vermont would change the bill of the Senator from Indiana in this, that after the certificates are opened they are submitted to a committee who are to act *instantly* and in the presence of the two houses?

Mr. EDMUNDS. Not precisely that. I will come to that presently, and I will concede just as much as possible, because I know how valuable time is.

The difference, Mr. President, between what I suggest and what this bill—leaving out double votes for the time being—is this: In the one case, as the bill now stands, everything is to be counted that purports to be a vote unless the two houses separately concur in rejecting it. My proposition, or suggestion rather, because I have made no motion, is that these papers should be referred to a sworn committee of four Senators and four Representatives; that they should have time to examine them; and acting under their oaths should decide whether the papers presented are votes, and being votes should count them; not being votes, they should reject them. Then they report. Now what is to be done, my friend asks. I say that nothing ought to be rejected after such a report, unless the two houses agree to reject it; that is to say, that the probability of conformity to the Constitution and conformity to the law is heightened by having the present and sworn judgment of four Senators and four Representatives who have had time and opportunity to scrutinize the documents, is safer than to say that these papers shall be counted, unless the two houses acting separately in their numerous bodies, say the same thing.

The next question is, What is to happen then? My friend says, "Suppose they disagree;" because what I have already said only shows that this paper is not to be counted unless both houses concur in rejecting it. If it has gone through the scrutiny of eight sworn Senators and Representatives, and they decide upon their oaths that it is not a vote at all, unless both houses agree in then saying it shall be thrown out, I think that diminishes the chances of fraud, or of passion, or of tumult, a great deal.

My friend from Indiana asks, "What are you to do if they are equally divided in opinion, if you have eight?" Then, Mr. President, in order to meet his views, although it would not quite meet my own, I should propose that after a scrutiny by four Senators and four Representatives, made a committee for that purpose, if the question were so doubtful that they were equally divided in opinion, I would take his theory as it now stands in the bill and let it go, that a paper which came so near, to say the least of it, being what it purported to be, the vote of a State, should not be rejected unless, as he now proposes without that scrutiny, both houses should agree in rejecting it.

Mr. THURMAN. The Senator from Vermont may have spoken on the word "then" in the Constitution, but owing to the interruptions around me I may not have heard it; but if he has not, I wish to ask him what construction can be given to the word "then" in this sentence:

"The President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates, and the votes shall *then* be counted."

How restricted does the Senator take the word "then" to be?

Mr. EDMUNDS. I think I am safe in saying I have no doubt I give the same meaning to that word that my friend from Ohio does; that it must mean "on that occasion." "Then" does not mean "at that instant of time," because you cannot count a vote in an instant. The instant is gone while you are uttering the word "count." But the word "then," I think, in suits between private individuals, which my friend so well knows about, means "on that occasion."

Mr. COCKLING. "Forthwith."

Mr. EDMUNDS. "Forthwith," as my friend from New York suggests. That is to say, "then and there," "on that occasion," "forthwith," "without the intervention of any other affair;" and therefore if it took two days, as it may in a hundred years when we have a hundred States, to count these votes, it is "then" all the time. So that in the suggestion I make I would provide that this committee thus sworn to scrutinize and report upon these votes, doing it "then," would fulfill the Constitution if it took them a week to consider it, the two houses remaining in joint session, by recess or otherwise, awaiting their report, just as if we were to direct the Committee on Privileges and Elections at this moment, by a resolution, to bring in a bill forthwith to preserve the peace in the District of Columbia, if there were a great tumult here, and that we would do no other business until that were done. What would we do? That committee would retire and we would take a recess for two hours. The two hours come; the committee is not ready to report; we take a recess for two hours more, or two days, any time, within the Constitution, is it not "then?" I think "then" means "on that occasion," that is to say, it is the business presently to be performed and the next thing to be done, and therefore covers a space of time broad enough to accomplish the purpose for which the Constitution requires the two houses to attend. If I am wrong in that, I hope my friend from Ohio will suggest some more limited and better definition of the word "then."

Mr. HOWE. If the Senator is correct in his interpretation of "then," would not his own line of procedure be excluded by it? If "then" commands the convention to count the vote the next thing, would it not prohibit the convention from referring a vote to a mixed commission such as he suggests?

Mr. EDMUNDS. No, sir; it would not, any more than it would prohibit the convention from opening the package which had been unsealed by the Presiding Officer of the Senate.

Mr. HOWE. That is preliminary. That has been done before.

Mr. EDMUNDS. No; all the President of the Senate shall do is to open the package, "and the votes shall then be counted." That requires that the eye of somebody shall run over the certificate to perceive that it is the certificate of the State, that it bears its great seal, that it bears the signature of the governor, that it contains the statements which the law requires, that the electors met on the day prescribed by law and cast their votes in conformity to law. If you are to hold otherwise, then you hold that this Government is not a government of law but a government of something else. I do not think that there is any difficulty about the word "then." I think it refers to the occasion, and that it means precisely the same as if the Constitution had said "on that occasion, and as the business in hand, at that time, there shall be the necessary steps taken under the law to carry out this Constitution, such as the law may provide, to ascertain what are the votes of States, and how, they being justly compiled, the result is to be ascertained." That is what I think it means. So I do not think that a committee, which should be sworn to take these papers as the agents of the law and the Constitution, and to make a sworn report upon them, on the occasion of this great and august performance, would be a violation of the Constitution, but much the more carrying out its true and perfect spirit and intent.

When the proper time comes I shall offer an amendment (I do not know that it will get any votes, but the gravity of the occasion compels me to do what I think will be my duty) which will cover the views I have expressed.

Mr. THURMAN. Mr. President, there is great force in what the Senator from Vermont says; and the question I put to him, as to the signification he gave the word "then," was to draw from him an expression of his opinion upon the subject, and not to intimate any opinion of my own. I might admit that the word "then" means "upon that occasion," as he suggests, or that it means "immediately thereafter;" that is to say, immediately after the opening of the votes, without the intervention of any other business; that they should go on until the counting takes place. Of course what time is necessary for the counting and what agencies may be necessary in order to ascertain all that is necessary to a counting of the votes may be resorted to. I do not gainsay that, always consistent, however, with the fact that the votes are to be counted forthwith after they are opened, and in the presence of the two houses, and the result declared. Now, whether under this provision of the Constitution the word "then" can be extended so as to cover the time which would elapse in a canvass of these votes by a committee, such as has been suggested, is a very grave question, upon which I would want to reflect before forming an opinion. I shall say no more of that, therefore, at present.

But there was one branch of the remarks of the Senator from Vermont upon which I wish to say a word, because, with great respect to his opinions, I am unable to concur with him, and that is in regard to the idea expressed by him that the election of a President of the United States may be made the subject of contest in the courts of the United States. To that view I entirely dissent. Let us see first what the judicial power is. I beg the attention of my friend from Vermont to what I am about to say. I read from the third article of the Constitution, section 1:

"The judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish. The judges, both of the Supreme and inferior courts, shall hold their offices," &c.

That simply states where the judicial power shall be vested, without any definition of the extent of that power. That is provided in the second section.

"SEC. 2. The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority; to all cases affecting ambassadors, other public ministers, and consuls; to all cases of admiralty and maritime jurisdiction; to controversies to which the United States shall be a party; to controversies between two or more States; between a State and citizens of another State; between citizens of different States; between citizens of the same State claiming lands under grants of different States, and between a State, or the citizens thereof, and foreign states, citizens, or subjects."

I read from the original Constitution. Now, as is well known, it has been decided again and again, in accordance with this language of the Constitution, that there must be a case made before the judicial power can be exercised. It must be a case, what is known in the technical language of the law, either common law or equity or statute law, as a case, before the court can get any jurisdiction of the subject, for the Constitution is plain that "the judicial powers shall extend to all cases in law and equity." Hence you must have a case before the judicial power can be brought into action. That has been frequently decided by the Supreme Court.

Then, coming to the grant of original jurisdiction to the Supreme Court, we find it provided for in the next paragraph of the section from which I have just read—

"In all cases affecting ambassadors, other public ministers, and consuls, and those in which a State shall be party, the Supreme Court shall have original jurisdiction."

Very plainly these words do not include the case of a contest for an office; and the Supreme Court has decided definitely that you cannot add by legislation to this original jurisdiction conferred by the Constitution, so that you could not by law provide that there might be a contest by *quo warranto*, or any other form, originally begun in the Supreme Court of the United States, because no such thing is embraced by the words "cases affecting ambassadors, other public ministers, and consuls, and those in which a State shall be party," and they are the only cases in which the Supreme Court has original jurisdiction:

"In all the other cases before mentioned, the Supreme Court shall have appellate jurisdiction, both as to law and fact, with such exceptions and under such regulations as the Congress shall make."

It follows from this that if an election of President or the right of an individual to the office of President can be contested in a judicial court of the United States, that contest must be begun in one of the courts inferior to the Supreme Court, and can only reach that court by Congress conferring upon it appellate jurisdiction from the decision of the inferior court. And furthermore, it follows, as the inferior courts have no jurisdiction whatsoever except such as Congress may confer upon them by law, that whether they should have jurisdiction in such a case or not would depend wholly upon the will of Congress, and therefore it would be just as one Congress might decide or as another Congress might decide whether there should be this judicial contest at all. Was it intended that the title to the office of President of the United States should depend upon a contest in a court, which contest itself is wholly dependent upon the fluctuating opinions of Congress? One Congress might pass a law clothing the Supreme Court of the United States with power to entertain a *quo warranto* in such a contest, and just when that contest was at its height, and before any decision had been rendered upon it, the next Congress might repeal the law conferring the jurisdiction. Was any such thing as that ever intended by the framers of the Constitution? It seems to me not. It would be a very extraordinary constitution that would thus leave it to the fluctuating will of Congress whether or not in the first place there should be any judicial cognizance of the question at all, and in the next place that would allow Congress one day to provide for this judicial cognizance and the next day or the next week repeal the law that gave the court jurisdiction.

Mr. EDMUNDS. May I ask the Senator a question?

Mr. THURMAN. Certainly. I wish to arrive at the truth.

Mr. EDMUNDS. Would not that same argument apply to all the cases of judicial jurisdiction arising under the Constitution and provided for in terms except those "affecting ambassadors, other public ministers and consuls, and to those in which a State shall be a party;" and then would not the argument be just as great that Congress could not have intended that there should not be any trial of issues between citizens or anybody else in cases arising under the Constitution, except those over which the Supreme Court had original jurisdiction? In addition to that Congress must create a Supreme Court, to begin with, and how could it be supposed the Constitution intended to allow such suits, inasmuch as it was left for Congress to create the court to do it?

Mr. THURMAN. The Senator's question seems plausible, but it is not satisfactory at all. What I say is that, from the very nature of the thing, it never could have been intended that the title to the office of Chief Magistrate of this nation should be subject to any such fluctuation as that. The idea of the framers of the Constitution was that that question should be settled, settled at once and settled forever, and that it was better for the peace of the country that it should even be settled erroneously than that it should remain unsettled. It never was intended that the President should be in the exercise *de facto*, in virtue of the count made before the two houses, of the office of President of the United States, and at the same time that his right to that office should be a subject of contest in the courts. And how strangely would it work.

Suppose a contest of the office of President; suppose the case that has been supposed by the Senator from Vermont, that one man is declared; in strict pursuance of the Constitution, to be President of the United States; of course then he is inaugurated; and then a contest is begun by *quo warranto* in a circuit court of the United States. I say nothing now about how long it would take to decide that controversy, because if a *quo warranto* could be brought in one case and for one reason, it could be brought for any reason that would vitiate an election. I will suppose a *quo warranto* to be begun in the circuit court; that circuit court renders a decree ousting the President of his office; an appeal is taken to the Supreme Court, and the Supreme Court affirms the decision. How are you going to enforce it? It is made the duty of the President to see that the laws are faithfully executed. How are you going to enforce that? The Supreme Court has no power to do it; it commands no army; it has no treasury. How can you enforce a judgment of ouster against the man who is *de facto* President of the United States and has the Army at his back? Was it ever intended by our fathers that any such state of case as that should arise? It seems to me certainly not.

But there is still another reason why the idea is wholly inadmissible. When would such a judicial contest end? If, as I said before, a judicial contest may be commenced for one cause, it may be for another. Suppose that the ground of the contest should be that there was fraud in the election in the great State of New York, that there were fraudulent votes given, that men voted who were not qualified to vote, that men voted under duress, that men were bribed to vote, and the like, and that if such votes were cast out then the vote of that State, which determined the election, would have been given for the unsuccessful candidate. Suppose that is the ground of contest, then the President being defendant in such a proceeding would have the right to recriminate and say "there may have been votes given for me by persons who were not entitled; there may have been bribery or corruption or intimidation or duress on my side; but I answer, *et tu quoque*; there was as much or more on your side;" and then the court is to go into a canvass of the election in the State of New York, and find out which set of electors received a majority of the lawful votes of that State. I do not remember at this instant how many votes New York casts; I think it is about 700,000. Will the Senator from New York please tell me?

MR. CONKLING. Eight hundred thousand.

MR. THURMAN. Eight hundred thousand. When will you get done canvassing 800,000 votes or the half of 800,000 votes or the fourth of 800,000 votes, and who is to pay the expense? Such a contest on such a ground as that, the most material of all grounds, would be simply impossible.

Again, suppose the question is whether or not voters were intimidated, thousands of them at a time, which we hear so much of in regard to southern States, where in the world would be the end of the testimony? When would you get it all taken?

But here comes still another reason. This matter is to be submitted to the judge, in the first place, of the circuit court. That judge may be or may not be a judge appointed by the very man whose title to the seat is contested; probably he would not be, and yet he might be because you would have to fix some place where the suit should be brought, and at any rate while that suit is pending every vacancy on the bench of the Supreme Court, which is ultimately to decide the case, would be filled by the very man whose title to the office of President was contested.

It seems to me that these considerations abundantly show that the idea of contesting the office of Chief Magistrate of the United States in any court whatsoever is not to be entertained for a moment. I do not, therefore, agree with the Senator from Vermont that there can be any such contest. I do not think that the framers of the Constitution intended that the title of the persons declared in the joint assembly of the two houses to be President should remain in doubt for a single moment, but that, on the contrary, from the time he was declared to be elected all men should respect his title, for he was declared elected pursuant to the Constitution of the country. There might be error in deciding who was elected; every body of men is liable to commit error; courts are liable to commit error as well as congresses; the decision may be in favor of the wrong man; but the public safety and peace require that that decision, when once made, shall be final and irrevocable.

MR. FRELINGHUYSEN. It seems to me, Mr. President, that there is one idea which the Senator from Ohio has entirely omitted, which is conclusive upon this subject; it certainly is to my mind. I think the twelfth article of the amendments to the Constitution settles who has jurisdiction over this question. It does not do so in express terms, but it does do so by necessary implication. It says that the President of the Senate is to open the certificates and the votes, which are then to be counted in the presence of the two houses. That by necessary implication to my mind gives the jurisdiction over this subject to the two houses; and if the Constitution does give it to them, we cannot by law give it to the judiciary of the country.

MR. MORTON. I would suggest to my friend further that the twelfth article of the amendments provides that if no candidate receive a majority of all the electors appointed, the House of Representatives shall immediately proceed to elect by States, giving no interval of time.

MR. FRELINGHUYSEN. Certainly. The whole frame-work of the Constitution is repugnant to the idea of its being settled by the judiciary. But while I have not made up my mind it does not seem to me that the amendment suggested by the Senator from Vermont is at all subject to a like criticism. That proposition is to have a committee appointed who shall *instantly*, if the thing is feasible—I do not know that it is—consider the votes, and if they report favorably on a vote it shall be accepted unless both houses reject it, and if they report unfavorably it shall only be accepted on both houses voting for it; the only effect of that committee being not to take the jurisdiction away from Congress but to change the rule of evidence, it strikes me that it may be a precautionary measure of some value. I do not know whether the Senator from Indiana has thought of that.

MR. MORTON. The committee had the benefit of having the amendment proposed by the Senator from Vermont before it, and it was somewhat considered. The proposition of the Senator from Vermont is to intrude a joint committee of the two houses

into the consideration and determination of this question, providing that that committee shall be four of each House, a joint committee of eight, that it shall not be like a conference committee, the members from each branch acting separately, but that it shall compose one committee, and that the returns of the election of electors shall be referred to that committee, and when that committee makes its report that shall stand as the voice of both houses unless overruled by both. I think there are a number of very grave objections to that.

In the first place, it is a plan that is unknown to the system of legislation which we have, a joint committee of the two houses having power of that kind conferred upon it. It certainly was not embraced in the idea that the two houses should be present, although not as a joint convention but present each in its own capacity when those votes are counted. In the next place, it involves the dangers of the present rule to a very great extent, and it involves another danger perhaps equal to that in its character. It places the election of President and Vice-President in the hands of eight men, or rather a majority of eight men, which would be five, unless their action is overruled by the two houses. You substitute the judgment of eight men, or a majority of eight men, for the judgment of the two houses.

Mr. EDMUNDS. No; we substitute that for the naked return which the Senator's bill proposes shall stand unless the two houses reject it. I say subject the naked return to these eight men unless the two houses reject their conclusion, which gives you a higher security.

Mr. MORTON. No, sir. I think it does not give a higher security, and I think it presents the greatest temptation for corruption that could possibly be devised. You place the election of Chief Magistrate in the hands of five men out of eight, and their action is to stand unless overruled by the joint convention of the two houses, and the two houses differing in politics may not agree jointly to overrule that action if it shall be in favor of that candidate who has a majority in one of the houses. You have the very difficulty involved in the present rule. Let me suppose a case. You appoint four Senators and four Representatives to constitute one committee. The House is democratic and the Senate is republican. They get together and the four members of the House and one member of the Senate agree to make a certain report throwing out the votes of certain States, if you please, or counting improperly the votes of certain States, and then the conclusion of those five of the eight must stand unless both houses agree to overrule the conclusion. That is putting a majority of the joint committee of the two houses in a position that the Constitution has never contemplated. No precedent for a thing of that kind, I venture to say, can be found, and a more dangerous contrivance cannot well be devised. It brings the question back to just where it stands now. The question would then be to get possession of the committee. If both houses are of the same complexion, and both candidates for President are substantially of the same complexion, the question is determined by a majority of that committee. If the houses are of different political complexion, the committee will be divided in precisely the same way; they will either not agree at all, or if they do agree it must be in favor of one party or the other, and that party is sure to have a house against it.

It seems to me that there is nothing to be gained by this provision. It complicates the matter. It substitutes the judgment of four or five men for the judgment of the two houses. The other plan is simpler, and it is safe in my judgment. A return is made. The Senator from Vermont says it may be a forgery out and out. If so, that is not the return from the State; that is not what is contemplated; but here is a return from a State. It is opened in the presence of the two houses. It bears the seal of the State; it has all the insignia of coming from the State of Vermont, if you please. As it stands, without the twenty-second joint rule, the President of the Senate opens that vote, and it must be counted. There is no help for it. There is no provision by which you can avoid counting that vote. Under the twenty-second joint rule if an objection is taken to the counting of the vote the two houses separate, and if one house refuses to overrule the objection the vote is thrown out; Vermont is disfranchised, just as Arkansas was disfranchised upon a mere technicality that turned out not to be founded in fact, disfranchised upon a trifle that turned out to have nothing in it; and that was only two years ago.

Mr. President, where the vote of a State comes up—and a mere forgery cannot be intruded; and a mere mock electoral college cannot be palmed off; it will be understood that this vote has come from the messenger sent by the State or has come in the regular way—that vote ought to be counted; the State should not be disfranchised unless both houses agree to do so, and have a good reason for doing it. You cannot pass a simple law, without the concurrence of both houses, even of the most unimportant character. I ask if you will disfranchise a State or half a dozen States without the concurrence of both houses, and what is the advantage of intruding this committee here? You create a small body of men and you clothe them virtually with the power of determining who shall be President of the United States, a majority if you please of eight men, subject to the greatest temptation that ever a majority of eight men was subject to in this world—the power to determine who shall be President and

Vice-President of the United States. If men are weak, if they can be corrupted, if temptation may overcome them, you place these men in a position where they are more exposed than they could be in any other way. It is a contrivance unknown, utterly wanting in analogy in anything common to our system of government.

This bill provides that if an objection is made to an electoral vote, the two houses shall separate and consider the question. If it is a forgery out and out, there is no doubt but that it would be objected to. We must consider that both houses act with some integrity, although they may be swayed by popular passion or by popular feeling to a great extent. If both houses concur in rejecting the vote, the State is disfranchised. If they do not, then the vote is to be counted. But there is one case that is provided for in this bill, a case where, for example, there are two rival governments in a State, or where there are two sets of electors, both certified to in the same form, where there may be an actual controversy, as there has been in some of the States, and two sets of returns are sent here. How will you settle that question? This bill provides that when that question comes up it shall be referred to the two houses, and that return which shall be the genuine return according to the votes of both houses shall be counted. You cannot adopt any other rule than that in my opinion, and for that reason I think the amendment proposed is without merit.

Mr. WRIGHT. Will the Senator from Indiana allow me to ask a question on the point he is now discussing?

Mr. MORTON. Certainly.

Mr. WRIGHT. I understand that where there is more than one return, as is provided in the second section of this bill, and the two houses are unable to decide which is the true return, then the implication is that the vote of the State is not to be counted. That, I understand the Senator to say, is left to implication entirely. The section does not state what shall be the effect if the two houses are unable to agree. It says that the return from such State shall be counted which the two houses, acting separately, shall decide to be the true return. But suppose that they are unable to agree upon either, then what is to be the result? I understand, by implication of course, the vote is to be rejected; but I submit to the Senator whether that ought not to be put in such language as that it should not be left to implication.

Mr. MORTON. I would have no objection to an amendment making that certain, but I think that is the implication.

Mr. WRIGHT. I have no doubt that is the implication. I suggest—without using too many words—that the Senator use this language: “and that return from such State shall only be counted which the two houses acting separately shall each decide;” putting in the word “only” after “shall” and “each” before “decide.”

Mr. CONKLING. Why not put it after “return;” so as to read: “and that return only,” &c.

Mr. MORTON. I have no objection to that amendment.

Mr. WRIGHT. I suggest it then.

The PRESIDING OFFICER. (Mr. Carpenter in the chair.) The amendment will be reported.

The CHIEF CLERK. It is proposed to amend the bill in line 7, section 2, after the word “return,” by inserting the word “only,” and after the word “shall” inserting “each;” so as to read: “And that return only from such State shall be counted which the two houses, acting separately, shall each decide to be the true and valid return.”

The amendment was agreed to.

Mr. MORTON. At the suggestion of several Senators around me, for the purpose of taking the sense of the Senate, I move that at 5 o'clock the Senate take a recess until half past 7 for the purpose of finishing the bill.

Mr. EDMUNDS. Let us finish the bill now.

Mr. MORTON. I will take the sense of the Senate.

The PRESIDING OFFICER. The question is on the motion of the Senator from Indiana to take a recess from 5 to half past 7 o'clock.

Mr. MORTON. I made the motion at the suggestion of the Senator from Ohio [Mr. Sherman] more particularly. I would much prefer to go on now and finish the bill. I think it can last but a little while longer, but I am willing to take the sense of the Senate.

Mr. SHERMAN. My experience has always been that it is better at a reasonable time to take a recess and come back at half past seven, and then we can sit for a number of hours.

Mr. MORTON. I withdraw the motion.

Mr. SHERMAN. Very well.

The PRESIDING OFFICER. The motion is withdrawn.

Mr. THURMAN. I would prefer to sit this bill out if we can come to an understanding that we shall adjourn when we are through with this bill, which I agree with the Senator from Indiana will be shortly, as far as I know, for I do not know of anybody who wishes to speak at length. But if it is meant immediately after this bill shall be disposed of to take up another measure and proceed with its consideration to-

night, then I think the sooner we take a recess the better. And therefore it all depends with me upon the question whether or not another measure is to be taken up and proceeded with to-night after the disposition of this bill. If that is the purpose of the majority of the Senate, then I hope the Senator from Indiana will renew the motion for a recess.

Mr. EDMUNDS. After this bill is disposed of I propose to move to take up the civil-rights bill. I shall then propose, speaking as I hope with the assent of the gentlemen on this side of the chamber, that the gentlemen opposed to the bill may have all the time until to-morrow afternoon at five o'clock to discuss the bill: that then the general debate shall terminate, and if any amendments are to be offered to the bill that they may be offered and there may be the short debate of five or ten minutes in support of amendments or against them that in such cases is usually allowed, and that then the Senator in charge of the bill, myself or any other Senator who may happen to have charge at the time, shall have half an hour to close the debate, and we then vote. If that is agreeable to gentlemen on the other side, all I would wish to do to-night would be to dispose of this bill and take up the other and then adjourn, if gentlemen on the other side would like to do so.

Mr. THURMAN. I should not like to make any agreement of that kind, at least to-day. It is too soon to make an agreement as to when debate shall be closed on that bill. I, however, feel some little delicacy about making any suggestion upon it. I do not expect to speak on the civil-rights bill. I have twice spoken upon it and spoken very elaborately at different sessions of the Senate, and I do not feel disposed to take up any time by further remarks, but would rather leave it to others who have not enjoyed the opportunity of giving their opinions. But I think it is too soon for us to come to any conclusions. Besides, I hope that when we are through with this bill, a majority of the Senate will proceed to consider a bill that it seems to me demands the attention of the Senate now, that must be taken up now or be lost; I mean what is commonly called the steamboat bill. If it has been determined elsewhere that the civil-rights bill shall have precedence over everything else when this bill is disposed of, I know very well that any effort on my part to get up the steamboat bill will be futile; but in the hope that it has not been decided elsewhere that the civil-rights bill overrides everything else, I shall feel it my duty to ask the Senate after this present bill has been concluded to take up the steamboat bill. At this early stage, in fact before the civil-rights bill has been taken up at all, I do not think it will be possible for us to come to any arrangement as to when debate on it shall close.

Mr. EDMUNDS. There is nothing for us then but to go on and do the business that is before us.

The PRESIDING OFFICER. The bill is before the Senate as in Committee of the Whole.

Mr. MERRIMON. Mr. President, two or three considerations have been thrown out in this debate as the real ground why this bill ought to be passed at the present session. We are told that unless it shall pass or some bill like it shall pass at this session, the country will be in great danger of revolution when the time shall come to count the electoral votes for President at the next election. We are told that the danger is imminent. I have been struck with the fact, however, that we are simply so told. No fact, no circumstance has been brought to the attention of the country which goes to show that there is more danger at this time or that there will be more danger two years hence than there has been in the past. From the beginning of the Government down to February, 1865, there was no rule or statute prescribing how the electoral votes for President and Vice-President should be counted. During all those years, in times of high party excitement, when party distinctions were as marked as they are now, no danger of this sort ever came on the country, nor was it seriously apprehended at any time that there would be a revolution. In 1865 the twenty-second joint rule was adopted. What particular considerations moved Congress to adopt that rule I do not know. The political party then in power and administering the Government was the same that administers the Government to-day. That rule adopted by that party having such majority provided that—

“No question shall be decided affirmatively and no vote objected to shall be counted except by the concurrent votes of the two houses.”

Then no vote was to be counted except by the concurrent action of the two houses. Now suddenly it is proposed to abolish this rule, to pass a statute that is to govern the manner of counting the electoral votes for President and Vice-President and to reverse this rule whereby it is to be provided that no vote shall be rejected for President and Vice-President unless it shall be done by the concurrent vote of both houses. I cannot understand, I have not been told anything that gives me to understand, why there is a necessity, or what that necessity is, if there is any, for this sudden change.

Mr. EDMUNDS. The Senator ought to remember that this is not a sudden change. This topic has been under discussion almost every year since I have had the honor to be here, and it is a misfortune that it has been delayed so long in reaching some satisfactory conclusion.

Mr. MERRIMON. But we are told now that it is suddenly very important to pass it.

Mr. EDMUNDS. Not suddenly.

Mr. MERRIMON. No graver question could come before the Senate. It involves constitutional considerations of the most serious and complicated character. Right at the heel of the session, when there is no time for consideration or proper deliberation, we are called upon to pass this very delicate bill and touching a very delicate power to be exercised by Congress. I think that no good reason has been assigned for this precipitancy, and I can conceive of none except this, that the Government is about to change hands politically. In the next Congress there will be a very large majority of democrats in the lower branch of Congress; there will be a republican majority in the Senate, and I will not say it is so, but it looks very much as if the purpose was to create a check, a negative upon the democratic House. If such consideration is a moving consideration to pass this bill in this precipitate manner, I maintain that it is insulting to the democratic party, to the country, and to the American people. They are as patriotic as the republican party. They are no more given to revolution and to doing that which is unjust than any other party in the country. No consideration has been brought forward, I maintain none can be brought forward, which goes to show that the democratic party will be less dutiful to the American people, less dutiful to their obligations to the Constitution, when the time shall come to count the electoral vote for President and Vice-President again, than they have been in the past or than any party has been in the past. I believe that the Forty-fourth Congress will be as honest a Congress as this, and that in the exercise of the duties that will devolve on the Congress at that time in counting the electoral votes, a patriotic spirit will move the Congress as it has done in the past, and there will be no greater danger of revolution than there has been in the past. At all events no reason has been assigned, no fact has been stated, no consideration has been brought to the attention of the Senate going to show that there will be a different state of feeling at that time from what has prevailed in the past. There is then no necessity for the precipitancy that is manifested in considering this bill and in passing it right at the close of the session, when other matters are pressing upon us, when appropriation bills ought to be under consideration to the end that the interests of the Government may be carried on in the ordinary lawful way.

Mr. EDMUNDS. There are no appropriation bills before us.

Mr. MERRIMON. If there are none there ought to be some, and there would be if it were not for the bringing forward of political measures.

Mr. LOGAN. The Senator asked for a suggestion as to the reason of this. Will he allow me to show him one?

Mr. MERRIMON. Certainly.

Mr. LOGAN. He says this measure grows out of the fact that the next House is democratic. He will find by reading the rule under which we now vote for President—

“And no question shall be decided affirmatively and no vote objected to shall be counted except by the concurrent votes of the two houses.”

Now, if he is putting it on the ground that we desire political advantage, the old rule is the one we would act under, because, having a majority in the Senate, we could prevent the vote of any State being counted by just saying it shall not be counted. We cannot do that under this law unless by the consent of your democratic House. If we acted on political grounds, we would want the rule as it stands, not this bill.

Mr. MERRIMON. It might operate either way. It might operate to reject the vote.

Mr. LOGAN. No, sir; I beg your pardon. If you talk about dishonesty, I do not attribute any dishonesty to any house, or any political trick.

Mr. MERRIMON. I did not say anything about that.

Mr. LOGAN. There is no political trickery in a bill that is discussed and understood; but if we desired political advantage, we have it in the present rule; and it is to prevent that that the bill is presented to the Senate requiring that both houses must concur to reject a vote. That is the very object. The bill is taking an advantage away from ourselves that we now have under the rule.

Mr. MERRIMON. So far as that goes, it is about as much one way as the other.

Mr. LOGAN. Not by any means; because the vote is bound to be counted, unless both houses concur in rejecting it. Hence the other house may get a count of the vote without the assent of ours. Both houses have to concur under this bill to exclude a vote; otherwise, under the rule, one house could exclude a vote.

Mr. MERRIMON. In order to answer the Senator from Illinois intelligibly, I will read the provision in the bill touching this matter. The bill provides:

“And no electoral vote or votes from any State to the counting of which objections have been made shall be rejected except by the affirmative vote of the two houses.”

Now, suppose that in the next counting of electoral votes such electoral votes shall come up to be counted as came up from the State of Louisiana two years ago. Although, as I contend, that electoral vote was unlawful and ought not to be counted at all, yet that vote must be counted unless both branches of Congress shall concur in rejecting it. Am I not correct in that?

Mr. LOGAN. Certainly you are correct that a vote cannot be rejected under this bill except by the concurrence of both houses. You are going on the presumption that one house or the other is going to be dishonest and will object to a vote anyhow. We go upon the presumption that men will act honestly; and inasmuch as both houses have to count the vote and assemble together to count the vote, therefore both houses ought to determine when a vote is not correct. Is not that the rule in legislation? What do you convene both houses for?

Mr. MERRIMON. If that is correct, why was not that the rule before?

Mr. LOGAN. We want to correct a rule that I consider incorrect.

Mr. MERRIMON. Why not alter the rule? Why adopt this elaborate statute?

Mr. LOGAN. This does alter the rule.

Mr. MERRIMON. It is true this alters the rule, but it is done by statute and not by a change of the rule.

Mr. LOGAN. There is no difference between a statute and a rule, so far as the effect goes.

Mr. MERRIMON. There is a very wide difference between a statute and a rule.

Mr. LOGAN. Not at all, so far as Congress is concerned.

Mr. MERRIMON. The same reasons which existed at the time the rule was adopted exist to-day; and the point I was making when the Senator from Illinois interrupted me was that no sufficient reason has been brought forward in this debate to justify the precipitancy with which this measure is being pressed through Congress. The Government has lasted nearly a century without it; and every one must concede, all have conceded indeed, that the difficulty to be solved is one of great importance that requires the highest and gravest deliberation. It is a statute that ought to be passed into law with great care, and it ought not to be passed until the whole matter is thoroughly ventilated in both branches of Congress, and every one must concede that there is no opportunity to do that now. We are to pass this bill through the Senate after a debate of three or four hours, when it ought to engage the attention of the Senate, it seems to me, as many days.

Mr. LOGAN. It has engaged the Senate for years, and the House too.

Mr. MERRIMON. Not this Senate.

Mr. LOGAN. A proposition of this kind has been before committees for years. It has been before the committee on which I am serving, the Committee on Privileges and Elections, ever since I have been in the Senate—some proposition or other of this kind.

Mr. MERRIMON. But, Mr. President, to pass over that, in my judgment Congress has power to pass an act regulating the manner of comparing the electoral vote for President and Vice-President, and that power is derived from two clauses in the Constitution. The first is this—

Mr. LOGAN. I do not want to disturb the Senator, but there is one point I should like to suggest to him. He says there has been no reason given for what he calls this precipitate action on the part of the Senate. He says we got on for many years without any rule of this kind. That is true. I ask him if he believes, had Mr. Greeley been living at the time of the counting of the last vote, and had the votes of Louisiana, of Arkansas, and of Georgia been sufficient to turn the election on either side under this rule—does he believe we could have got through without a revolution?

Mr. MERRIMON. Yes, sir; I do. I think the republican party would have decided that General Grant was elected, and I have too much confidence in the patriotism of the democratic party and the democratic people of this country to believe of them that they would revolutionize the country and destroy the whole system of government because that decision had been made by a power authorized to do it.

Mr. LOGAN. Now I will ask the Senator suppose it had been decided on the other side, what does he think the result would have been?

Mr. MERRIMON. I think the republican people of the Union would have submitted to it.

Mr. LOGAN. Whether they thought it was correct or not?

Mr. MERRIMON. Yes, sir.

Mr. LOGAN. You say the democrats would have submitted. Suppose these States had voted for Mr. Greeley fairly, and there was no reason why it could be said that the result of their vote was unfair, and those States gave Mr. Greeley the majority, but by throwing all these States out we elected General Grant by one vote; do you believe then, if the republican party had thrown out those States and elected Grant by one vote, while if they had been fairly counted Mr. Greeley would have been elected, the democratic party would in that case have submitted?

Mr. MERRIMON. In the first place I do not think the republican party would do that; but having the power to do that, being charged by the Constitution of the country with the power to do it, if they had made the decision, I think the American people would have submitted to it.

Mr. LOGAN. You do?

Mr. MERRIMON. I do.

Mr. LOGAN. Our past experience does not prove that to me.

Mr. MERRIMON. And further than that, I believe it is characteristic of the American people that they submit to a decision properly made by the proper authority however much they may condemn its justice, however erroneous it may be, just as they submit to a decision made by a court having competent jurisdiction of a question to decide it. If the Supreme Court having jurisdiction of a question here before it were to make a decision that was distasteful to four-fifths or nine-tenths of the American people, I believe they would submit to that decision because the proper constitutional tribunal had made the decision; and just so I believe that if the republican party in 1873 had improperly and erroneously decided that General Grant was elected in comparing the electoral vote, however much they might have condemned it, however erroneous, false, fraudulent it might have been, Congress having the power to decide that question, and having decided it, the American people would have submitted to it; but they would have condemned the act at the ballot-box. When the next election took place the administration would not have received the cordial support of the American people; it would have been condemned, the whole party would have gone down in history, condemned, with the seal of condemnation upon it; but the people would have submitted to it. If I am not correct in this view, if that revolutionary spirit prevails in the American people, that mobocratic spirit which is attributed to them, free government cannot last. If the people are not honest, if they are not willing to submit to their tribunals, if they are not willing to submit to the Constitution and live under it, then we have no government; might is right and despotism is triumphant in this country. I do not believe any such doctrine, and when gentlemen make such suggestions with a view to push this bill through Congress in such a hurry they fail to alarm my fears. I believe I have confidence enough in the republican party of the nation to believe that if, when the next electoral vote is counted, the Congress shall ascertain that a democratic President shall have been elected, the republicans of this country will submit to it. If they do not do it they are not fit to be Americans, and they are less Americans than I believe they are.

But, sir, to go on with the point I was on when the Senator interrupted me, I say I believe Congress has power to pass a law regulating the manner of counting the electoral votes for President and Vice-President, and that power is conferred by two provisions contained in the Constitution. The first is in these words:

"The electors shall meet in their respective States and vote by ballot for President and Vice-President, one of whom, at least, shall not be an inhabitant of the same State with themselves; they shall name in their ballots the person voted for as President, and in distinct ballots the person voted for as Vice-President, and they shall make distinct lists of all persons voted for as President, and of all persons voted for as Vice-President, and of the number of votes for each; which lists they shall sign and certify, and transmit sealed to the seat of government of the United States, directed to the President of the Senate. The President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates, and the votes shall then be counted; the person having the greatest number of votes for President shall be the President, if such number be a majority of the whole number of electors appointed; and if no person have such majority, then from the persons having the highest numbers not exceeding three on the list of those voted for as President, the House of Representatives shall choose immediately, by ballot, the President," &c.

That is as far as it is material to read for my purpose. Now I maintain that if there were no other words in the Constitution conferring power upon Congress, these are sufficient. When the Constitution provides that the certificates of election shall be sent to the President of the Senate, through him Congress gets jurisdiction of the electoral vote and in the particular way prescribed in the Constitution. What is that? That the Senate and House of Representatives shall come together in joint assemblage; there the President of the Senate shall open all the certificates, *ex vi termini*; the vote must be counted. The vote must be counted by the Congress; the vote must be counted by the Congress in joint assemblage; it must be the act of this joint assemblage; and I maintain that, touching the counting of the vote, every question that shall arise must be decided by the Congress, not as two separate bodies, but as the Congress sitting in joint assembly.

Mr. MORTON. If I understand the Senator's position, it is this: that when the vote is counted the two houses come together and act as one body, and that each Senator and each Representative shall have one vote.

Mr. MERRIMON. Yes, sir; that is it exactly.

Mr. MORTON. And that they must settle all questions?

Mr. MERRIMON. They must settle all questions. It is done after the manner in which United States Senators are elected by the several State legislatures. The act of Congress prescribes how the Senators shall be elected. The two houses of the legislature vote on the first day separately. On the second day the two houses go into joint assemblage, and as a whole, as a joint body, they ballot for a United States Senator, and continue to ballot until one shall be elected. They vote as one body; the

two branches of the legislature are in joint assemblage; and the assemblage cast their votes as one body for United States Senator.

I maintain that by all rules of constitutional construction, of legal construction, the two houses met for the purpose of comparing the electoral votes for President and Vice-President act as one body. They act in their joint capacity, and all questions that may arise touching the counting of the votes must be decided by that joint body. Why, sir, let me ask this: When a question is raised, as it may be raised under the twenty-second joint rule and it may be raised under this bill if it shall become a law, where is the constitutional authority for the two bodies separating, the Senate going into its chamber here and deciding a question here in this body? I respectfully ask Senators who are supporting this bill to show me any constitutional authority for that. Show me any rule of constitutional construction or of legal construction which warrants the joint body in separating and going to their respective chambers and deciding a question. Why, sir, in that case the matter is decided by the Senate as a Senate in its own chamber, separate and apart from the other branch of Congress. The House decides it as a body separate and apart from the Senate. It cannot be pretended that there is one word in the Constitution which authorizes the two bodies thus to separate and to make a decision touching that matter. It was contemplated by the Constitution that the two bodies should go into joint session and for a particular purpose, to exercise a power that was conferred upon them as a joint body and to decide all questions touching the matter they had jurisdiction of as a joint body, as such joint body.

I say again that I respectfully ask any Senator who can do so to point me to a single word in the Constitution that authorizes the Senate, when a question shall be raised under the twenty-second joint rule or under this bill if it shall become a law, to come back into the Senate chamber, and here, in its capacity as a Senate, separate and apart from the House of Representatives, decide a question and then go back into joint session again. They are not exercising a power conferred by the Constitution when they do that, and I maintain therefore that Congress has power to pass a law which shall regulate the action and the proceedings had by that joint assemblage in comparing the electoral vote for President and Vice-President. This bill, if it shall pass, in so far as it provides that, when a question is raised there touching the counting of the vote, the Senate shall come back into its chamber and decide that question, in my judgment, is absolutely null and void: it is inoperative, for no such power is conferred by the Constitution.

There is another clause that authorizes Congress to pass this act which I beg to read. I refer to the clause authorizing Congress—

“To make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the Government of the United States, or in any department or officer thereof.”

That clause of the Constitution is in aid of the clause which I have been endeavoring to elucidate. It authorizes Congress to pass all laws necessary to execute every provision contained in the twelfth article of amendments, but it authorizes Congress to pass all laws necessary to execute the twelfth article consistently with the power conferred upon Congress in the twelfth article. By the twelfth article the electoral vote for President and Vice-President must be counted by what body? By the Senate? No. By the House? No. But it must be counted by the Senate and the House sitting in the chamber of the House of Representatives as a joint body. Then if they must count the vote as a joint body, how can it be pretended that the two branches of Congress shall separate to decide questions essential to that count? I maintain that it is not only illogical but manifestly in the face of the Constitution.

But, sir, I want to say to the Senate that for one I have not studied this subject as thoroughly as I should desire to do. It is a grave question, one of great moment, one that ought to be decided after due deliberation and long discussion. In my judgment, it ought to be postponed until the next Congress, and then I should be very glad if the Senator from Indiana would bring the question forward early in the session so that we might have ample time to examine it and debate it thoroughly, and pass a law without reference to party considerations one way or the other, and a law that would become as perpetual as the Constitution itself, and ward off any possible danger.

But, sir, I repeat what I said a moment ago, that I do not believe there is danger of revolution; I do not believe that revolution is imminent. I have too much confidence in the American people of all parties to believe that they are going to destroy their Government because Congress, in the exercise of a power confided to it, shall decide that one man or another has been elected President.

My main object in rising was to call attention to the point I have made that Congress must sit as a joint body in counting the electoral vote, and that their decisions made touching the counting of that electoral vote must be made as a joint body and in no other way.

Mr. HAMILTON, of Maryland. Mr. President, this proposition gives trouble in coming to a correct or even a satisfactory conclusion. My trouble is not in regard so much to this bill, or to the present joint rule, or to the amendment offered by the Sen-

ator from Vermont; but it goes up higher than that; it goes to the question of our constitutional power to pass any measure at all upon the subject. We all know, and I fully appreciate the fact, that there is danger, great danger, lurking in the existing joint rule, and no one can doubt but that there is equal danger in the proposition now under consideration; and therefore my earnest desire was that we might have a constitutional amendment in order to obviate the difficulties that we necessarily incur in attempting to legislate upon the subject at all. As soon as we begin to legislate we get into trouble: and the difficulty is that the moment we undertake to give a direction to the Constitution apart from its word and spirit and then enact laws or rules to suit, we hardly know where to begin and where to end. If we once begin to legislate on this subject, we hardly know where to stop. I care not what exigency brought into being the twenty-second joint rule; it is a most extraordinary rule for any exigency, and the bill now before us is not less extraordinary in its general import. It proposes to supply alleged defects or omissions in the Constitution, when it cannot cover the whole question nor apply the general and effective remedy.

The honorable Senator from Vermont has offered an amendment that in some respects is really more reasonable, and probably would tend to secure better results, than either the twenty-second joint rule or the bill now before the Senate; and yet when we come to look at that proposition, it is equally objectionable as a mode of safety from tumult or trouble, when we observe that the Constitution is so emphatic in respect to the power of both houses when in joint convention, in respect to the power of both houses when they meet in joint convention, as they are directed to do, and when in their presence the certificates shall be opened and *then* counted.

The only provision of the Constitution justifying any legislation upon this subject is this:

"The President of the Senate shall, in presence of the Senate and House of Representatives, open all the certificates, and the votes shall then be counted."

This the only ground for legislation of any kind. It is very narrow indeed.

I listened to the honorable Senator from Vermont with a great deal of interest. He undertook to expand the word "then" to a very great extent, and so as to cover very considerable legislation. I very readily recognized that he could technically, according to his reasoning, expand or extend that word to cover almost an infinity of time, a whole session of Congress for illustration. But even extending it as far as he would, to what results do we come under his proposition? What can we inquire into during all that extended time? The Constitution is emphatic that the votes shall be counted in the presence of both chambers. What does the amendment of the Senator from Vermont propose to do? To appoint a joint committee, and they are to inquire into something and then report. What is to be the reach of their power? Are they to inquire simply as to what arises on the face of the certificate only? How far is the inquiry to extend, whether it be made by a joint committee, or by the tellers, or by the two houses separated? Is it merely and purely to look at the certificates to see whether they are properly executed and have been duly attested? Is that the limit of the power, I ask, or can other questions, as to the appointment of electors, or in the case of the return of two or more votes of electors to ascertain the rightful set, and then considering this to go back and behind all for that purpose? There is no such authority given. There is nothing provided if there should be a contest as to electors. There is not an allusion to a case of the kind. The duty of the President of the Senate and of the two houses is as simple as words can make it. And can we upon these words ingraft a whole system for contest and ascertainment?

The framers of the Constitution evidently never contemplated any such things as have transpired within the last eight or ten years. They took it for granted that the States would appoint electors, and in whatever manner it suited each State; that they would cast their votes, and that that was the end of their functions and of the action of the State, and that as they were sovereign bodies in this respect they would see to it that this important act should not be left in doubt or in any manner wanting in legal validity, and that, each State so speaking, the only simple duty was to receive the certificates, open them, and count the votes as given by the electors. The States were given the power to appoint the electors in any way they pleased, and it was supposed that the power would be so exercised and so conclusively exercised that all that in any way could follow would be the simple count in the presence of both houses. It was contemplated by the Constitution that this most important act was final upon the part of the State and placed by its own action beyond cavil or controversy.

What is contemplated in the inquiry proposed by referring the electoral votes either to a committee appointed under the amendment of the Senator from Vermont or to the tellers to be examined in the presence of both houses or by the houses separately in case objection is made; what have we to be examined? Can we go back and inquire into the manner in which the electoral votes were cast? Can we go back and inquire into the manner in which the electors were appointed? Can we go back to ascertain whether they were legally appointed or elected by the people? Into what inquiry in either aspect of the case are we allowed to go? I think it must be conceded that if

under this clause of the Constitution when the two houses are assembled together for that purpose the votes must then and there be counted, it was intended that there should be no inquiry. If, however, we are permitted to inquire, then how is it to be done? In separate houses or as a joint body? We meet as a joint body. The votes can only be counted in our presence. Shall we infer therefore that we have in separate bodies the right to investigate and reject? Is each house to examine into the manner in which the electors were appointed or how they discharged their duty? Is each house to investigate separately as to whether electors have been appointed or how appointed, or which are the rightful ones in cases of two or more sets of electors? Can this all be done as the Constitution now exists? Can it be done under the phrase "the votes shall then be counted?" Can each house, acting separately, under that phrase enter into an investigation, summon witnesses, and determine controversies about votes? Can this be done in either a joint or in separate assembly or before the committee that is to be appointed under the amendment of the Senator from Vermont? No, sir. I think not; the power is not broad enough. In fact we are but the witnesses of an act. We are summoned to see the certificates opened and the votes then to be counted. As to the latter we may be a ministerial body, in the performance of a single duty, the counting of the votes as the certificates so opened may disclose. Beyond that our duty and our power cease.

"The votes shall then be counted." I do not care how wide, how expanded, and how extended you make the word "then," you cannot have a contest in its real sense before you under that word. You are limited to one simple inquiry, and that is as to what the certificate may show when it is opened; if there be no votes shown as cast by the certificate, that is the end of it, and the vote of the State is lost. We cannot go back; there can be nothing behind it; if there be error that error remains, not to be corrected. In those simple words there is no time for nor chance for correction. If there be two sets of returns, one must be right and the other wrong, or both must be wrong; both cannot be right, for with that you would have too many electors. But how inquire, how contest, how investigate? If at all, it ought to be done in joint convention or assembly, for the count is a high act and to be done in the presence of a united body. It would be anomalous to count a result in two separate bodies, it being an act that cannot admit of separation. But the prominent fact is that the framers never contemplated that there could be a contest, that there could be duplicate returns, and accordingly made no provision for it.

In the bill now before us you allow either house to except to the count of electoral votes where there be two returns made from a State. What are you to do then? The two houses are to separate and to determine the question, and in case they disagree the vote shall not be counted. Have you that power? I think not. But what are you to do in such a case? Vote blindly to receive or reject? If not, what kind of an examination can you have? You have two sets of electoral votes, two returns laid before you, each set apparently duly certified. Are you then to inquire into the fact which set of electors are entitled to cast the votes? And this involves the inquiry further, which set was appointed; and, if elected by the people, which did receive a majority of the votes of the people? Take the case of Louisiana, where two sets of electors were returned at the last election; how is it to be determined? It was not then, nor can you frame a law under this language of the Constitution that can at all be satisfactory. Can there be a contest? Is there any provision for it? When these two sets of electoral votes are before us, can we summon witnesses or have depositions taken for the purpose of showing which set of electors received a majority of the votes cast in the State, or whether they were properly appointed? That would not be *then* upon that occasion counting the votes. I do not think the language of the Constitution covers such a contested election, and yet the anomaly is this, that though we have not the right thus to examine into the fact whether certain electors were really and in fact elected by the people or not, we are required by this bill to separate and determine that question and all other questions that may arise as to such votes or certificates. And a difference is to settle the question as to the vote of the State—two separate tribunals deciding with equal power upon a fact they are required, if required at all, to see solved in joint meeting.

I differ also with the Senator from Vermont in the idea that the district court of the United States can determine upon a *quæra ranto* who is President of the United States. I deny it. True we are limited in the count of electoral votes, our power being very narrow, as I have before said; yet when the votes are counted in the presence of both houses as directed by the Constitution, it is conclusive upon the fact and no earthly tribunal can review this ascertainment. Whenever it is ascertained and declared in the presence of both branches of Congress that such and such a person has received a majority of the electoral votes, that ends the subject so far as all judicial tribunals in this land are concerned. Our action here, though thus limited in our powers, though thus not permitted to go into a contest and to inquire whether the electors have been appointed properly or improperly, whether they have been elected by the people or not, if counted, is conclusive upon all other tribunals. It is the decision of a tribunal

specially appointed to see the count made. The count is all there that is to be made but that being made, no tribunal can go behind it.

Adopt the principle here contended for and there is danger that you will make this an arena for all kinds of election tumults and disturbances. We cannot attend to any such thing. It is evident from this limited power conferred by the Constitution that it was never contemplated by the framers of it that there would be any trouble, because with the appointment of the electors the duties of the States ended and ours was only to count their votes. The framers never apprehended the troubles which have been upon us for the past eight or ten years. We never had any before. But, this upon us, would it not be well for us to provide in time by a constitutional amendment for the troubles that we will in vain attempt to avert by legislation?

I do not see then the necessity for this legislation. I know that if any are disposed to give trouble now, they can make it under the twenty-second joint rule and so they can under this bill. If there is a determination to revolutionize, if there is a determination to overthrow and subvert the will of the people by revolutionary or arbitrary action, it can be done under the present joint rule or under the bill proposed by the Senator from Indiana. My trouble lies not with the details of the rule or of the bill, but in the fact that neither of them is authorized by the Constitution of the United States and neither of them provides adequate safety. My hope is that the Senate will recommit this subject, pass it by for the present in the hope that as things begin to look now the people of the country are not ready for disturbances and that right measurably would be done at the next presidential election, and that in the mean time we could do by a constitutional amendment what would obviate the difficulties which now surround the subject and that would so plainly indicate the manner in which the great question of the election of a President of the United States should be determined so that there could be no future trouble in having it settled in a fixed manner, not to be tampered with by legislation and that would be acceptable to the people.

That was my desire; and therefore the more I read of this bill, the more I read the twenty-second joint rule, the more concern it gives me, because I see the utter want of constitutional power to determine the election of President of the United States by any rules or laws that we may make outside of the counting of the certificates as they are handed by the Vice-President to the tellers and counted in the presence of both houses of Congress. From the year 1793 down to 1865 the Vice-President always discharged that duty unexceptionably. He handed the certificates to the tellers and the seals were broken and the contents proclaimed in the presence of both houses and the votes counted. All other questions, save only the count, were pretermitted. In fact and in truth, when we come to consider the matter, that was infinitely preferable to the danger of undertaking to exclude the votes of States by raising objection probably to some technical defects that might appear on the face of the papers, and then, by separate action, exclude the count.

In fact, when you look at the twenty-second joint rule and when you look at the bill proposed by the Senator from Indiana, and also at the amendment proposed by the Senator from Vermont, you see at last that they all are confined to an abstract, dry legal question whether the returns upon their face are right, for there is no machinery provided for any kind of an investigation beyond, no details in the bill or amendment by which truth as to any fact may be ascertained, but everything is left to the papers, or certificates, and, it may be, to our own personal knowledge of events, either historical or personal. Instead, therefore, of making trouble by indifferent and inefficient legislation, we should direct our thoughts to an amendment of the Constitution by which ample provision could be made for manifest omissions—rather say not omissions, but for the manifest changes of times which have taken place since the adoption of the Constitution and the present.

MR. SAULSBURY. Mr. President, the bill under consideration proposes "to provide for and regulate the mode of counting votes for President and Vice-President, and the decision of questions arising thereon." In my opinion the Constitution of the United States provides the only mode for counting those votes, and I have very grave doubt as to whether any law enacted on that subject can have any force, especially if it conflict at all with what has been the practice under the constitutional provision.

As between the twenty-second joint rule and the bill now before the Senate, I am not satisfied that the bill under discussion is any better in its effect or will prove of more advantage than the twenty-second joint rule; but one question with me is as to the power of Congress to determine anything about this matter. The Constitution has fixed how the votes shall be counted. The two houses are to meet in joint convention and the President of the Senate, in the presence of the two houses, is to open, according to the constitutional requirement, the votes of the several States, which are then to be counted. I concur in the view expressed by the Senator from Maryland [Mr. Hamilton] that it must be done at that time and that the result then arrived at and then announced determines this whole question.

I am not satisfied, in the first place, of the power of Congress to enact any valid law

on the subject, and I think the best thing that could now be done would be to repeal the twenty-second joint rule and leave the question just where the framers of the Constitution left it. I do not apprehend that we should have much difficulty under the constitutional provision; we have lived under it up to the present time; we never did have any difficulty. Even in 1861, when, perhaps, there was as much excitement in the country as there ever had been over the result of any presidential election, with a Vice-President in the chair who was himself a candidate for the Presidency, the vote for Mr. Lincoln was counted and the country acquiesced in the fairness of the result. I apprehend that if we repeal the twenty-second joint rule and leave this whole question just where the Constitution leaves it, we shall never have any difficulty in this country in counting and ascertaining the result of a presidential election.

For this reason I wish I could induce my friend from Indiana to let this bill go over for the present, or to amend the present bill so as simply to repeal the twenty-second joint rule. I would concur in that. At present I see no safety under the present bill or under the joint rule, and therefore I think it better to leave the question where the Constitution left it.

MR. MERRIMON. Mr. President, I wish to add a few words to what I said a while ago touching the manner in which an election for President and Vice-President of the United States may be contested. For one I do not believe that Congress or any national authority has any right to contest the election of President and Vice-President. The American people do not elect the President as a mass. They do not elect the President as the American people. They elect the President as the people of the several States and exercising their rights as citizens of the several States. The manner of the election of President is one of those provisions in the Constitution which recognize, and not only recognize, but provide for and uphold, the autonomy of the States. The people of the States as citizens of those States, and as making up the people of the States, elect a President. The Constitution provides in these words:

"Each State shall appoint, in such manner as the legislature thereof shall direct, a number of electors equal to the whole number of Senators and Representatives to which the State may be entitled in the Congress; but no Senator or Representative, or person holding an office of trust or profit under the United States, shall be appointed an elector."

Thus it appears that the people do not vote for President directly, they vote to elect a certain number of electors who assemble at a time and place fixed by law to elect the President; and therefore if the people of a State should decline to vote for President there is no power to compel them to do it. The Federal Government is not so much interested in having a State vote as the State itself is. If a State shall see fit to decline to vote for President at all, there is no power to compel the people of that State to vote for President, nor is there any power conferred on Congress to compel the people of the State to have an election for President at all. It is a matter within the control of the people of the State through their legislature. The legislature may provide that the people may elect a certain number of electors to vote for President and Vice-President. The legislature may provide that they themselves shall elect the electors. They may provide that the governor may appoint them. They may provide that the supreme court may appoint or the chief-justice may appoint them, or they may provide so many appointers to appoint electors to cast the vote of the State for President and Vice-President. The whole matter is within the jurisdiction of the States, each for itself.

It has been asked, suppose there are great frauds practiced in the States in an election of President and Vice-President, as is sometimes the case in that election as in other elections. There is no power conferred in the Constitution on the national authority to contest the election in that behalf. The authority remains in the State to provide for that. It is true that in the history of this Government it does not appear that any State ever has provided for a contest of the election of electors of President and Vice-President; but it does not follow, therefore, that the State might not have done it. A good many powers are conferred on various authorities by the Constitution that have never yet been exercised, and I do not think I go too far when I say that the American people and the Congress of the Union and the authorities of the Union have to learn a good many things yet about the Constitution. It is an instrument that is not yet fully comprehended by the most learned men in the land.

I maintain that it is perfectly competent under the Constitution for the legislatures of the several States to provide for contesting the election for President and Vice-President, in order to ascertain whether the people are directed to elect, whether A B, C D, and E F were elected electors by the people according to law. They might provide that the legislature should contest it and that the contest should be decided by the legislatures of the several States. They might provide that the Supreme Court should decide it. They might provide that a commission created by a law passed by the legislature should determine whether the election was fairly held, and who were elected electors. So if the legislature elected, they might by law provide for ascertaining whether the electors were fairly elected by the legislature. So if the leg-

islature should confer power on the governor to appoint, there might be a tribunal constituted to contest the matter and see whether or not the governor had fairly appointed so many men to be electors to vote for President and Vice-President.

It is a matter with which the Federal authorities, I repeat, have no concern whatsoever. It is a matter with the State, and when it is determined by the State, Congress cannot inquire into the election any more than Congress, when the people of a State have voted for governor, and the proper authorities have decided that he was elected governor, can go on and determine that question again. I suppose no one will seriously pretend that if an election is held in New York, and the proper authorities of New York ascertain that A B has been elected, Congress may inquire into that matter and ascertain whether the election was conducted fairly, whether he was in fact elected. That is a matter that pertains to the State, and of which the State authorities alone have jurisdiction, and of which the Federal authority has no jurisdiction whatever.

So in the election of President and Vice-President the election, so far as the State is concerned, is exclusively within the jurisdiction of the several States. I admit that the States have not heretofore provided a tribunal for such contests, but that does not prove that they might not have so provided. I believe they could have so provided. I believe that it is important that they should so provide, that every State should pass a statute regulating the manner and providing a tribunal for contesting the election of electors of President and Vice-President, just as they have a tribunal before which to contest the election of a governor or any other State officer; and therefore that difficulty is out of the way.

The only question that ever can arise before Congress must arise before it in joint session, and the Congress in joint session, in exercising the powers conferred upon it as a joint body, can only determine whether a vote that is sent to the President of the Senate is the vote that was ascertained by the authorities of the State, and when that is ascertained that is the end of the controversy. If the certificate of election was so informal that it did not show that there was an election, Congress would have the power to say "it does not appear that any election was held in North Carolina," but Congress has no power to say that the election held for electors of President and Vice-President in North Carolina was fraudulent, that democratic electors ought to have been elected whereas the returns show that republican electors were elected, or *vice versa*. When the State authorities have determined the matter, there is the end of the controversy and Congress cannot inquire into it. The election of electors of President by the people of the State or by the authorities of the State as provided by the Constitution is a matter of greater moment to the State than to the Federal Government. It is a matter with them. If they choose to elect, they have the privilege and the right to do it. If they choose to abstain from voting, there is no Federal authority or power that can compel them to vote.

The bill was reported to the Senate as amended, and the amendments were concurred in.

Mr. EDMUNDS. I feel it to be my duty to move to amend the bill now by striking out all after the enacting clause and inserting what I send to the Chair.

The Secretary read the words proposed to be inserted, as follows:

"That within not more than ten and not less than three days next prior to the last Monday in January next following any election for President or Vice-President, the Senate shall appoint four Senators and the House of Representatives shall appoint four members, and such eight persons shall constitute a committee upon elections for President and Vice-President. A majority of said committee shall be a quorum thereof, and the concurrence of such majority shall be necessary in any action thereof. Each member of such committee shall, before he enters upon the duties by this act imposed on such committee, take and subscribe the following oath:

"I, ———, do solemnly swear that I will faithfully and impartially perform all the duties imposed upon me by the act entitled 'An act to provide for and regulate the counting of votes for President and Vice-President:' so help me God."

"And such oaths of Senators shall be filed in the archives of the Senate, and of members of the House of Representatives in the archives of the House."

"SEC. 2. That Congress shall be in session on the last Monday in January next after any election for President and Vice-President shall have occurred; and the Senate and House of Representatives shall meet in the hall of the House of Representatives, at one o'clock, afternoon of that day, and from day to day, (Sundays excepted,) at the same hour, until the duties required by this act shall have been performed; the President of the Senate shall preside, and whenever the Senate shall withdraw, from time to time, the Speaker of the House shall resume his chair; having so met, the President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates and papers purporting to be certificates of votes given at the last preceding election for President and for Vice-President, respectively, and which shall have come to his possession; and the votes shall then be counted in the manner and with effect hereinafter provided.

"SEC. 3. That when the certificates of votes for President of the United States shall

be opened by the President of the Senate, in the presence of the Senate and House of Representatives, as provided in the Constitution and by this act, the same shall, with the votes therein contained or stated, be then and there delivered to the committee provided for in section 1 of this act; which committee shall forthwith proceed to examine the same, and shall count the votes which shall appear to have been legally given and duly certified and returned. And said committee shall report in writing as soon as may be to said meeting their proceedings, the state of the votes, and what persons, if any, have been pursuant to law elected President and Vice-President respectively; and if, on such report, any question shall be made by any Senator or member of the House of Representatives touching the legal validity of any vote or votes so delivered to said committee, or touching any action of said committee, the Senate shall withdraw, and each house shall proceed to consider the question; and if the two houses concur in the decision thereof, their judgment shall stand, and the report of such committee shall be modified accordingly; but if they do not so concur, the report of such committee shall stand; and if such committee shall be equally divided in opinion, the vote in question shall be counted unless both houses concur in rejecting the same. And the persons so declared elected shall respectively be deemed entitled to exercise the functions of their offices.

"SEC. 4. That section 142 of the Revised Statutes of the United States and all provisions inconsistent with this act are hereby repealed."

Mr. EDMUNDS. I do not wish to take the time of the Senate to explain this amendment any more than I have already done, which only, as I conceive it, furnishes an additional security and safeguard in the inspection and scrutinizing of the papers coming from States purporting to be votes; and when it comes to be a disputed question, it leaves it substantially where the bill of the Senator from Indiana leaves it.

Mr. MORTON. I do not intend to discuss this amendment. I have already said that I think this amendment is as dangerous and does embrace most of the dangers of the present twenty-second joint rule. I think it is unsafe in every respect, and I know of no advantage to be derived from it. It would be fatal to the bill if it should be adopted.

The PRESIDING OFFICER, (Mr. Scott in the chair.) The question is on the amendment of the Senator from Vermont.

The amendment was rejected.

Mr. STOCKTON. Mr. President, I did not intend to say a word upon this question, and I shall not detain the Senate at this time of the evening longer than a few moments.

I have listened attentively to this debate, and the conclusion of my mind is that it never was intended that the two houses of Congress in separate session in their own chambers should legislate on this subject at all. The power given by the Constitution of the United States as to counting the electoral votes is for the Vice-President to count the votes in the presence of the two bodies. The power commences there; it commences at no moment before they are so assembled; and I have heard nothing in this debate from the commencement to the end of it which answers that objection. You will recollect, Mr. President, that that clause of the Constitution which provides for the election of Senators requires that they shall be chosen by the legislatures of the States. Under that clause, as is well known, various manners of elections sprang up. Some legislatures elected in separate session of the two houses, and failing to agree went into joint session, as they do now, voting as they do *per capita* under the existing law of Congress. Congress had the right to provide a manner, but at that time had not provided. Other legislatures elected in joint meeting at once. The objection was made that the joint meeting was not the legislature, that it was not the power that legislated, that passed bills. The decisions and precedents were otherwise and have been otherwise. They did not meet in that capacity to pass laws; they met under the Constitution of the United States as a joint body for the purpose of having an election; and they claimed the right and exercised it, whenever they met in joint meeting, to make the rules that indicated the manner of their making their choice.

It seems to me that our fathers never did contemplate that this power of deciding upon the legality of a vote should ever come before Congress at all, either in its legislative capacity, sitting each house in its own chamber as a separate body, or when sitting together for the purpose of counting the votes. I think it never did occur to them that such a question could or ever would come up. It may be that it is a case that ought to be provided for by constitutional amendment, but that is not the question with us now. The question is whether we shall by legislation, sitting in different chambers long before the moment comes when our power begins, make a law which will control the action of that body to whom, and to whom alone, the Constitution of the United States has committed that power. It may be that it is a mere ministerial power. I have no doubt it was meant to be that and nothing else by the Constitution and those who framed it. But whether it be a ministerial power, or whether it goes further and includes the right to decide upon the legality of the votes, the body can get no right from your legislation. Will any Senator insist that any more power than

the Constitution has given to these two bodies sitting under that clause of the Constitution can be given to them by legislation by each house in separate bodies? No Senator will insist on that. If so, why should you act in reference to the ease of how they shall decide when two parties from the same State present different certificates of election? Why should you provide for that if you can give them no more power than they have; and certainly it must be so?

I really think, without the slightest desire to re-open this debate at this moment that we are acting unwisely in attempting to pass any law on this subject at this time of night and at this stage of the session. I think it will be found that so far from doing away with the difficulty which undoubtedly exists, which all admit exists, we are getting ourselves in more trouble and undertaking to do what we have not power to do. If a constitutional amendment is not necessary, then those two bodies there assembled have the power to regulate the way they shall count the vote, and if they have not the power it certainly does not exist in these two bodies sitting before the Congress meets, before the body to whom the Constitution of the United States has committed the power to count the next vote of presidential electors has convened. At a session before they are elected, you are here making laws to prevent them from doing that which was committed to them alone, and not to you, by the Constitution of the United States.

I do not know that I should have said a word on this subject if it had not struck me that the amendment offered a few moments ago by the Senator from Vermont was a better bill, if a bill must be passed, than the bill we have been discussing which has been offered by the Senator from Indiana. I think the discussion has shown some of the difficulties of the case; and some of them possibly are avoided (not those I have mentioned, but some others that have been spoken of by other gentlemen) by the amendment of the Senator from Vermont; and yet that amendment comes in at this moment. It is a question of too much importance to be acted upon at such a moment as this without consideration, without time to examine even whether the amendment is better than the original bill, and yet the question is put upon the amendment and is voted down, and now we are on the eve of passing the bill when many gentlemen really do not know what was the precise effect of the amendment of the Senator from Vermont. I think it is unwise. While I perceive that the majority of this body mean to pass this bill to-night, I simply desire to enter my protest against a subject of so much importance being legislated upon in this way. I certainly for one—I know there are others—most earnestly desire an opportunity of reading carefully the amendment offered by the Senator from Vermont. I think that amendment would be adopted in preference to the bill of the Senator from Indiana if we had an opportunity of examining it; but it is voted down without a division, simply because not one-half the Senate heard it read, and I presume not many of the Senators knew what it did contain nor the advantages it might possess over the bill of the Senator from Indiana.

I need not say that I do not look upon this question as a party question at all, and I do not suppose any gentleman can. I have therefore refrained from speaking of it because I wished to listen to those who were wiser than myself, who have had more experience. I have listened carefully and attentively, and have simply made up my mind on a consideration of the whole matter. I am driven, as I said before, to the conclusion that it is not a subject for our legislation at all.

MR. EATON. Mr. President, I wish to call the attention of the Senator from Indiana to the close of the bill:

“Such joint meeting shall not be dissolved until the electoral votes are all counted and the result declared; and no recess shall be taken unless a question shall have arisen in regard to counting any such votes, in which case it shall be competent for either house, acting separately, in the manner hereinbefore provided, to direct a recess not beyond the next day at the hour of ten o'clock in the forenoon.”

I desire to ask the honorable Senator if the meaning of the bill is that the second day closes the action of the two houses upon this subject necessarily.

MR. MORTON. Not necessarily.

MR. EATON. Then I think the bill is very imperfect if in the opinion of the framer and manager of the bill the session does not close with the ordinary day; but there should be a time when it should close, so as not to run on until the 4th of March. There should be some definite time in the bill. I am not prepared to offer an amendment, for I hardly knew what the opinion of the honorable Senator was.

MR. MORTON. I hardly think any amendment is necessary. The Senator will observe that in the first section the time of counting the votes is fixed on the last Wednesday in January, which is two weeks earlier than is now provided by law. That was intended to give plenty of time in case there should be questions of difficulty arising, in order to give time to consider and have the whole matter determined before the 4th of March.

MR. EATON. My impression is that there should be something definite as to this point, if the bill is to pass. I am not prepared to offer an amendment at this time. I am opposed to the passage of the bill; and I shall occupy the time of the Senate but for a few moments in stating why.

I agree in brief with what was said by my distinguished friend from New Jersey, [Mr. Stockton.] It is not in the power of this Congress to pass this law. It is a void law if passed. For three-quarters of a century the good people who represented their fellow-citizens here were satisfied with the Constitution of the United States; and let me read the Constitution to see whether there is any necessity for the bill. It is well to read it. It will not harm anybody to hear it. Article 12 of the amendments provides:

"The electors shall meet in their respective States, and vote by ballot for President and Vice-President, one of whom, at least, shall not be an inhabitant of the same State with themselves; they shall name in their ballots the person voted for as President, and in distinct ballots the person voted for as Vice-President, and they shall make distinct lists of all persons voted for as President, and of all persons voted for as Vice-President, and of the number of votes for each, which lists they shall sign and certify, and transmit sealed to the seat of the Government of the United States, directed to the President of the Senate. The President of the Senate shall, in presence of the Senate and House of Representatives, open all the certificates, and the votes shall then be counted"—

I have no trouble about whom the count is to be by, though there has seemed to be some little trouble on that subject—

"the person having the greatest number of votes for President shall be the President, if such number be a majority of the whole number of electors appointed; and if no person have such majority, then from the persons having the highest numbers not exceeding three on the list of those voted for as President, the House of Representatives shall choose immediately"—

That means the next day—

"by ballot, the President. But in choosing the President, the votes shall be taken by States, the representation from each State having one vote."

That is all I care to read.

Mr. President, I said that I did not propose to go into a lengthy discussion of this question; but I say in advance one thing, not for the purpose of casting any reflection upon any honorable member of this Senate—far be that from me—that I look upon any bill for a public act of this character, that is brought forward in this chamber without anybody to say anything in its favor, as suspicious, to say the least. There has been no discussion, not a word, not a breath in favor of the principles contained in this bill. And has it come to this at last, that a bill is to be passed in these last hours of the session, probably unconstitutional, by the mere force of numbers, without one word of argument in its favor? I say, Mr. President, it is suspicious. For seventy-five years the people of this country acted under the Constitution of the United States. They can now. The court is here. I defy any Senator on this floor to show any state of facts where under the Constitution, without any bill for a public act, without any rule of the two houses, we cannot go on and perform all the duties that are devolved upon us in this behalf. Some Senators say that it is impossible that it can be done. Let us hear why; give a reason for it, and do not simply rely on a large vote to pass a measure of this character. I say it is suspicious.

Again, it was alleged with great power by my distinguished friend from Delaware [Mr. Bayard] that if there was any necessity for a bill of this character it should be passed at the next session of Congress; it should not be a party measure. I appeal to every Senator on the other side of the Chamber on that point. They, like I—the mantle of charity covers us all—desire proper action, not improper. Can it be had at any better time than when this Senate is under the control of the republicans—if terms expressing party names are to be used here? I have not been in the habit of using them in legislative assemblies; it has been forbidden by the rules of such assemblies where I have served, and it ought to be here—where and when the dominant party on this floor will be in the majority for the coming two years; while on the other floor, at the other end of the Capitol, the other party, the party to which I am attached, will be in the majority? If there be any necessity for a rule, which I deny, is there not patriotism enough in both parties to get such a rule as is proper and just? There is no President to be elected next January. Two years must elapse. Why, then, in hot haste, without proper consideration, pass this measure of doubtful constitutionality at the best? Will some gentleman tell us why? Give us the necessity for it. Let us know why you do it; why your appropriation bills, your tax bills, your other bills of importance lie upon the floor or on or under your table, and you harp away upon a measure which cannot be of use for two years. It is suspicious at least.

And why is this a bill for a public act, I beg to ask? Why not amend your rule if your rule is not right? Why a bill for a public act that cannot be repealed until you have a President and a Senate and a House of Representatives to agree to repeal it? Where is the necessity for that? I say, Mr. President, that this bill ought not to be passed in this manner. I should like some honorable Senator on the other side of the chamber to give a reason for it. Is there such a necessity for it, that everything else must go by the board, that a bill to pay old men eighty years of age must be put on

the table or refused to be taken up, men that will die before this bill can be of any service, whether it be proper or improper? O, no, this bill must be taken up; you will not pass anything that is necessary, that the honor of the country demands should be passed, but you will prefer and pass a bill for which there is no earthly use for years and that without a single reason having been given for it. I do not like to characterize it as a party measure. I do not like to say either that any honorable Senator on this floor has given birth to a measure of that character or that any other honorable Senator is supporting the measure because it is a mere partisan measure. I simply say, and no man will deny it, that there is no use for it for years. If you pass it now, you pass it with that imputation hanging over you and you cannot avoid it. There is no use for it. If the election was to be held next January, if the election was to be held in a month or two months, and gentlemen felt that there was a necessity for a bill of this character, then I agree it would be their absolute duty to pass it; but no such necessity exists. It is not here.

Mr. President, not to take up the time of the Senate on this subject, as I said I should not, I simply wish to protest against legislation of this character. It is not consonant to the spirit of the Constitution of the United States which I am here to maintain and defend.

I move the indefinite postponement of the bill now under consideration.

THE PRESIDING OFFICER. The Senator from Connecticut moves that the bill be indefinitely postponed.

Mr. MERRIMON. I ask for the yeas and nays on that motion.

The yeas and nays were ordered; and the Secretary proceeded to call the roll.

Mr. JOHNSTON, (when his name was called.) On this question I am paired with the Senator from South Carolina, [Mr. Robertson.] If present he would vote "nay," and I should vote "yea."

Mr. NORWOOD, (when his name was called.) On this question I am paired with the Senator from Maine, [Mr. Morrill.] If present he would vote "nay," and I should vote "yea."

The call of the roll was concluded.

Mr. GORDON, (after first voting in the affirmative.) Upon this question the Senator from Missouri [Mr. Schurz] is paired with myself, and I voted inadvertently. I therefore desire to have my name stricken from the roll. If he were present he would vote "yea," and I should vote "nay."

THE PRESIDING OFFICER. The Senator's vote will be withdrawn.

Mr. STEVENSON. On this question I am paired with the Senator from Ohio, [Mr. Sherman.] If he were here he would vote "nay," and I should vote "yea."

Mr. CONKLING. I am opposed to the bill as it now stands, and although it is a matter of little consequence on this motion which way I vote, I will vote "yea," the motion being to postpone indefinitely, as I understand.

Mr. HAMILTON, of Maryland. On this bill I am paired with the Senator from Pennsylvania, [Mr. Cameron.]

Mr. KELLY. I am requested to state that the Senator from Missouri [Mr. Bogy] is paired with the Senator from Iowa, [Mr. Allison.] Mr. Bogy would vote "yea" and Mr. Allison "nay."

Mr. TIPTON. The Senator from Rhode Island [Mr. Anthony] left the chamber under the impression that I was paired with him on this subject, and I will not therefore vote. I am paired with him on another question if it comes up, but as he was of the impression that the pair extended to this question, I desire to be excused from voting.

The result was announced—yeas 14, nays 31; as follows:

YEAS—Messrs. Bayard, Carpenter, Conkling, Cooper, Davis, Dennis, Eaton, Goldthwaite, Hager, Kelly, McCreery, Merrimon, Ransom, and Stockton—14.

NAYS—Messrs. Boreman, Boutwell, Chandler, Clayton, Conover, Cragin, Dorsey, Edmunds, Ferry of Michigan, Flanagan, Frelinghuysen, Hamlin, Harvey, Hitchcock, Ingalls, Jones, Logan, Mitchell, Morrill of Vermont, Morton, Oglesby, Patterson, Pease, Sargent, Scott, Spencer, Sprague, Stewart, Washburn, West, and Windom—31.

ABSENT—Messrs. Alcorn, Allison, Anthony, Bogy, Brownlow, Cameron, Fenton, Ferry of Connecticut, Gilbert, Gordon, Hamilton of Maryland, Hamilton of Texas, Howe, Johnston, Lewis, Morrill of Maine, Norwood, Pratt, Ramsey, Robertson, Saulsbury, Schurz, Sherman, Stevenson, Thurman, Tipton, Wadleigh, and Wright—25.

So the motion was not agreed to.

The bill was ordered to be engrossed for a third reading, and read the third time.

THE PRESIDING OFFICER. Shall the bill pass?

Messrs. Bayard, Conkling, and Sprague demanded the yeas and nays; and they were ordered.

Mr. CONKLING. I have but a single word to say on this bill. I will not at this hour and at this stage of the debate undertake to go at length into its merits. The twenty-second joint rule as it stands is in my judgment objectionable. Perhaps I might say something more; I think I may say it is a dangerous provision and questionable in several respects. It is proposed to obviate it by the adoption of a statute which I

think more objectionable, more likely to invite difficulty, more likely to forecast disturbance and trouble in the counting of the presidential vote. I said in the beginning that I would not inflict on the Senate a discussion of the subject or a statement of my reasons, but having looked at the bill as carefully as I can, that is my judgment, and I shall therefore vote against it.

Mr. MORTON. The Senator from Connecticut [Mr. Eaton] complained somewhat that there had been nothing said in favor of this bill. I have abstained from argument because I wanted a vote. The questions involved in this bill have been discussed on this floor for several years past, and I supposed the Senate was agreed on the question that the twenty-second joint rule ought to be repealed and that there ought to be some provision made by law to prevent the imminent danger of a collision at the counting of the presidential vote. This rule was adopted in 1865, under which as it now stands a single objection, however trifling in its character, will cause the two houses to separate and to vote separately upon that objection, and unless both houses agree in overruling the objection the vote is lost.

There is nothing partisan in this bill. It is as fair for one party as it is for another, and I regret that our democratic friends have been found voting unanimously for the indefinite postponement of this bill, and I presume they will unanimously vote against the bill on its final passage. There is nothing partisan in it; and if I were disposed to seek for motives of a party character, I might turn around and say in reply to my friend from Connecticut that as the next House of Representatives will be democratic, and as it is in the power under the present rule of either house to throw the election into the House of Representatives by sustaining objections, therefore there was a strong democratic interest in preserving this rule as it is; for if this rule shall stand as it is, when we come to count the presidential vote in February, 1877, and objection is made to the vote of any State, however trifling in its character, unless that objection is overruled by both houses, the democratic House concurring in overruling it, the election will be thrown into the House of Representatives and the democratic party will then elect the President. If I were disposed to hunt for party motives, I might find them in the existence of that fact. I might therefore account for a solid democratic vote against this bill; but I have attributed no personal or partisan motives to anybody. I had earnestly hoped that there would be no party feeling about this bill. The Senator from Ohio [Mr. Thurman] who has made an argument in favor of this bill, and I believe will vote for it, is certainly governed by no party considerations in the matter. He has risen above them, and he for one is not willing to have that temptation left to the next House of Representatives, for a great temptation would be the power by sustaining an objection to throw the election of President into their own body.

Mr. GORDON. Will the Senator allow me to ask him a question?

Mr. MORTON. Yes, sir.

Mr. GORDON. Does the Senator suppose that the temptation would be any greater with the next House than it has been with preceding houses?

Mr. MORTON. I will say to my friend that the two houses have both been of the same political character since the adoption of this rule. This rule was adopted in 1865. Up to this time the country had not been exposed to the danger of having a House of a different political complexion from that of the Senate. If the twenty-second joint rule was abolished, it would throw it back simply to what it was before that time, and the danger of collision before that time was imminent. If any Senator will take the trouble to read the debate in the two houses that occurred immediately after counting the vote for President and Vice-President in 1857, he will understand the narrow escape that the country made at that time. That was before there was any rule on the subject. When the vote was counted for Mr. Buchanan, objection was made to counting the vote of Wisconsin. The electoral vote had not been cast at the time prescribed by the act of Congress. The Constitution required all the States to vote on the same day. The framers of the Constitution thought that was a very important provision. The act of Congress fixed that time, the first Wednesday in December. The electors of Wisconsin did not meet on that day, but met on a day subsequent. It was objected that that vote ought not to be counted because it was not cast in conformity to the act of Congress. If the election had turned upon the vote of Wisconsin, as was said in the debate that took place both in the Senate and in the House the very day afterward, perhaps it would have resulted in an armed conflict and a revolution, but it was very fortunate that at that time Mr. Buchanan was elected without regard to the vote of Wisconsin. Mr. Mason, the President of the Senate, said that as the matter stood, any motion to reject the vote of Wisconsin was not in order. No motion was in order, he said, but to count the vote. The vote of Wisconsin was counted. He then marched out of the House of Representatives and the Senate followed him, and this very interesting debate took place immediately afterward; and it seemed to be agreed on all hands, in both houses, that there ought to be some rule adopted by which the great danger would be avoided when the election might turn upon the vote of some State that was in that condition. Therefore, although no collision has taken place up to this time, and although no trouble has come, yet we

have seen in the election of 1863, we have seen in the election of 1872, that these things may happen, and it is the part of prudence to provide an act by which they shall be guarded against. This bill has been well considered; there is no advantage in it to any party; I believe it is fair; and I have therefore brought it before the Senate, and hope that it will be passed to secure the future peace and safety of our country.

Mr. EDMUNDS. As I feel obliged to vote against this bill, I wish to say a single word in justification of what I do, and I am not specially afraid of being found voting with the democrats if they vote this way; I do not know that they will. Every man must act upon his own conviction of duty.

To repeal the twenty-second joint rule is one thing which I may be and I think I am in favor of, because it is open to objection. To set up another rule, which is just as bad or worse, which to my mind this bill does, is quite a different thing. If this were simply a proposition to repeal the twenty-second joint rule, I think as at present advised I should vote for it. But it is a proposition not only to do that, but to set up another rule in its stead which, in my opinion, opens a broader ground for collision, as my honorable friend from Indiana calls it, a broader ground for difficulty and doubt than the present rule. It is in effect to say that any spurious or revolutionary vote which may be brought forward from people pretending to be the electors of a State shall be counted, unless both houses agree that it shall not. It is not brought forward for decision, but it stands because it comes as the authoritative voice of the people until the two houses concur in saying it is not a vote. The twenty-second joint rule is not open to that objection. That requires consideration. So it appears to me that the rule provided by this bill is more dangerous to the public peace than the twenty-second joint rule. But as I say it is not a choice between these two, because we can omit to pass this bill and still repeal the twenty-second joint rule.

When the electors meet on the first Wednesday in December in each of the States, the Constitution entitles us to know, entitles everybody to know, that the persons who thus meet are the electors. It entitles the people of the United States to know in some way under a government of law that what those who claim to be electors send to the capital is the vote of the State lawfully and constitutionally given. Now, the Senator's bill says that whatever comes from that State purporting to be this thing shall decide who shall be President, unless the two houses concur in saying that it is inadmissible. I think that is more dangerous than the twenty-second joint rule. I do not want to enlarge upon it, for I have not the time.

Mr. MORTON. I must say one word in reply to that, and I confess my surprise. When I brought forward a proposition the other day to repeal the twenty-second joint rule my friend opposed it, thought there ought to be a law on the subject, and he himself brought forward a bill involving the same principle as this bill, with this difference, that he interposed a committee of eight persons, four Senators and four Representatives. In his amendment offered to-night he provided that when that committee made a report, that report should stand and the votes it reported to be counted should be counted unless that report was overruled by both houses acting concurrently.

Mr. EDMUNDS. Yes.

Mr. MORTON. It involved the very principle in this bill, except that it finally brought it back to the twenty-second joint rule.

Now the Senator says this involves all the dangers of the twenty-second joint rule. What is the foundation for that? How can that be said? If we have no rule at all, the President of the Senate will open the return and hand it down and it will be counted and there is no power anywhere to prevent it from being counted. If you have no rule at all, as in the case of Wisconsin, as was then decided, and both houses agreed that as the matter stood the President had decided correctly.

Mr. EDMUNDS. I do not so understand it at all.

Mr. MORTON. Yes, sir; they decided that there was no remedy, there was no law, there was no rule on the subject, and after discussing the matter it was dropped by common consent in both houses. If we have no rule, whenever a vote is opened by the President of the Senate in the convention of the two houses it must be counted, whatever may be the irregularity or the unlawfulness of it; there is no way to prevent it. That is the condition if you have no rule. Now, with the provisions of this bill, when a certificate is opened, if an objection is made, the houses separate and deliberate upon it. If they both agree that the objection is good, then the vote is not counted; but if they do not agree that the objection is good, then the vote is to be counted. But as the rule now stands, if an objection is made, however trifling and contemptible, unless both houses do agree in overruling it, the vote of the State is thrown out.

Mr. EDMUNDS. Or however valid it may be.

Mr. MORTON. Or however valid it may be. You have under this bill the judgment of both houses. In other words, under this bill you cannot disfranchise a State except by the concurrent vote of the two houses. Under the rule as it now stands one house can disfranchise a State. Without any rule every vote must be counted, no matter

how false, how fraudulent, how unlawful it may be. That is the simple situation, and without a rule every vote must be counted. With the rule as it now stands one house can disfranchise New York and Indiana. Under this law no State can be disfranchised except by the combined judgment of the two houses. I say that is in analogy with our form of government. It is conformable to reason, and in my opinion it is safe.

Mr. MERRIMON. I beg to ask the Senator from Indiana a question. Why does he say that in the absence of a rule every vote must be counted?

Mr. MORRIS. Simply because there is no way of getting clear of the count. That was held in 1857; and if my friend has ever taken the trouble to read the discussion that took place in both houses then, lasting two or three days, a very earnest and very able one, he will see the difficulties we labored under at that time and the conclusion that the able Senators and Members then in Congress came to.

Mr. THURMAN. Mr. President, as I have said before in the debate to-day, I should greatly prefer that this legislation should not take place at this session, but that it should be deferred until the next Congress. In saying that I mean no imputation upon anybody of either house. Nor do I mean to say that a better bill could probably be passed by the next Congress than the bill now before us. But I do say that a bill passed by a Congress, one house of which belonged to one of the great parties of the country and the other to the other, would be more likely to be satisfactory to the country and to remain the permanent law of the land than a bill passed in the expiring hours of a Congress two years nearly before the act can have any operation or effect. I should have been glad, therefore, if the majority of this body had consented to let this bill go by this session and make it the subject of legislation next winter. But the majority have seen fit to do otherwise, and we are brought to the consideration of the bill.

Now, I wish to say, in answer to some remarks made by the Senator from Indiana, that I have not been influenced in my course upon this subject by any apprehensions of what the next House of Representatives would do, nor do I share in any apprehension expressed by the Senator from Indiana, nor do I believe there is any ground for their existence. He seems to think that if the present twenty-second joint rule is left to govern us, the next House of Representatives may throw out the vote of a State in order to make the election of President devolve upon the House of Representatives.

In the first place, that is to impute to that House improper motive. It is not to be presumed that the House would throw out improperly the vote of a State any more than it is to be presumed that the Senate would do it. It is not to be presumed of either body that it would thus violate its sworn duty to maintain the Constitution of the Republic. If the House should vote to reject a certificate from a State, the presumption is that in the opinion of the House there was good cause for its rejection, just as if the Senate should vote to reject it, the presumption would be that in the opinion of the Senate there was good cause to reject it; and therefore it is not to be supposed for a moment that the House would proceed in violation of the sworn duty of its members, and in a factious and revolutionary spirit, to defeat the will of the people by throwing out the vote of a State which clearly ought to be counted. But if there were any such danger, let me say to the Senator from Indiana that it will exist under his bill; that he cannot get rid of it upon his interpretation of the Constitution. How is it that he supposes that the election may be devolved upon the House of Representatives by the revolutionary proceeding that he has imagined? It rests upon this theory, that the person who is declared elected by the people must receive a majority of the votes of all the electors who shall have been appointed by the States; and that is the literal reading of the Constitution in article 12 of the amendments. In the original Constitution it was declared that—

“Each State shall appoint, in such manner as the legislature thereof may direct, a number of electors, equal to the whole number of Senators and Representatives to which the State may be entitled in the Congress.”

The amended article declares that—

“The person having the greatest number of votes for President shall be the President, if such number be a majority of the whole number of electors appointed.”

Giving a literal interpretation to this language, the Senator from Indiana construes the Constitution to mean that if a return should be cast out for any other reason than that the persons making that return were not electors, then, although that return could not be counted, Congress would be bound to take notice of the fact of the appointment of those electors and count them upon the question whether any individual had received a majority of the whole number of electors appointed. It is a very hard thing to suppose a case of that kind, and yet we might suppose it. In fact, it actually occurred in the case of Wisconsin. There the electors were appointed; there there was no question that they were appointed; there there was no question as to their just title to the office of electors; and the objection to the reception of the return made by them was that they had cast the vote on a day different from that provided in the law.

There it might be said electors were appointed, and Congress is bound to take notice of the fact that they were appointed; and therefore no one could be President unless

he received a majority of all the electors appointed, including those whose votes were rejected. That is one interpretation of the Constitution. It is certainly the literal interpretation, but it is open to argument whether that is the true interpretation of that instrument.

However, I do not wish to go into that argument now. That is not a case likely to occur. If votes are rejected, it is not likely to be a case in which the evidence before us will satisfy us of the appointment and make it our duty to say that electors were appointed, at the same time that we reject their certificates. That is a case that I think is very unlikely to occur, but even under this bill this difficulty might arise. Where there were double returns it might be that one return would be rejected, although both houses should believe that the persons casting the votes in that return were the legal electors, and another return might be rejected through some informality. One return might be rejected because the persons casting the votes were not the legal electors, although the return itself might in every respect conform to the law. If either house were disposed to act factiously, to act in truth corruptly, to act in a revolutionary spirit, in a case where there were two returns, the very difficulty which the Senator supposes might occur under this bill. I do not believe there is danger of anything of that kind taking place, and therefore I have no idea that there is any necessity for passing this bill for the purpose of preventing a factious, corrupt, and revolutionary attempt on the part of the House of Representatives to defeat the will of the people and devolve the election on that house.

I do not know that I desire to say anything more on this subject. I shall be glad to have it laid over. I am free to say, however, that I believe this bill is better than the existing twenty-second joint rule.

MR. SPRAGUE. Mr. President, I shall vote against the measure before the Senate, because it introduces the President of the United States into a matter with which he has nothing to do under the Constitution, and brings him into a dangerous innovation. He is charged with the execution of all laws. This is to be a law. He is charged with its execution. When was it contemplated that a retiring President should have anything to do with the election of his successor? There is too much executive interference in elections now. To make it his duty to interfere is in my judgment most pernicious. I am opposed to the bill, therefore, because its tendency is such.

And to conclude. I have listened with pain to this discussion. It is apparent that men wisest in the land, or men supposed to be the wisest, think they can carry on the Government successfully leaving the great material powers among the people untouched, to drift, to act irregularly. Why, sir, the danger mentioned in counting the vote in 1857 was not a danger of that moment, but was nearly ripe from the material condition among the people. It is the irregular action of these affairs that will soon tumble your government structure into atoms, and then these discussions of mere laws and rules will appear in their true light: simply false and weak guides to ruin.

MR. STEWART. Mr. President, this subject is surrounded by difficulties, and my opinion is that it would be safer to leave it where it is in the Constitution without any legislation or rules. I believe it would be more likely to be right. It seems to me the difficulties attempted to be avoided are not met in this bill. In the first section it is provided that the vote shall be counted and the result declared, and that no State shall be rejected without the concurrence of the two houses, acting separately. That of course would place it in the power of either house to retain a vote, although that vote might not be a proper vote. In any event you could not take it out of the power of either house to do wrong if they were disposed to do it.

But then the second section provides—

“That if more than one return shall be received by the President of the Senate from a State, purporting to be the certificates of electoral votes given at the last preceding election for President and Vice-President in such State, all such returns shall be opened by him in the presence of the two houses when assembled to count the votes; and that return from such State shall be counted which the two houses, acting separately, shall decide to be the true and valid return.”

We have had two returns from the same State, and very likely if this law was passed it might invite two returns from a State. We might have several cases of that kind, and then the two houses, acting separately, would have to determine affirmatively before a vote could be received. Suppose they disagree upon the returns, where would we be then?

MR. LOGAN. It would not be counted.

MR. STEWART. It would not be counted. The two houses would disagree. There would be a long discussion. That case might arise. I think perhaps they would have disagreed on the vote of Louisiana the last time if this bill had been a law. They might have disagreed; I do not say they would have done it. You would have under this bill after a disagreement a long and heated discussion.

Then you have got in this bill another provision:

“Such joint meeting shall not be dissolved until the electoral votes are all counted and the result declared.”

Then suppose one house would disagree and they would say, "You have no right until the votes are all counted to declare the result." It may be they would not go back to have the result declared. You have the very machinery here to produce great difficulties. What would be the probable result if you had two sets of returns? The two houses separate. One house would claim that one return should be counted, the other house claiming that the other return should be counted, and you could not get the two houses back so that the result could be declared. The President of the Senate under this law would have no right to declare the result until all the votes were counted. It seems to me, under this bill, where there were two sets of returns that very question might lead to a revolution. I do not see how you could avoid it. The two houses have separated, having disagreed; they get up a heated discussion. No result can be declared until the votes are counted, and the votes cannot be counted until the houses agree, because there is no provision made for that.

I would much prefer to repeal the twenty-second joint rule and leave this question where the Constitution has left it. From the short provision in the Constitution it is very evident that the framers had considerable trouble at the time. It is very evident they could not agree upon any elaborate mode of doing it, and I think if it is left where they left it, it will be put nearly in the true place. The Constitution says:

"The President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates, and the votes shall then be counted."

I think it was anticipated that they should just count them, and he should declare the result. In that case you get a President, but under this bill you might have a civil war before you get a President; and if you do not declare the result there might be a pretext for it. In this case there will be no President, no declaration, nothing to swear to according to law. You have separated the two houses, got up a heated discussion upon a disagreement, and there is a provision in the bill that the result shall not be declared until the votes are all counted. One house will be contending for one set of votes and the other house will be contending for another set of votes, and the Vice-President will not be allowed to declare the result. I say you have a state of things calculated to lead to rebellion. I cannot vote for this bill as it stands.

THE PRESIDING OFFICER, (Mr. Carpenter in the chair.) The question is, Shall the bill pass?

Mr. LOGAN. I should not now say anything but that I see there is a disposition to talk on this bill. I was very sorry to hear my friend from Nevada say he would vote against this bill unless amended. I do not know that I have capacity enough to satisfy him that the objections he makes to this bill are without any good basis; but I can certainly satisfy myself of it. Let us see what his objections are.

First, his objection to the bill is because, if there are two returns from a State, both houses must concur in counting one or the other or they are not counted.

Now, I desire to call the attention of Senators who have any difficulty on this point to this proposition, and we will see where my friend will come out. Under the joint rule as it exists, if either house objects the vote is not counted at all, but if both houses concur it is counted. That is the case under the rule.

Mr. STEWART. Under the existing rule the result would be declared in that case; but you here propose a legislative enactment which will prevent the declaration of the result.

Mr. LOGAN. Hold on! One point at a time. Let us see where you come out. Under the existing rule—

Mr. STEWART. I do not like the existing rule either.

Mr. LOGAN. Very well. I am speaking about things as they exist, and we are trying to better them. Under the rule as it exists if one house objects, then the vote cannot be counted at all, whether you have one State rejected or two. Under this bill we require the concurrence of both houses. If both houses do not concur to reject the vote, then the State has its right under the Constitution to its vote. That is the difference between the rule that exists and the rule that we propose to adopt. If two sets of returns are made to the Vice-President, the two houses are to determine which returns shall be counted; and unless both concur as to which return shall be counted, none is counted. That is the result under the bill, but under the present rule one house can determine whether the vote of a State shall be counted. Here you require both houses to determine that the vote is a fraud before you can reject it.

Under the Constitution both houses are required to count the vote. Now, if it requires both houses to count the vote, it should require both houses to determine the vote, because the Constitution contemplates that both houses form a convention for the purpose of determining these questions. That is the meaning of the Constitution. Both houses then having formed a convention for the purpose of determining the votes, in this bill we provided that it shall require the assent of that convention—that is, the assent of both houses—before a State shall be deprived of its right under the Constitution to have a vote.

That is the proposition in this bill. I defy any good lawyer to tell me why both houses should not be consulted in reference to depriving a State of having a vote for

President when both houses are required to count the vote. Under your present rule one house may determine that which the Constitution requires both houses to determine.

Let us see further. My friend from Nevada says that it will produce a revolution because both houses are required to determine which one of all returns shall be counted. I will put this point to the Senator, or to any of the Senators who have made an objection to this particular section of the bill. When a State votes for President, I do not care if it makes one hundred returns, some one of these returns must be correct. If the people of the State vote at all they must have voted for some person. Under the present rule it makes no difference whether they vote for some person or not, you deprive them of the right to have it determined whom they voted for and to have their votes counted, but under this proposed rule you allow them to have a vote as is contemplated by the Constitution. You allow the convention of the two houses to determine which one of these lists may be the right vote, according to the sentiments of the people when they voted for President and Vice-President. I ask any man to tell me what wrong there is in that proposition. Even in Louisiana, a State which we have been contending about, they did vote for somebody if we could ascertain it. No man can doubt that.

We provide then that when the State does vote for somebody the two houses may determine whom that vote was cast for, and then give them credit for that vote when it is determined. In the present condition of things you deprive States of votes, but under this bill you provide so that States may vote and have their votes counted. Instead of its being calculated to produce revolution, it is calculated to produce peace and satisfaction to the people who vote for President that their votes shall be counted. If my State votes for President and Vice-President of the United States and one house of Congress undertakes to say that her vote shall not be counted and it is therefore rejected, I am dissatisfied; but when both houses in convention under the Constitution determine that to be the fact, then I have no right to complain. But I would have a right to complain under the present condition of things.

A second objection is to the following clause in the bill:

"Such joint meeting shall not be dissolved until the electoral votes are all counted and the result declared."

My friend from Nevada objects to this because he says it would be interminable; that Congress might prevent the election of a President at all. Will the Senator stand up before this intelligent body and say that under the Constitution of the United States, without any joint rule or without any law, the two houses can dissolve without having determined the result in any other way except by a reference to the House of Representatives? It is not contemplated that they shall dissolve until a President is declared to be elected; that is, until the result is declared. You may declare that no one is elected President and then it goes to the House, but under the Constitution you are expected and required to determine the result. Some result must be ascertained, either that some man has been elected President or that no man has been elected President. If no one is declared elected, then the House determines who shall be the President. This bill only provides that this convention shall not be dissolved until "the electoral votes are all counted and the result declared." What result? Either that there has been a President elected or that there has not been a President elected, so that if there has not been a President elected the House may then act and perform their functions under the Constitution.

You may take this bill and examine it. I know I have not perhaps given the consideration to it that some gentlemen have; but it was before the committee of which I am a member, and has been fairly considered and examined. It has been considered with a view to having the law framed in accordance with the requirements of the Constitution, so framed that neither one house nor the other should deny to a State the right to vote. I ask the Senator by what rule is it to-day that the Senate of the United States alone can determine that a State's vote shall not be counted in any election whatever except an election that applies only to its own body? By what rule can the Senate alone determine that a State cannot vote? By the joint action of the two houses alone can this be determined, as I read and understand the Constitution. If there is anything unconstitutional, in my judgment it is the twenty-second rule, which permits one house by its solitary act to deny a State the right to vote in a presidential election.

Mr. MERRIMON. Will the Senator allow me to ask him a question?

Mr. LOGAN. Certainly.

Mr. MERRIMON. I ask the Senator whether this bill, if it should become a law, would not put it within the power of one branch of Congress to compel the count of an unlawful vote?

Mr. LOGAN. It puts it in the power of one branch of Congress to not deny the State its vote. It does not put it in the power of one branch of Congress to say how the vote shall be or shall not be. Under the Constitution and under the rules that have been determined prior to the twenty-second joint rule it was held that Congress itself could not deny the right to count the vote.

Mr. MERRIMON. I can see the objection to the twenty-second joint rule. I am now speaking of this bill.

Mr. LOGAN. Very well. I will state my answer to the Senator. Up to the time of the twenty-second joint rule it was held by the Congress of the United States that you could not deny a State its right to vote, whether it voted in accordance with law or not. Until that rule was established allowing one branch of Congress to deny the right of a State to vote, the right had not been denied. If it is held that one branch of Congress can deny a State the right to vote, is it not better that both branches of Congress shall have the power to deny it? Ought not both branches of Congress to have the right to determine the question of these votes? Would you have it that one branch shall determine that a State shall not vote, but that both branches cannot determine that she shall vote? I would ask the Senator if that is not the logic of his suggestion?

I will answer the Senator further. I would prefer, as a member of the Congress of the United States, to count the vote of a State, even if it was informally presented and informal in all that is connected with it, rather than to deny the right of a State to vote whenever its certificate was formal.

Mr. MERRIMON. Suppose this case: Suppose that a certificate is sent here by usurping electors, and the Congress of the United States should have cognizance of that fact. In that case under this bill one branch of Congress could compel the count of the certificate of usurping electors.

Mr. LOGAN. Both branches of Congress would be required to exclude it; but if there was no certificate except that, how would you have any knowledge of any other? Will the Senator answer me that question?

Mr. MERRIMON. I might have knowledge of the fact outside.

Mr. LOGAN. But that is not the point, and as a lawyer you know it is not. How would you have any official knowledge of it? You would have none, and you know it as a lawyer.

Mr. MERRIMON. I could ascertain it in this way, and I think it is perfectly logical and lawyer-like: The joint assemblage of Congress would have the power to direct a committee to inquire into those facts just like this body might appoint a committee to inquire into facts, and when they should be ascertained, the joint assemblage of Congress could act upon the facts as they might be reported.

Mr. LOGAN. Where does the Senator get the authority to appoint his committee? When the Constitution says that the Senate shall assemble in the Hall of the House of Representatives and there the votes shall be opened by the Vice-President and there they shall be counted and the result declared, where does the Senator get his authority for this committee?

Mr. MERRIMON. From the Constitution.

Mr. LOGAN. I cannot find it.

Mr. MERRIMON. I say the Constitution provides that Congress shall act in a joint capacity; and Congress in that joint capacity has the power to determine all questions that are essential to ascertain the result of the electoral vote, to appoint committees, or do anything else for that purpose.

Mr. LOGAN. I will not go into a labyrinth of argument on that point, because it is not the question before us now. I only say to the Senator that I do not recognize his law, but I will not detain the Senate by any argument in reference to it. I merely say of the objections made now, so far as the Senator from North Carolina is concerned, I think he is a fair man usually, but I do not believe that we could frame a bill to-night or at any other time in reference to counting the vote of President and Vice-President that he would assent to, unless he framed it himself.

Mr. MERRIMON. I am sorry the Senator has such a bad opinion of me.

Mr. LOGAN. It is not a bad opinion at all.

Mr. MERRIMON. I do not think I have given any evidence of that. I am sure Congress has power to pass a bill, and I would most cheerfully support a bill for this purpose which I believe conformed to the Constitution.

Mr. LOGAN. I will give the Senator the reason why I made the statement. He has argued this constitutional question to-day differently from any man I ever heard argue it in my life, and therefore I presumed he would have to draw a bill himself in order to get his vote for it. I have seen it the case frequently that legislators never could frame laws that would suit other people. It is not to be expected that they can. All laws are compromises; in their nature they must be, because our minds are so constituted that they do not run exactly in the same channel.

I was surprised, I must confess, at finding objections to this bill from some of the quarters from which they have come to-day, for it was different from my understanding in reference to it. But the objections that have been made to this bill by Senators to-night are objections that can be wiped away like a cobweb, or as you would wipe water from a table with a sponge, by the logic of the Constitution and the fairness and the justice of the thing itself.

You have now a rule in your Manual allowing one house to reject the vote of a State,

Do you say it is on account of fraudulent elections? They need not be fraudulent. If either house were to so far forget their honesty and integrity as to object to the vote of a State, they can prevent the vote being counted, whether it is an honest vote or a dishonest one. There is no objection specified in the joint rule; but it allows the objection of one house to prevent the counting of the vote of your State, my State, or any other State. I witnessed an exhibition of the workings of this joint rule two years ago. The vote of Arkansas was objected to in the House. That objection caused the Senate to retire and examine it. What was the objection? That the seal of the State was not affixed to the certificate of the men who cast the vote. It turned out that Arkansas had no seal of State; that the only seal she had was the seal of the secretary of state; and the certificate was stamped with that seal. Upon that frivolous objection the State of Arkansas was refused to be counted in the last presidential election. It only showed that any objection made, however frivolous, by one house might deprive a man who has been elected President of the United States of his right to the office, or might deprive a State or States of their right to vote. When, after seeing the operation of the rule in the direction in which this rule has operated, we change it even by law so as to require the action of both houses, in my judgment it is just, in my judgment it is constitutional, in my judgment it is honest, in my judgment it is fair.

Mr. HAGER. I have no desire to enter extensively upon this debate, but rather to explain the vote that I shall give. It is a question of constitutional power and of constitutional interpretation that addresses itself to us as lawyers and as Senators. The view that I take is that the Constitution of itself is operative, and that you cannot add to the powers conferred or diminish them. According to my view, neither the twenty-second joint rule nor this bill, if it shall become a law, has any binding force upon the Congress that must act in this matter under the Constitution. In other words, we cannot here establish a rule by which we dictate to another Congress how they shall perform a constitutional duty. The Constitution is plain:

"The President of the Senate shall, in presence of the Senate and House of Representatives, open all the certificates, and the votes shall then be counted."

There is a plain duty imposed upon the President of the Senate and upon the Senate and House of Representatives assembled together. Can you say, sir, that you may limit your powers or add to them by any legislation here? Can you bind your successors in any matter of constitutional legislation? Turn to the powers that Congress has. Congress may "lay and collect taxes, duties, imposts, and excises." You might just as well undertake to pass a law here pointing out how Congress shall levy taxes and imposts, as to undertake to regulate them in the performance of a constitutional duty in regard to this matter. As well might one supreme court undertake to bind their successors as for one Congress to undertake to bind their successors. It cannot be done either by legislation or by any rule that you may see fit to adopt.

I admit that there is an imperfection in this part of the Constitution as to how the joint body when assembled together shall proceed to act and determine the result of the election. But as the duty is imposed upon the Senate and the House of Representatives it is for them and each body that is called upon to act in that capacity to regulate rules for themselves.

There is another important matter that enters into this consideration upon that point, and I should like to hear Senators answer it. If we pass this bill, in order that it may become a law it must be signed by the President. The President then to some extent enters into the counting of the electoral vote. Suppose we pass this bill and it becomes a law by the signature of the President with the intent to bind some other house, not ourselves. I admit we could pass a law here to regulate the election if we were to act in the matter. If we were to meet next week to count the electoral vote we could by the concurrence of both houses pass a law to regulate our action in the matter; but we cannot, I say, pass a law to regulate the action of a future House or future Senate when they meet to perform a constitutional duty.

But, as I said, suppose this bill becomes a law signed by the President, how are you to get rid of it in the future? If it is binding upon the Senate and House that meet next, it requires, in order to repeal it, not only the vote of the Senate and the House, but the approval of the President. Thus the President enters into the consideration, when the Constitution never contemplated any such thing. It is a duty imposed entirely upon the Senate and House of Representatives; and if you pass this bill, in order that it may be a law it requires the approval of the President, and hereafter to repeal it and get rid of it also requires the approval of the President, so that a future Senate and a future House of Representatives may be entirely under the control of the President of the United States.

Did the framers of the Constitution contemplate any such state of things as that when the twelfth article of amendment was adopted? It was the intent that the people should control the election of the President, and not the President of the United States. It was the intent that the electoral vote should be brought here and opened in the presence of both houses, and that they there, according to such rules as they might adopt, should declare the result. The President has nothing to do with it.

Sir, I am satisfied that we cannot bind our successors by any legislation in regard to a

constitutional duty that they have to perform. They themselves must judge how they shall perform it; and you might as well undertake to dictate that they should do it in a particular way to accomplish a particular result as to undertake to say that they shall do it according to the provisions of this bill.

I shall therefore vote against the measure. I believe that if it passes it will be clearly unconstitutional. I see also that there is great difficulty in getting the question before any tribunal by which it may be determined. I think we should legislate on a matter of this importance with great deliberation and great care, because I know of no tribunal that can undertake to decide the question. It cannot be raised until a convention meets to act upon it; and they must act within a certain period of time, and it may lead to interminable difficulties before we can get a judicial interpretation of this law as to whether it be or be not a constitutional act.

Mr. STEWART. Mr. President, my friend from Illinois [Mr. Logan] failed to remove the objections in my mind. From his remarks I do not think he understood my objections.

The first section of the bill is a very smooth, easy-going section. If both houses concur in the counting it goes on to say that the vote shall be counted and the result declared. But when you come to the second section, where there are two sets of returns, which may happen and probably would happen, and if persons were sufficiently disposed to have a revolution it would be a natural state to have two sets of returns. What then? "That if more than one return shall be received by the President of the Senate" * * * "that return from such State shall be counted which the two houses acting separately shall decide." They shall decide which of the two returns shall be counted. My friend from Illinois thinks it is eminently fair to leave the two houses to decide separately such a question. If the two houses agree affirmatively that a particular return shall be counted, then very well; but suppose they do not?

Mr. MORTON. Let me ask the Senator a question right there. Suppose there are two returns placed in the hands of the Vice-President, who shall determine which one of them shall be counted? Will you leave it to him to determine it? Will you leave it to one house to determine? Or will you leave it to both houses to determine it? Somebody must determine, and to whom will you leave it?

Mr. STEWART. I will discuss that afterward. I would leave it where it could be determined and not put it where it certainly cannot be determined, as this bill does.

Mr. MORTON. That does not answer the question.

Mr. STEWART. I will answer it by and by. I say I would put it somewhere where it could be determined, but this bill has put it where it cannot be determined. Provided the two houses disagree, there is no determination of the question but civil war, because you have provided in the same bill that the result shall not be declared until all the votes are counted, and they cannot be counted on a disagreement.

"Such joint meeting shall not be dissolved until the electoral votes are all counted and the result declared."

The votes shall not be counted unless both houses agree when there are two sets of returns, and unless all the votes are counted the joint meeting shall not dissolve, nor shall the result be declared! There you are. Suppose you had a heated discussion for a week or ten days, the two houses refuse to agree, and there is no way of declaring the result, and there is nothing pointed out as to what is to be done next, and in that state of things it seems to me you have legislated yourselves into war.

I am not here to defend the twenty-second joint rule. I have seen the operation of it, and I think it very dangerous, and believe that both houses will consent at this session, or any other, to get rid of that. Under that it is in the power of either House to exclude the vote of a State; but that being done, which is a great injustice, it does not further provide that the result shall not be declared, or the joint meeting dissolved. It does not leave you in a state of anarchy. Under it a great outrage might be committed by the action of either house excluding States entitled to cast their votes; but there is no prohibition against declaring the result and having a President, so that we can have law and order. I think this bill is a good deal worse than the twenty-second joint rule.

Mr. MORTON. What is the provision the Senator refers to?

Mr. STEWART. "Such joint meeting shall not be dissolved until the electoral votes are all counted and the result declared."

Mr. MORTON. Does the Senator know that it provides, as the twenty-second rule does, for taking a recess?

Mr. STEWART. It does provide for taking plenty of recesses. I understand that, and that is one trouble. It provides for recesses, for time, for deliberation, for discussion, for organization, for treason, and for overthrowing the Government; but it does not provide for declaring anybody President. You have your recess and you get apart and the two houses disagree and nobody has authority under this bill to come together and declare the result; no result is declared, and we have no President. Every day faction will be strengthening if the two houses should disagree and no chance of a result. Under the twenty-second joint rule they might arbitrarily rule out a State, but when they came together they would be bound to declare a result.

Mr. MORTON. The terms are the same precisely in the first section as in the rule on that point.

Mr. STEWART. In the first section it is provided that they shall declare the result when the votes are counted, but in the second section there is a contingency in which the votes cannot be counted. You say if the two houses do not agree the vote shall not be counted, and then you say in the last section the result shall not be declared unless all the votes are counted.

Mr. MORTON. There is no such provision there that the result shall not be declared.

Mr. STEWART. I will read it again.

"Such joint meeting shall not be dissolved until the electoral votes are all counted and the result declared."

Mr. MORTON. Exactly.

Mr. STEWART. You cannot declare the result until you count all the votes, and you have provided a contingency in which all the votes shall not be counted. You say that where there are duplicate returns and the two houses disagree the vote shall not be counted at all. Then you say that the joint meeting shall not be dissolved until they are counted. I think we had better leave it under the Constitution. I think that is better than to have this legislation on the subject.

"The President of the Senate, in the presence of the Senate and the House of Representatives, shall open all the certificates, and the votes shall then be counted."

And for a great number of years they were counted.

Mr. LOGAN. What votes does it mean?

Mr. STEWART. It means the votes that are there.

Mr. LOGAN. Does it mean all the votes or part of the votes?

Mr. STEWART. It does not provide affirmatively for anarchy, and I would rather leave it to the good sense and patriotism of the two houses there together to work out a good result and in the hands of a firm Vice-President to declare some result and keep us out of anarchy; I would rather the Vice-President would take it by the strong hand and declare the result and give us a President, than trust to a law that legislates us into anarchy. It is not clear to me but that the Vice-President after he has counted the votes and found a majority would have a right to declare the result; he would have a show of authority; and somebody would be President. I would rather leave it just where the Constitution leaves it, and when a result is reached let the Vice-President declare that somebody is President. I think there is less danger in that than in providing for all sorts of frivolous objections and then providing one contingency when anarchy is inevitable.

I am aware of the good faith of the author of this bill: I am aware of the labor bestowed on this bill; but I am also aware of the intrinsic difficulty of the case. It is all idle to talk about getting up any other tribunal. I do not believe your courts would last an hour after they had this function to perform. It is too big a function to turn over to any other tribunal than Congress. It is too great a question for any tribunal to be organized to decide. No tribunal could exist a day in this Republic that was organized to try this question, and the more you legislate to patch this up the worse you will be off, in my opinion. The founders of the Republic would have used some language and pointed out some ways of doing this thing if it had seemed safe, but they said that when the two houses were assembled the votes should be counted and the result declared.

I think the sensible thing is to repeal the twenty-second joint rule. I do not believe this bill will be passed when it is reflected upon. I do not believe it is wise to pass it. I want to say here that I believe more evil results will grow out of this than out of the present rule. This bill provides for a great many contingencies—provides for one of the worst features of the rule, frequent separations, giving opportunity for arrangements and organizations: and those who have seen such things know the evil results of them and the danger of a disagreement between the two houses, when the disagreement must bring them right against a position where there is no law to execute itself and where it is easy for a party to say, "We will not go any further; we will not count any votes." Again:

"And that return from such State shall be counted which the two houses acting separately shall decide to be the true and lawful return."

But suppose the two houses do not agree, then that return cannot be counted. They must agree affirmatively before it can be counted. Then I submit that there is a disagreement upon a vital point.

"Such joint meeting shall not be dissolved until the electoral votes are all counted and the result declared."

Suppose you have a division of opinion as to a vote, suppose now that from the State of Illinois there come up two sets of returns; the two houses separate. One house decides in favor of one set of returns and the other house upon the other. They meet; that vote cannot be counted. If there is only one return it cannot be excluded without the joint action of the two houses.

Mr. LOGAN. But one return now can be excluded by one house.

Mr. STEWART. It is not excluded, but you do not count it. Here it says the votes shall all be counted. If it is excluded from the count, then the joint meeting shall not dissolve; it is hung up. There may be various pretexts under this bill to get the two houses separated and discuss the question of who shall be President, and after heated discussion two or three weeks you will find you have a great deal more difficulty than there would be if you declared

the result at once before there could be organizations. This invites them. I do not want any rules except those that have stood since the foundation of the Government. The twenty-second joint rule has nearly destroyed us already. All see the folly of that practice. Let the Vice-President declare the result. That is the safest thing that can be done in my opinion.

Mr. EATON. May I ask the Clerk to report the second section. It seems to me that it is inconsistent with other parts of the bill.

The PRESIDING OFFICER. The section will be read as amended.

The Secretary read as follows:

"SEC. 2. That if more than one return shall be received by the President of the Senate from a State, purporting to be the certificates of electoral votes given at the last preceding election for President and Vice-President in such State, all such returns shall be opened by him in the presence of the two houses when assembled to count the votes; and that return only from such State shall be counted which the two houses acting separately shall each decide to be the true and valid return."

Mr. EATON. Now, I desire to suggest that the first section of the bill provides—

"If, upon the reading of any such certificate by the tellers, any question shall arise in regard to counting the votes therein certified, the same having been stated by the Presiding Officer, the Senate shall thereupon withdraw, and said question shall be submitted to the body for its decision; and the Speaker of the House of Representatives shall, in like manner, submit said question to the House of Representatives for its decision; and no electoral vote or votes from any State, to the counting of which objections have been made, shall be rejected except by the affirmative vote of the two houses."

Now the second section is that—

"All such returns shall be opened by him [the Vice-President] in the presence of the two houses when assembled to count the votes; and that return only from such State shall be counted which the two houses, acting separately, shall each decide to be the true and valid returns."

I ask the honorable Senator from Indiana if there may not be some inconsistency here? It strikes me that there may be. Let me suppose that the condition of the country just after the next presidential election should be as it is now and has been for years past, though I hope it will not be. A certain return comes up; the seal of the State is upon that return, or a pretended seal of the State, whether stolen or not; it is there. How do you reconcile these two provisions? I take it that men are generally made of the same material. I apprehend that if a return came here that I believed was a fraud, that I had no doubt the seal of the State was fraudulently placed upon, I would vote against the reception of that return, and my friend from Indiana would in the same way vote against the other return, and for some good reason. Our feelings of party might have something to do with our judgment, but we would both endeavor to be honest; I have no doubt about that; but as men think differently to-day with regard to the government in Louisiana, one gentleman honestly thinking it to be a fraud and usurpation and another gentleman of equal capacity, of equal honesty, of equal integrity, believing it to be a proper and legitimate government. I suggest that if the condition of the country two years hence should be just what it is to-day, this bill would produce anarchy in this city and you could not carry it out. By honest men I mean men doing what they believe to be just and right, but differing in opinion with regard to the returns that are sent here. I say there is an inconsistency between these two sections, and gentlemen had better be very careful before they pass the bill.

Mr. MORTON. One word in answer to the Senator from Connecticut. The second section is intended to apply to a particular case which has occurred in one of the States of this Union, that is, to a case where there are two sets of returns from the same State sent to the Vice-President. There are two sets of returns in his hands. Somebody must have the power to determine which are the correct returns. Will you give that power to the Vice-President? will you trust it to him alone? Will you give it to one of the houses independent of the other? You answer "no." Then you give it to both houses to determine which of the two sets of returns is the correct return. You cannot do anything else under these circumstances. If somebody cannot determine that question, it is not to be determined at all, and neither set is to be counted. You would not leave that to the Vice-President, who might be a candidate himself. You would not perhaps trust his judgment. It might be a disputed point. You would not leave it to one house. Therefore you leave it just where you leave the enactment of a law—you leave it to both houses.

The first section refers to a case where there is only one return from a State. Somebody gets up and makes an objection; it may be a very trivial one. We have known examples of that kind. Now the twenty-second joint rule says that unless both houses concur in overruling that objection the vote is lost. We say that is not sensible; no State ought to be disfranchised in that way. We say in this bill that unless both houses agree that the objection is a good one the vote of the State shall be counted.

Mr. THURMAN. Will the Senator allow me to interrupt him?

Mr. MORTON. Yes, sir.

Mr. THURMAN. The inconsistency here is only because these provisions are in two different sections. The first section lays down a general rule; the second section excepts one

class of cases from that general rule. If the words "section 2" were stricken out, and the words "provided that" inserted, so as to make the second section precisely what it is, a proviso to the first section, there would be no inconsistency at all. It is the office of a proviso in a statute, as everybody knows, to except some case from the generality of the text of the law. This second section is in fact a proviso. It excepts one class of cases from the operation of the general rule established by the text of the statute.

I suggest to the Senator from Indiana that he can avoid all the trouble on the score of apparent inconsistency by simply amending the bill by striking out the words "section 2," and inserting "provided that."

Mr. MORTON. The bill is not amendable now. At this stage of proceeding I prefer not to amend the bill.

Mr. EDMUNDS. We are now on the passage, though nobody would object if the Senator from Indiana wishes to make that amendment.

Mr. MORTON. It is not an amendment of substance, and I ask to have the vote taken.

Mr. GORDON. I do not want to discuss the bill; I only want to ask the Senator a question that I think is of some importance. If I understand the operation of this bill, if it becomes a law it can increase the electoral vote of States, and may therefore make more votes in the electoral college than the Constitution provides for. Now let us see if that be true. The second section of the bill provides that where there is more than one return from a State both shall be opened; that is, "such returns shall be opened by the Vice-President in the presence of the two houses." Then the first section provides that neither shall be rejected unless upon the concurrence of both houses. Now, suppose one be a democratic return and one a republican return, and the Senate in good faith believes that the republican return is the true and valid return, in the language of the second section, and the democratic house believes that the democratic return is the true and valid return, then under the second section of this bill both of these returns must be counted, giving to the electoral college an additional number of votes.

Mr. LOGAN. O, no.

Mr. MORTON. I submit to my friend from Georgia that it is not so.

Mr. GORDON. That occurs to me as the working of the bill, and I want to know whether it is so.

Mr. MORTON. The second section is intended to apply to a case where there are double returns from the same State. In that case somebody has got to decide. We say it shall be left to both houses. It shall not be left to the President of the Senate to decide a grave question of that kind. It should not be left to one house alone. It should be left to both houses, and that return—not returns, but that return which the two houses agree is the valid one shall be counted.

Mr. GORDON. I understand that.

Mr. MORTON. Does my friend think it would be safer if we were to say that only one return should be counted from one State?

Mr. GORDON. Suppose both houses would not agree upon any one of these returns. My question was based upon the supposition that the Senate should declare one to be the valid return and the House the other the valid return. Now, I maintain that under the first section of the bill both must be counted, because neither can be thrown out unless both houses agree.

Mr. MORTON. My friend has not read the section. The section applying to two returns goes on to say:

"And that return only from such State."

The word "only" was put in some time ago, on the suggestion of the Senator from Iowa, [Mr. Wright.]

Mr. GORDON. I had not seen the word "only."

Mr. MORTON. "And that return only from such State shall be counted which the two houses, each acting separately, shall decide to be the true and valid return."

Mr. GORDON. But suppose they disagree? That is the point.

Mr. MORTON. Then neither is counted. That is the express provision.

Mr. STOCKTON. Mr. President, I cannot at this last moment see the vote taken on this bill with a debate going on among gentlemen so distinguished, which seems to me so entirely away from the real point of issue in reference to the bill, without saying a final word.

When the Senator from Indiana replied to the remarks of the Senator from Connecticut by asking, "Where shall we leave the power?" he showed precisely the ethros and anxieties of his mind as to where that power should be left. If he was willing to leave that power where the Constitution of his country places it, he would have no anxiety to decide where he should leave it. He can put it nowhere. All he should do with it is to leave it where it was put by the fathers of the country until he can succeed in altering the Constitution, which is the fundamental law of the land.

But, Mr. President, the few words I am going to utter were called forth more by a remark made by the Senator from Rhode Island [Mr. Sprague] and some subsequent remarks that were made by the Senator from California, [Mr. Hager.] I endeavored, feebly indeed, to call the attention of the Senate to the fact that while it was very doubtful whether the twenty-second joint rule was constitutional and very doubtful whether a joint rule passed by

these two bodies in separate session could control that joint meeting for another purpose under a constitutional power, yet a bill, which is an act of legislation, attempting to control that, was clearly unconstitutional. But, sir, reaching for a substance I lost sight of an illustration which I got from the Senator from Rhode Island; and in my own behalf and on behalf of the Senator from Connecticut [Mr. Eaton] I desire to thank the Senator from Rhode Island for having introduced that point. An act of legislation, this bill requires the signature of the President of the United States. The President of the United States can veto this bill. The President of the United States may be a candidate running for a second or third term, and it may be important to him to settle how these votes shall be counted; and whether he approves of the bill or not finally settles the question. You can make no such law without his approval. Does any gentleman dare rise in his seat and say that the Constitution of the United States has placed it in the power of the President of the United States to say how these votes shall be counted? Make your rule here; let it be decided in joint session or in separate session, each house by itself; do by rule all that is necessary to execute that power which the Constitution of the United States gives you for the purpose of counting the votes; do all that; but dare you say that, without one clause in the Constitution to justify it, the very man who may be a candidate may have the power of approving or disapproving a bill, vetoing or not vetoing a bill preventing the action to be had two years hence in the counting of the votes by the two bodies or by the Vice-President in their presence?

I thank the Senator from California for his illustration and I thank the Senator from Rhode Island for making that point. As I said before, I was grasping at it when I said that no legislative act could control that body; it was not an act of legislation, it was not a law; but for the moment it did not occur to me that it requires the President as well as both houses of Congress to make a law; and in passing this bill you are proposing to-night to regulate, contrary to the Constitution, the counting of these votes by making the President a power that may veto the rules you make. Gentlemen here discuss whether this thing shall be done in joint session or in separate session, whether it shall require both houses; but the President of the United States has his voice in that by your bill. He can send you word that he will approve no bill which puts the thing in this position or that position. He vetoes it. Then you try to pass it by a two-thirds vote over his veto.

The truth is and the honest truth is that the twenty-second joint rule ought never to have been passed. The whole power rested in the joint assembly when it met; and as the Senator from Nevada well said—I cannot quote his words—the power in those simple few words is as plain and express as language can make it, and as the Senator from Connecticut said this afternoon, for seventy-five years we got along very well; there never was any trouble, and I believe that there never will be any trouble in counting the vote unless you undertake to take the power from the place where the Constitution put it.

This is an effort on your part by an act of legislation to change the body, to control it; and do you say to me this is only the manner of the choice? If that be so, the Constitution left the manner of the choice, by not expressing it, to the body where it placed the power of counting the vote. The counting of the vote was put on the body who were told they must count the vote. If it be a manner, if, as I said before, you insist that the manner may be determined by your joint rules and joint regulations made in separate bodies, no man can insist that the President of the United States has anything to do with the manner. Has the President of the United States anything to do with how your tellers are appointed? Do you recollect a little amendment offered this morning by the Senator from Ohio, that there should be two tellers on the part of the Senate? Has the President of the United States anything to do with that? Did the Constitution mean he should have anything to do with it? The President of the United States, if this be proper, had better be there present personally to attend, and instead of the clause of the Constitution being that the Vice-President shall open the votes in the presence of the two houses, change your law and say the President himself shall be personally present.

I use these illustrations as they occur to me simply in order that before the vote is taken on this bill the point made by my distinguished friend from Rhode Island should not be forgotten or omitted. It is precisely the point, as I said before, that I was trying to reach this morning, and I thank him heartily for having brought it out.

In addition to that my friend from Missouri [Mr. Boggs] suggests to me that the instant the law is passed it becomes the duty of the President on his oath to execute it; and here the man who may be a candidate running has the power of veto in his hand, and is made a party to the making of the very rule of this joint body, and he is the man in command of the Army and Navy sworn on his oath to execute it.

Sir, I say to the Senate with perfect frankness and with perfect candor that I did not know this bill was so bad when I first spoke upon it. I sat here this afternoon a listener. My mind went step by step during the debate, and I found that the bill, in my judgment, was unconstitutional; and listening to-night to the points that have been made, I say it is much worse than unconstitutional; it is a revolutionary measure, and I do not believe the bill has had proper consideration. I believe that views will enter the minds of gentlemen who have charge of this bill before this debate is over which will make them in their own hearts think differently about it.

I have found in my humble experience in life, not only at the bar, not only in the Senate, not only in deliberative bodies, but at business meetings of all kinds, that there was nothing which would elicit truth so well as the knocking of heads and minds together. The advantage of our free debate in this body, which God forbid ever shall be restricted, is for those of us who come here, as I hope we all do, really and honestly wishing and hoping to do our duty and to vote on bills as our best judgment may guide us—the advantage is that we learn; and, although we may not be so well prepared when the debate opens as others, particularly those on the committee and the lawyers of the Senate, yet with reasonable good sense, after hearing the arguments, we have the advantage of a judge who hears a case argued on both sides. I hope, if there are gentlemen in the Senate whose minds have become awakened by this debate to the fact that this question is a much more serious constitutional question and likely to create more trouble than they apprehended, they will pause before they put this bill through to-night.

Mr. SHERMAN. I think Senators have borrowed a great deal of trouble about this matter. I am not acute enough to see the weight of many objections made to this bill. Look at it: The first, second, third, and fourth sections of this bill differ from the twenty-second joint rule only in one or two important particulars. The twenty-second joint rule has this provision:

“And no question shall be decided affirmatively and no vote objected to shall be counted except by the concurrent vote of the two houses.”

On the other hand this bill provides:

“And no electoral vote or votes from any State, to the counting of which objections have been made, shall be rejected except by the affirmative vote of the two houses.”

There is the gist of the whole matter. The other point of differences between the rule and the bill is this: The rule requires that when the two houses meet to pass upon a question raised in joint convention, the question shall be decided without debate. The third section of this bill, however, provides for a limited debate.

These are the material differences between the first, second, third, and fourth sections of the bill and the present joint rule. My objection to this bill, if I was going to make it as a reason for voting against it, would be that it is unnecessary, in order to correct the errors in the joint rule, to pass a law; and the only exception that I take to this measure is that it is in the form of a bill instead of a joint rule. It is to be sent now to the President and approved or disapproved by him. It will be very much like the thirteenth amendment, which was sent to Mr. Lincoln. Mr. Lincoln said he did not see that his signature to it would give it any additional force, but still he was very glad to sign the thirteenth amendment. If this bill is sent to the President of the United States, I believe it will be a useless act. It will have all the force of a joint rule, binding upon each house in the ministerial duty of counting the presidential vote, without the signature of the President; but the signature of the President will not make it any the worse, will not take away its binding force, will not change it. It is said the President may veto it. If he vetoes it, there is the end of it; but what is the use of talking about that? There is no difficulty of that sort.

Therefore, so far as the gist of the matter is concerned, the first, third, and fourth sections of the bill are only a modification of the rule, and we have been spending this whole day in doing what might be done in that way. But as the bill has been presented and the Senator from Indiana with a good deal of force said Senators objected to any form of joint rule, and my colleague I am told concurred in that opinion that it was better to give this change of the rule the form of a law; if in order to satisfy some of our democratic friends it was deemed advisable to put this in the form of a law, it cannot hurt it by that form; it cannot make it any worse and does not make it any better. The signature of the President is not necessary at all to the modification of our rules, but his signature will not hurt. I believe we refused to send the fourteenth amendment to President Johnson because he had nothing to do with it, but we sent the thirteenth amendment to President Lincoln, and I believe we sent the fifteenth amendment to President Grant. I am not certain about that and it is not material.

The only new matter introduced in this bill is in the second section, which provides for the case of a contested election where there are two sets of electors claiming to be electors from a given State. This provides for a case that is not provided by the joint rule, and it is a case that it is well enough to provide for, and I see no objection on that point. It provides that where there are two returns found in their character from a State or from two bodies to be electors, if the two houses cannot agree which is the proper, legitimate return, for that reason the vote shall not be counted. That is all there is of it.

I do not think there is any very great evil to occur from the passage of this bill, excepting that it provides by bill against a contingency, a trouble arising in the mere execution of a ministerial act if the two houses concur. I regard it as vitally important, because it is utterly impossible, in the nature of things, to decide a contest which may arise in the count of electoral votes under the present rule. I shall vote for the bill, not that it is in the best form, because I would prefer some modification of the joint rule, but it is, in substance, an improvement of the joint rule, and in two important particulars it is a vital improvement; that is, it prevents either house, by its own arbitrary *dictum*, from excluding the vote of a State from being counted, and next it allows a reasonable debate.

We all remember the difficulty about Arkansas, growing out of the fact that not one word could be said. The objection was made and presented to us, and there was not a single word of debate allowed under the joint rule, and every Senator went up to the Clerk's desk to pass upon the question whether or not the seal of the secretary of state was attached to the return from Arkansas or the seal of the State. We had no opportunity to explain. Somebody endeavored to say that the State of Arkansas had no seal, but he was hooted down, as I remember, or at least was not allowed to say anything in the way of debate. This bill allows a moderate and reasonable debate, and in that respect it is an improvement on the joint rule. The only material changes are, first, that it allows a short and reasonable debate, and next it changes the rule as to the effect of a disagreement of the two houses.

Mr. FRELINGHUYSEN. Do I understand the Senator from Ohio to say that this bill will have the force of law without the signature of the President?

Mr. SHERMAN. No, sir; I say it could have the force of a joint rule without the signature of the President, and as a joint rule it would be just as effective.

Mr. FRELINGHUYSEN. But not in the shape it is now.

Mr. SHERMAN. No. The President of the United States will probably not veto it, and the only danger my friend seeks to guard against is that possibly the President will veto it.

Mr. FRELINGHUYSEN. I understood the Senator to say that it would have force without being submitted to the President for his signature. That certainly cannot be.

Mr. SHERMAN. Not in the form of a bill.

Mr. FRELINGHUYSEN. The true answer to the suggestion which was made by the Senator from California and repeated by the Senator from New Jersey, my colleague, is that the Constitution provides that Congress may by proper legislation carry out and execute the various provisions of the Constitution. This is doing that.

Mr. SHERMAN. This provision of the Constitution is to be executed by two bodies of men acting in a ministerial capacity, witnessing the counting of the vote, and we can prescribe the rules and mode and manner of doing that business just as we can the mode of coming to an agreement about disagreeing votes on amendments.

Mr. HAGER. I should like to ask one question, and that is whether, when we get through with this bill, it will be considered a rule or an enactment without the approbation of the President? Ordinarily legislative bodies control their own rules, but in this case we put it beyond our control.

Mr. SHERMAN. Not at all.

Mr. HAGER. Certainly; unless the President approves the bill we may pass to repeal this.

Mr. SHERMAN. Not at all. I have no doubt the two houses can in their own way, in their own manner, on the very day they meet in convention, pass a joint rule prescribing the mode and manner of doing that ministerial duty.

Mr. CONKLING. And thus repeal a law?

Mr. SHERMAN. I have no doubt. This amounts to a modification of the joint rule, just as the two houses of Congress, by a vote of two-thirds, can submit a constitutional amendment to the people of the United States, whether the President be willing or unwilling.

Mr. CONKLING. But does my honorable friend mean that if we pass a bill in the form of a statute, which becomes a statute by the executive signature and takes its place in the book, we can supersede or repeal that statute in any way except by passing another statute?

Mr. SHERMAN. I do say that in regard to this ministerial duty to be performed by the two houses, that the two houses at the next Congress can pass a modification of the rule which will abolish and repeal this statute.

Mr. HAGER. Without the President's approval?

Mr. SHERMAN. Yes, sir.

Mr. CONKLING. Then I undertake to say as a lawyer that that is a *cognovit* and admission, clear and distinct, that there is no constitutional power to pass this bill. If there is constitutional power to pass this bill, it becomes a statute, and no joint rule, no concurrent resolution can strike it down. The Constitution says that, and such an attempt would be in the very teeth of it.

Mr. SHERMAN. I do not think there is any ground for that declaration whatever. The Constitution of the United States declares that the two houses may meet together in joint convention and count the votes.

Mr. EDMUNDS. It does not say that.

Mr. SHERMAN. It does practically, and we have a right to prescribe by our joint rules our own actions. We may put this joint rule in the form of an act, and yet the two houses, in the execution of that ministerial duty, may adopt any other rule they may see proper. Sir, if we put our joint rule, the whole of it, in the form of law, the Constitution gives to each house the power to make rules for its own government and the power to make joint rules for the government of the two houses. That is a constitutional power, and this Forty-third Congress cannot deprive the next Congress of the power of making rules for the government of the two houses or for the government of either house. There the constitutional privilege overrides all your laws.

Sir, the Senate of the United States can make any rule it pleases that affects its mode of proceeding, and no law can affect it, and the next Senate may change it. So with the

House of Representatives. The right to make the rules of each legislative body is inherent in every parliamentary body, and is expressly guaranteed to it by the Constitution of the United States: and the right to make joint rules is equally operative.

Mr. EDMUNDS. Where does the Senator find that power in the Constitution?

Mr. SHERMAN. The Senator can look at the Constitution and find that each house may prescribe its own rules.

Mr. EDMUNDS. That I see; but the Senator adds that they have the right to make joint rules.

Mr. SHERMAN. Undoubtedly, the one includes the other. The joint rules of the two houses are nothing but the concurrent rules of the Senate and House.

Mr. EDMUNDS. What does the Senator say to this clause of the Constitution—

Mr. SHERMAN. I hope my friend will not catechise me now.

Mr. EDMUNDS. Certainly not. I was merely asking a question for information.

Mr. SHERMAN. How is it that we pass a bill? Do we send a joint rule as to our mode of passing a bill to the President of the United States? Not at all. Where does our power exist to make a joint rule? I ask my honorable friend, and he may answer me after a while. Is that given by the Constitution?

Mr. EDMUNDS. Does the Senator wish an answer now?

Mr. SHERMAN. No; after a while. Well, I will ask the Senator to answer now.

Mr. EDMUNDS. I do not wish to interrupt the Senator now, but if the honorable Senator will state his question I will stand the catechism.

Mr. SHERMAN. I ask where he finds the power of both houses to make joint rules for their government?

Mr. EDMUNDS. I was asking the Senator that very question. When he answers my question I will answer his.

Mr. SHERMAN. That is as frank as I expected the honorable Senator to be. We do make these joint rules. If we make them without any authority in the Constitution, are they of any binding force upon us?

Mr. EDMUNDS. Will the Senator pardon me if I ask him a question?

Mr. SHERMAN. Certainly.

Mr. EDMUNDS. I ask him in good faith to tell me whereabouts in the Constitution he found the power to enact a joint rule, and he turns around and asks me the same question, and when I ask him to answer me he says I am evading. I do not think that is fair.

Mr. SHERMAN. Well, I will answer the question of the Senator.

Mr. EDMUNDS. I merely wish light about it.

Mr. SHERMAN. The Senator has the Constitution before him. If he will turn to the provision that authorizes each house to make rules for its own government I will answer him.

Mr. EDMUNDS. I will do that. It is in the second paragraph of the fifth section of the first article:

“Each house may determine the rules of its proceedings, punish its members for disorderly behavior, and with the concurrence of two-thirds expel a member.”

Mr. SHERMAN. It is under that clause that joint rules are made, because the joint rules are but concurring votes of the two houses. We have joint rules that have been in existence from the very foundation of the Government. Where is the express provision of the Constitution which authorizes the two houses to make joint rules? It necessarily flows out of the right of each house to make rules for its own government; and rules for the government of the two houses may be made by joint vote. There the power rests. The two houses acting together may go on a certain day named in the Constitution or law to count the vote, and they can make a joint rule to govern their proceeding. That has already been done. That is the constitutional right of the two houses, and no law can impair it unless it can repeal the Constitution of the United States, which gives to each house and the two houses power to make these rules. This law cannot prevent this exercise of a constitutional power, and there is the answer to my honorable friend from New York.

Mr. EDMUNDS. Are we, then, exercising a constitutional power in passing a law which repeals the constitutional privileges of each house under the clause that has been read?

Mr. SHERMAN. I do not know that it makes any difference whether we put our joint rules in the form of a law or in the form of rules. It does not weaken their force in the least. They are the assent of the two houses. As I said before, if I had been consulted, or if I had undertaken to frame this matter myself, I would have made it simply an amendment to the joint rules, and so suggested to the honorable Senator from Indiana; but he said that there were other Senators—

Mr. MORTON. The Senator from Vermont, among others, suggested that it had better be in the form of a law.

Mr. EDMUNDS. Certainly; and I stand by that now.

Mr. MORTON. There being two opinions, I rather thought myself it had better be in the form of a law, and accordingly took that course.

Mr. SHERMAN. My honorable colleague and the honorable Senator from Vermont concurred that this had better be in the form of a law. Why? Is it anything but a joint rule? Is it anything but an agreement between the two houses as to how they shall perform this duty? Their advice was followed, and if the Senator from Indiana has got into trouble, it

has been by following their advice. I say that the next Senate and the next House can, if they choose, modify and change this law, if you call it so, though it is nothing but a joint rule. It has not the binding force of a law except as it is the concurrent sense of the two houses, and may be put in the form of a law. The President's signing it does not weaken it, though it may be a work of supererogation.

Mr. EDMUNDS. May I ask a question? I do not wish to take the Senator's time or ask questions if it is disagreeable to him.

Mr. SHERMAN. Not at all.

Mr. EDMUNDS. I wish to ask the Senator, in view of what he is saying, what construction he puts on the third clause of the seventh section of the first article:

"Every order, resolution, or vote to which the concurrence of the Senate and House of Representatives may be necessary (except on a question of adjournment) shall be presented to the President of the United States; and before the same shall take effect, shall be approved by him, or being disapproved," &c.

Mr. SHERMAN. The answer to that has been made a hundred times, that where an act is to be performed by the two bodies, or is to regulate proceedings of the two bodies in the making of laws, or in any duty whatever, it does not require the assent of the President. It is only when you wish to give something more than a mere concurring vote of the two houses the force of law, to bind the people of the United States outside of Congress, that the forms of law are required: but to govern the proceedings of the two houses, acting together or separately, joint rules are amply sufficient.

The PRESIDING OFFICER, (Mr. Carpenter.) The question is, Shall the bill pass? on which the yeas and nays are ordered.

The Chief Clerk proceeded to call the roll.

Mr. GORDON, (when his name was called.) On this question I am paired with the Senator from Missouri, [Mr. Schurz.] If he were here he would vote "yea," and I should vote "nay."

Mr. HAMILTON, of Maryland, (when his name was called.) I am paired with the Senator from Pennsylvania, [Mr. Cameron.]

Mr. NORWOOD, (when his name was called.) On this question I am paired with the Senator from Maine, [Mr. Morrill.] I should vote "nay," and he would vote "yea" if present.

The roll-call having been concluded, resulted—yeas 28, nays 20; as follows:

YEAS—Messrs. Allison, Boreman, Boutwell, Chandler, Clayton, Conover, Cragin, Dorsey, Ferry of Michigan, Flanagan, Frelinghuysen, Hamilton of Texas, Harvey, Hitchcock, Logan, Mitchell, Morrill of Vermont, Morton, Oglesby, Patterson, Pease, Ramsey, Sargent, Sherman, Spencer, Washburn, West, and Wright—28.

NAYS—Messrs. Bayard, Bogy, Carpenter, Conkling, Cooper, Davis, Dennis, Eaton, Edmunds, Goldthwaite, Hager, Jones, Kelly, Merrimon, Ransom, Saulsbury, Sprague, Stewart, Stockton, and Windom—20.

ABSENT—Messrs. Allcorn, Anthony, Brownlow, Cameron, Fenton, Ferry of Connecticut, Gilbert, Gordon, Hamilton of Maryland, Hamlin, Howe, Ingalls, Johnston, Lewis, McCreery, Morrill of Maine, Norwood, Pratt, Roberston, Schurz, Scott, Stevenson, Thurman, Tipton, and Wadleigh—25.

So the bill was passed.

SENATOR MORTON'S BILL.

IN SENATE, December 8, 1875.

Mr. MORTON asked, and by unanimous consent obtained, leave to introduce a bill (S. No. 1) to provide for and regulate the counting of votes for President and Vice-President, and the decision of questions arising thereon; which was read twice by its title and ordered to be printed, to be referred to the Committee on Privileges and Elections when appointed.

March 3, 1876.

Mr. MORTON. I am instructed by the Committee on Privileges and Elections, to whom was referred the bill (S. No. 1) to provide for and regulate the counting the votes for President and Vice-President, and the decision of questions arising thereon, to report it back; and I give notice that I will ask the Senate at an early day to proceed to its consideration.

March 13, 1876.

Mr. MORTON. If there be no further morning business, I move to proceed to the consideration of Senate bill No. 1.

The motion was agreed to; and the Senate, as in Committee of the Whole, proceeded to consider the bill (S. No. 1) to provide for and regulate the counting of votes for President and Vice-President, and the decision of questions arising thereon.

The first section provides that the two houses of Congress shall assemble in the hall of the House of Representatives, at the hour of one o'clock, on the last Wednesday in January next succeeding the meeting of the electors of President and Vice-President of the United States, and the President of the Senate shall be their presid-

ing officer; one teller shall be appointed on the part of the Senate, and two on the part of the House of Representatives, to whom shall be handed, as they are opened by the President of the Senate, the certificates of the electoral votes; and the tellers, having read the same in the presence and hearing of the two houses then assembled, shall make a list of the votes as they shall appear from the certificates; and the votes having been counted, the result of the same shall be delivered to the President of the Senate, who shall thereupon announce the state of the vote, and the names of the persons, if any, elected, which announcement shall be deemed a sufficient declaration of the persons elected President and Vice-President of the United States, and, together with a list of the votes, be entered on the Journals of the two houses. If, upon the reading of any certificate by the tellers, any question shall arise in regard to counting the votes therein certified, the same having been stated by the presiding officer, the Senate shall thereupon withdraw, and the question shall be submitted to the body for its decision; and the Speaker of the House of Representatives shall, in like manner, submit the question to the House of Representatives for its decision; and no electoral vote or votes from any State, to the counting of which objections have been made, shall be rejected except by the affirmative vote of the two houses. When the two houses have voted, they shall immediately re-assemble, and the Presiding Officer shall then announce the decision of the question submitted. And any other question pertinent to the object for which the two houses are assembled may be submitted and determined in like manner.

The second section provides that if more than one return shall be received by the President of the Senate from a State, purporting to be the certificates of electoral votes given at the last preceding election for President and Vice-President in such State, all such returns shall be opened by him in the presence of the two houses when assembled to count the votes; and that return from such State shall be counted which the two houses, acting separately, shall decide to be the true and valid return.

By the third section it is provided that when the two houses separate to decide upon an objection that may have been made to the counting of any electoral vote or votes from any State, or for the decision of any other question pertinent thereto, each Senator and Representative may speak to such objection or question ten minutes, and not oftener than once; but after such debate has lasted two hours, it shall be in the power of a majority of each house to direct that the main question shall be put without further debate.

Section 4 declares that at such joint meeting of the two houses, seats shall be provided as follows: For the President of the Senate, the Speaker's chair; for the Speaker, immediately upon his left; the Senators in the body of the hall upon the right of the Presiding Officer; for the Representatives, in the body of the hall not provided for the Senators; for the tellers, Secretary of the Senate, and Clerk of the House of Representatives, at the Clerk's desk; for the other officers of the two houses, in front of the Clerk's desk and upon each side of the Speaker's platform. The joint meeting shall not be dissolved until the electoral votes are all counted and the result declared; and no recess shall be taken unless a question shall have arisen in regard to counting any such votes, in which case it shall be competent for either house, acting separately, in the manner hereinbefore provided, to direct a recess not beyond the next day at the hour of ten o'clock in the forenoon.

MR. BAYARD. Mr. President, I wish to ask the Senator from Indiana, who has heretofore considered this subject with a good deal of care, whether this bill differs, and if so in what respect, from the measure which passed the Senate at the last session?

MR. MORTON. There are some verbal alterations, but it is substantially the same bill.

MR. BAYARD. Nothing affecting the substance is changed?

MR. MORTON. Nothing affecting the substantial features of the bill which the Senate passed last year.

MR. BAYARD. Mr. President, I am very glad that, even at this stage of the session, this very important question has come up for the consideration of the Senate. The Senate may remember that many weeks ago I urged speedy action on the subject, and I suggested methods of action which I believed then and still believe were the best calculated to insure co-operative action between the two houses of Congress upon this subject. The power of each house is the same over this subject, the same measure being committed by the Constitution to each; and therefore it was that I believed the present condition of party majority in each house was exceedingly favorable to the framing of such a permanent rule in the shape of law upon this subject as would be satisfactory to the American people. Although the Senate has not seen fit to adopt my suggestion that this subject should be considered by the two Committees on Rules or the two Committees on Elections in the houses respectively, and in that way a measure could be made more probable of acceptance by each simply by being reported by each committee to its own house favorably, still I am most anxious to see something done in the proper direction upon this subject, and if this bill shall be a step in that way I am prepared to give it my support.

I have felt long that which I apprehend the honorable Senator from Indiana has felt, some degree of embarrassment in regard to the measure of power committed to Congress over the counting, accepting or rejecting of the electoral votes of the electors of the various States. The letter of the Constitution on this subject is very meager. In the second article of the original Constitution it was provided that "each State shall appoint, in such manner as the legislature thereof may direct, a number of electors equal to the whole number of Senators and Representatives to which the State may be entitled in the Congress;" and then proceeds to exclude Senators or Representatives or persons holding an office of trust or profit from the office of elector. Then follows in the original Constitution a provision for the meeting of the electors which has been superseded and annulled by the twelfth amendment of the Constitution. Then follows a paragraph authorizing Congress in its discretion to determine the time of choosing the electors and the day on which they shall give their votes, and declaring that that day shall be the same day throughout the United States.

The twelfth article of amendments, superseding a portion of the third paragraph of the second article, provides that—

"The electors shall meet in their respective States and vote by ballot for President and Vice-President, one of whom, at least, shall not be an inhabitant of the same State with themselves; they shall name in their ballots the person voted for as President, and in distinct ballots the person voted for as Vice-President, and they shall make distinct lists of all persons voted for as President, and of all persons voted for as Vice-President, and of the number of votes for each; which lists they shall sign and certify, and transmit sealed to the seat of Government of the United States, directed to the President of the Senate. The President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates and the votes shall then be counted."

This latter clause contains all the power that is delegated to the two houses of Congress or to any other officer of the Government in respect to the counting of the electoral vote; and the present bill provides simply the legislative machinery to accomplish this result. There has been argument heretofore before Congress, which I have concurred in, to the effect that the two houses are mere witnesses to the counting of these votes. The only officer named is the Presiding Officer of the Senate into whose custody the certificates shall have been delivered in accordance with the mandate of the Constitution by the electors or their agents, their messengers, and those certificates being in his hands are to be opened by him and the votes are then to be counted; by whom, is simply a matter of inference, perhaps of necessary inference; but they are to be counted. The powers given to Congress are enumerated, and a just and wholesome construction will cause the expression of one power over a subject to exclude other powers not expressed. Power is given to each State to appoint, through its legislature, or in such manner as the legislature may provide, a number of electors. Congress is given the power to determine the time of choosing them, and the day on which they shall cast their votes; and then the two houses are made the witnesses of the opening of the certificates by the Presiding Officer; and this enumerates all the express powers; and the question for the Senate and for each member to determine is how far this expression of powers excludes others not expressed.

For the last three presidential elections, the vote for President and Vice-President has been counted under the alleged authority of a joint rule, which at the end of eleven years the Senate have rescinded by their own action, which as yet has not been concurred in by the other house, whether any concurrence be necessary or not. I have heretofore stated that in my opinion the concurrence of the House was not essential. But under that rule the electoral votes in three presidential elections have been counted; under a rule that gave the power of absolute veto to either house, and that was given in separate session and without an opportunity of debate, with the barest statement of an objection which might be on its face the merest pretext for the assumption of a power to exclude the vote of any State, and disfranchise any State at the caprice, the unargued or unreasoning will of either house of Congress. It is not too much to say that such a power was an utter usurpation, utterly without warrant in the Constitution, dangerous in the extreme, and threatening to overthrow that spirit of popular government which all over underlies the frame-work of our system, because it enabled, on account of a disagreement in regard to a vote, the entire electoral vote of a State, any portion of the electoral vote of a State, or the electoral votes of any number of States, to be cast out by the silent operation of a veto by the vote of the Senate or of the House. It gave to either house the power to disregard and overthrow the expression of the popular will, and consign the election to that one body to which, only in the event of the failure of the people by a majority vote of all the electors to express their will, has the Constitution relegated the question. In that event the decision which the people had failed to make themselves the Constitution remits to the popular branch of Congress, the House of Representatives.

This state of things has continued for three elections. Thrice have the people of this country voted with a power that was foreordained in case of necessity to thwart

their election, given to either house of Congress, the right under any pretext in silence and without reason, without debate, to overthrow the result of the popular election. But the present bill abrogates that monstrous claim of power; and I will not say that the monstrosity of that claim was discovered only when a variance occurred under a popular election between the majorities of the two houses; but such is the fact, that for three presidential terms, the last term of Mr. Lincoln and both terms of the present President, and until there was a change in the majority of the popular branch of Congress, this rule with all its unhallowed and dangerous and despotic power stood unquestioned and unassailed.

Mr. MORTON. If the Senator will allow me I will call his attention to the fact that, so far as I am concerned, I proposed a change in this rule before this change in the House of Representatives. I think for three years I have been calling the attention of the Senate to the twenty-second joint rule and urging that it ought to be abolished or modified.

Mr. BAYARD. I do not desire to deny anything that the honorable Senator says in regard to his action; but I simply say, having been a member of the Senate for seven years, that until the last year and the last session I had no knowledge, and I do not think the records of the Senate betray any debate upon the subject in the line of reformation of that rule. If there had been any, there would have been no difficulty whatever in the passage of some remedy. The Senate had no trouble in passing this act at the last session, or one, as I understand, from the Senator almost precisely similar, and it could readily, in the then condition of the House of Representatives, have become the law of the land.

Mr. BOUTWELL. Will the Senator allow me a word?

Mr. BAYARD. Certainly.

Mr. BOUTWELL. While I have nothing to say in regard to the opinions that may have been entertained in the Senate, it is within my personal knowledge that immediately after the votes were counted in the month of February, 1869, a debate took place in the House of Representatives, where I then had a seat; and the provisions of that rule were generally condemned, I think uniformly condemned, by those who took part in the debate and who were then members of the majority party in the House. No action was taken tending to secure the repeal of the joint rule, for it was late in the session and late in the Congress; but at that time there was a very decided opinion that the rule was a bad one.

Mr. BAYARD. I am very glad, then, to hear that there was a debate in the House of Representatives; but I am also aware, as the Senate and the country are, that that debate was followed by no action and by no amendment of the rule. However, I merely cited this more historically than for any other fact. I am glad that a remedy or a proposed remedy comes now.

Now it is proposed, however, after the very sensible and I think authorized machinery of tellers merely to tabulate this vote and return it to the two houses, that "no electoral vote or votes from any State to the counting of which objections have been made shall be rejected except by the affirmative vote of the two houses." That is far safer, that is far better; and I do not know that I am prepared to offer any tribunal better adapted than the two houses for a co-operative vote, which is made necessary before the electoral certificate of a State shall be rejected; and yet my want of suggestion comes from the silence of the Constitution itself on this subject. It has been suggested that the Supreme Court of the United States might take cognizance of these grand questions of election upon which the Chief Magistracy of the Union and the Vice-Presidency also depend. And there will be found, I think, in the mind of every one who considers this question, a hesitancy for want of the power of the two houses of Congress to provide, as once they did, for giving to each house the power of rejection and now to constitute the two houses the tribunal which shall decide upon the reception or the rejection of the vote of a State. This bill undoubtedly does place this power in the hands of the two houses, formerly confined to either one, of disfranchising at any time an entire community; that is to say, the community of an entire State or of any number of States. The answer is very plain, that, where the two houses shall be of a different political complexion, both will not join to defeat a popular choice, because the Senate would not wish to throw the election into the hands of the House, as it necessarily must do, if there be not a majority of electoral votes declared by the count; and the House undoubtedly, on the other hand, would not have it in its power to claim the election by the non-assent of the non-concurring body of a different political view. But it is a grave question whether the two houses have the power to constitute themselves a tribunal for the acceptance or rejection of the vote of a State at will, and with the small amount of debate and time allowed by the subsequent sections of this bill, and thus by a concurrence of action assume and perhaps exercise the power of changing the *prima facie* result of a popular election, and throwing it under the control of one of the branches of Congress. That is the result; let us contemplate it, and ask whether we have the power thus to do.

In the event of a majority of the electors not having been found to cast their votes

for any one candidate, the election must go to the House of Representatives. I can imagine the two houses of the same political party, not as they are now constituted, for this is not a law for to-day only; it is to become a settled law, a fixed rule, requiring for its repeal the assent of a majority of each house and the President of the United States. We are to establish as our rule that a power is to be deposited in the hands of the Senate and the House of Representatives at their will to throw the election at all times into the House of Representatives by concurring in the rejection of the electoral votes of the various States. Is or is not that an authorized exercise of power? Is or is it not in accordance with the theory of our Government on this subject? Were the two houses of Congress ever intended to become the judges of the electoral vote of the people of this country? Apparently by the Constitution their duties would seem to be of a ministerial character only. They were to stand by and witness the counting, and their presence in that way as witnesses was supposed to be a security. Now you change this from a merely ministerial power into a judicial power of the very gravest and most important character. Is there a warrant for that in the Constitution of the United States? And if Congress has the right thus to create itself into a tribunal for this purpose or to create any other tribunal competent for this purpose, are the two houses of Congress the best tribunal that we can devise and suggest? I state these questions without the preparation to answer them fully, and in regard to them not having that conclusive opinion that I would wish to have before my vote is to be cast on this subject; but I state them to exhibit to the Senate the gravity of the propositions contained in the present bill, and to ask them not hastily to adopt a measure of this kind.

Everything that tends to give certainty, everything that tends to promote fairness, everything that tends to create such a decision as shall satisfy the great popular mind of the country and give that respect to public action which every legislator ought to do his best to secure, I desire to favor. Give the people a tribunal entitled to respect, and its decisions they will abide by though they may be adverse to the popular will at the moment. Therefore it behooves us, in dealing with a question which was intended to be left to popular election, not to interpose such a tribunal, and that tribunal to be created to-day by our own votes, as may thwart, and has certainly the power to thwart in a given case, the expression of the popular will at the polls.

I hope this measure will be discussed. I am not prepared to say that I shall vote against this bill, nor have I proposed to raise my voice in opposition to it; but I trust that these suggestions thus thrown out, and rather unpremeditatedly—for I did not suppose the measure would be called before the Senate this morning—may meet with some response from others on this floor who have likewise given grave consideration to this subject.

Mr. MORTON. Mr. President—

Mr. SHERMAN. With the consent of the Senator from Indiana, and before he discusses this bill, I arise to suggest an amendment in harmony with the general purpose of the bill.

The proviso of section 3, in my judgment, may possibly enable either house to defeat the object of the bill, the object of the bill as declared on the second page, in section 1, being to prevent either house from defeating the counting of the vote of any State, and to repeal the practice that had grown up under the twenty-second joint rule, by which either house might by its affirmative vote exclude any State for any cause whatever from having its electoral vote counted for President. That rule is sufficiently met by the language of the twenty-ninth, thirtieth, and thirty-first lines of the first section, as follows:

"And no electoral vote or votes from any State to the counting of which objections have been made shall be rejected except by the affirmative vote of the two houses."

But under the proviso to section 3, I fear very much that either house might by indirection defeat the counting of a vote, because it provides for the separation of the two houses and the consideration by each house of the question, and then provides:

"That after such debate has lasted two hours it shall be in the power of a majority of each house to direct that the main question shall be put without further debate."

This provision is not compulsory, and either house might prolong debate indefinitely, and thus prevent the question from being taken on the counting of the vote. It is true it is rather a violent supposition to suppose that either house of Congress would, by an abuse of its power, endanger the existence of the Government; but the object of this bill is to guard against all possibility of the abuse of power in that respect, and it is not an improbable supposition that in high party times, under great excitement, one house might thus neglect or refuse to direct the main question to be put. We know very well the influence of party excitement and party feeling, especially under strong provocation. Therefore it seems to me that this provision ought to be more peremptory in its character; it ought to require, after two hours' debate, a peremptory putting of the main question. I suggest to the Senator from Indiana whether it would not be safer and more in harmony with the object of the bill to require, after

a reasonable time, say two hours, that the question should be put in each house and the convention again assembled. I therefore move an amendment to make the provision read: "That after such debate has lasted two hours it shall be the duty of each house to put the main question without further debate." That, it seems to me, will avoid the difficulty, and then no question can be discussed longer than two hours. I think two hours ample time for the discussion of any question that may arise.

Mr. EATON. I was about to ask my friend from Ohio if, in his judgment, two hours' time would be sufficient to discuss the grave questions that might arise. I agree that his criticism is entirely just in regard to the clause in the bill. The only doubt in my mind is in regard to the time.

Mr. SHERMAN. This is a duty rather in the nature of a ministerial duty, that must be promptly performed. The only question before the two houses is as to the form and sufficiency of a return, and that depends on matters rather of a historical character. The facts connected with these returns will have been published to the world before the time when the two houses meet, and probably the attention of each member of Congress will have been called to them. If you allow more than two hours or open the subject for indefinite debate, you may defeat the object of the law. There is not much time allowed to elapse between the time of counting the votes of the electors and the time when the presidential office must commence, on the 4th of March. This bill antedates the time of counting the votes, making it two weeks, as I understand, earlier than it was before, in order to allow a reasonable time to dispose of any question which may arise. It seems to me that two hours' time is sufficient in a deliberative body to point out the real point or merit of any proposition likely to arise on a question of this kind, which is rather a matter of form than otherwise. Indeed I remember in the last case, which was a very important case, that the Senate hastily decided, I think wrongly, on the Arkansas vote; no debate was allowed. Each Senator went up to the desk and examined the paper, and without having time to look at the law, without having even time to send to the Library to see what the constitution of Arkansas required, we fell into the error of supposing a fact which did not exist, that the State of Arkansas had a seal, and therefore we rejected the vote of that State because of the want of a State seal to the certificate. Two hours' time is ample to decide any question of that kind or that is likely to arise in these cases. Indeed I thought it was rather longer than necessary. A short debate would be proper to call the attention of each house to the matters before them, and then the vote should be taken peremptorily and mandatorily, in my judgment. I submit the amendment.

Mr. WITHERS. In the same connection with the remarks made by the Senator from Ohio, and to save trouble to the chairman of the committee who reported the bill, I would call his attention to the second section, and inquire whether the point which I am about to mention was considered by the committee, and whether they designed the bill to have the effect that it seems to me it will have if it be adopted in its present form?

The provision in the twenty-ninth, thirtieth, and thirty-first lines of the first section gives practically a veto power to both houses acting conjointly when an objection is made to a vote being counted; but in regard to the contingency where different certificates of election are sent up from a State, the second section provides that "all such returns shall be opened by him" (the President of the Senate) "in the presence of the two houses when assembled to count the votes;" both the conflicting returns shall be opened. "And that return from such State shall be counted which the two houses acting separately shall decide to be the true and valid return."

It would therefore require the concurrent action of both houses to fix upon the authentic return from such a State. Suppose these two houses should differ; one should assert that one return was the correct one and the other the other; there seems to be no provision made for settling the difficulty that would thus arise. I would inquire if in the event such a thing should occur the vote of a State that was thus disputed would be cast out entirely? If so, it leaves it still in the power of either house to veto the vote of such a State.

Mr. WRIGHT. The suggestion just made by the Senator from Virginia had occurred to me, as also one or two others that I beg leave to submit to the chairman of the committee before he shall address the Senate.

By the first section it is provided that no electoral vote of a State shall be rejected except by the affirmative vote of the two houses. That contemplates a case where there is but one return from a State. The second section contemplates a case of two returns; and that provides that the return from such State shall be counted which the two houses acting separately shall decide to be the true and valid return. Now, suppose they shall not agree, then what is to be the result? That is a contingency that, it seems to me, is not provided for in this bill. That is one suggestion that I have to make; and it is the one already submitted by the Senator from Virginia.

I will suggest to the Senator from Indiana another trouble that occurs to me under the first section. The last clause of the first section contemplates that not only the question of the admission of the return from a State may be referred to the two

houses, acting separately, but that other questions "pertinent to the object for which the two houses are assembled may be submitted and determined in like manner." If the "like manner" refers to what precedes, with reference to the manner of accepting or rejecting a return, and that in determining any of these other pertinent questions there must be an affirmative vote of the two houses to reject, otherwise it shall be accepted; and if, upon a question thus pertinent being submitted to the two houses, they do not affirmatively determine to reject it, it seems to me that you would get into difficulty. That is my second suggestion.

The third suggestion arises upon the fourth section of the bill. That provides that—

"No recess shall be taken unless a question shall have arisen in regard to counting any such votes, in which case it shall be competent for either house, acting separately, in the manner hereinbefore provided, to direct a recess not beyond the next day at the hour of ten o'clock in the forenoon."

The doubt that occurs to me is whether that recess relates to a recess by each house separately or a recess as to both houses, and whether if one house determines to take a recess that works a recess of both houses or whether it only works a recess of such house as thus determines, or whether it is necessary that there shall be concurrent action determining in favor of a recess to have a recess of both houses, or whether either house acting for itself can take a recess.

I do not know but that the inquiries I make are entirely answered by the bill as it stands; but I suggest them as difficulties which have occurred to me, and I shall be glad to hear from the Senator from Indiana upon them.

Mr. EATON. Mr. President, the objection which has been so well stated by the Senator from Iowa and the Senator from Virginia had occurred to me, but I thought I would not mention it until the matter had been arranged in regard to the amendment of the Senator from Ohio. It seems to me that this second section is altogether vicious.

"SEC. 2. That if more than one return shall be received by the President of the Senate from a State, purporting to be the certificates of electoral votes given at the last preceding election for President and Vice-President in such State, all such returns shall be opened by him in the presence of the two houses when assembled to count the votes; and that return from such State shall be counted which the two houses acting separately shall decide to be the true and valid return."

Now, suppose they do not decide. Suppose the Senate acting separately decides that return marked "A" is the true return and the House of Representatives decides that the return marked "B" is the true return. Then neither can be counted by the terms of this bill. Manifestly this cannot be the design of the distinguished Senator from Indiana. Although perhaps it is a little out of place now, the question being on the amendment of the Senator from Ohio, if the Senator from Indiana will have the kindness to look at the second section of the bill—I will read the last paragraph:

"And that return from such State shall be counted which the two houses acting separately shall decide to be the true and valid return."

Now, I will suppose there are two returns, which I will designate, for the purpose of identification, one as "A" and the other "B." The Senate decides that "A" is the proper return; the House of Representatives decides that the return marked "B" is the proper return from that State. Which is to be counted under this bill? Certainly neither. "That return from such State shall be counted which the two houses, acting separately, shall decide to be the true and valid return." Manifestly the bill is vicious in this particular.

Mr. MORTON. Mr. President, before proceeding to comment on the features of this bill, I wish to answer a suggestion made by the Senator from Delaware to the effect that it was not proposed to repeal or modify the twenty-second joint rule until after a change had occurred in the political relations of the House of Representatives. The effect of that suggestion was to give this proposed amendment a political significance. Now, to relieve myself at least from any imputation of this kind, I call the attention of the Senate to a speech that I made in this body on the 17th day of January, 1873, three years ago and more, certainly before this change had taken place in the political complexion of the House of Representatives. I discussed the twenty-second joint rule as it stood until a few weeks ago, and I cannot now add anything to the objections I then took to that rule, to its enormity, and to its danger. I said:

"I now come to the consideration of the twenty-second joint rule of the two houses, adopted in 1865, in regard to the counting of the electoral vote. This rule was undoubtedly the result of a conviction in Congress of the necessity of providing some method for avoiding the dangers I have been discussing; but it was certainly adopted without much consideration, and with a view apparently of furnishing an additional safeguard against receiving electoral votes from States that had been in rebellion."

Again I said:

"It is, in my judgment, the most dangerous contrivance to the peace of the nation that has ever been invented by Congress; a torpedo planted in the straits with which the ship of state may at some time come into fatal collision."

I then went on to recite the rule, and discussed it somewhat at length. It was at a time when both houses of Congress were republican. I did not discuss it in an, political aspect. It was a question above party and political considerations, and a such I present it now.

The principal change which this bill makes from the old twenty-second joint rule consists in three things, to which I will call the attention of the Senate. Under the twenty-second joint rule, when the two houses assemble to count the electoral vote, if an objection be made, we will suppose to the vote of New Jersey, however technical and trifling it may be, the two houses separate to vote on the objection, each in its own chamber. Unless the objection be overruled by the vote of both houses, the vote of New Jersey is lost. For example, if the Senate sustain the objection and the House of Representatives overrule it, the vote of New Jersey goes out. If the house of Representatives sustains it and the Senate overrules it, the vote of New Jersey goes out. Thus, it was in the power of one house of Congress to disfranchise a State and to disfranchise all the States; and under the operation of that rule, when the two houses came to vote separately, there was no debate; there could not be a single suggestion. The Senate rejected the vote of Arkansas when we counted the votes the last time. Then, if there could have been a word said, we should have avoided that foolish blunder, for such it turned out to be; but under the rule there could not be a word said; we could not even refer to the constitution of Arkansas, and the result was that in twenty minutes we disfranchised about six hundred thousand people.

This bill allows a short debate to point out the objection or the futility of the objection; and it provides that no State shall be disenfranchised or any electoral vote lost without the concurrent vote of both houses. You cannot pass the most trifling bill without the concurrent vote of both houses; you cannot appropriate a dollar of money without the concurrent vote of both houses, each acting separately; but under this old rule you could disfranchise forty millions of people by one house. It was absurd, wickedly and dangerously unconstitutional. This bill provides that you cannot reject an electoral vote from any State unless both houses shall concur in that rejection, and that is the only safe rule on the subject, in my judgment.

Mr. BAYARD. Will the Senator permit me to make a suggestion?

Mr. MORTON. Yes, sir.

Mr. BAYARD. Do not the provisions of this bill allow of the increase of the votes of the electoral college by compelling the counting of any votes purporting to be electoral votes sent up from a State, no matter by whom? I want to show this effect. There are, say, in our electoral college at present 366 electoral votes; one-half of this is 183 votes, and 184 is a majority. The Constitution entitles the person having the greatest number of votes for President to be President, if such number be a majority of the whole number of electors appointed; so that if any man shall be found to have received 184 votes he has a majority, and he is entitled to be President. Now, if we shall permit two sets of returns to come from any State, and require the concurrence of both houses in order to reject either one of those two sets, we may, by one house refusing to concur with the other house in choosing which of these sets of duplicate returns shall be regarded as the lawful one, have the aggregate of the electoral votes increased; and say it occurs to the extent of 12 votes, we should then have 366, the true electoral college, increased to 378, and thereby we should make it necessary for a man to receive 190 instead of 184 to have a majority.

We are not making a law for this man's chance or that, or for this or that party, but proposing to make a permanent rule which shall be safe, satisfactory, just, and exclusive, so far as we can, of frauds or unfairness in elections; and the question is, would it be a wise thing to provide by this section 2—

"That if more than one return shall be received by the President of the Senate from a State, purporting to be the certificates of electoral votes given at the last preceding election for President and Vice-President in such State, all such returns shall be opened by him in the presence of the two houses when assembled to count the votes; and that return from such State shall be counted which the two houses, acting separately, shall decide to be the true and valid return."

Let us construe that section by the language of section 1, from line 29 to 32:

"And no electoral vote or votes from any State, to the counting of which objections have been made, shall be rejected except by the affirmative vote of the two houses."

Here, then, should we not find that it would be within the power of some mischievous and unfair persons in different States of the country to cause certificates purporting, to use the language of this bill, to be certificates of electoral votes to come up, and thereby the aggregate of the electoral college to be swollen to such a figure that a majority would be required which in reality the present Constitution does not require? I ask the Senator if it does not strike him that there is force in that view?

Mr. MORTON. The first section of this bill applies to a case where there is but one return from a State, and provides for settling objections which may be made to that return. The second section is intended to provide for a case where there are two sets of returns from the same State, as there were from Louisiana in 1872. Now, the ques-

hon of the Senator from Delaware goes to this point, that where there are two sets of returns and the two houses do not agree which set will be counted, both sets will be counted and the aggregate number of electoral votes increased. That is not intended to be the effect of this section, and I think it is not. The effect of it is to determine which set shall be counted, and if the two houses do not agree neither set is to be counted.

"That if more than one return shall be received by the President of the Senate from a State, purporting to be the certificates of electoral votes given at the last preceding election for President and Vice-President in such State, all such returns shall be opened by him in the presence of the two houses when assembled to count the votes, and that return from such State"—

I call the attention of the Senate now to this point—
"and that return from such State shall be counted which the two houses, acting separately, shall decide to be the true and valid return."

Does not that carry with it the negative, that if the two houses do not agree, neither set shall be counted? Would it change the sense if you insert the word "only?" I have no objection to that being inserted, if it is desired, to make it certain.

Mr. BAYARD. Then, I suggest, the only point is this: The Senator says that the second section relates to cases where different certificates come up, and that the first section does not relate to such cases; that in the second section it requires a concurrent vote to have either passed, and in the first section it requires a concurrent vote to have one rejected. Therefore in the two classes of votes, where a single certificate comes up it requires the action of each house acting separately to reject, but where there comes a duplicate certificate the result of the Senator's present construction of this bill is that either house by sticking to the certificate which it prefers can disfranchise the State as completely as was done under the twenty-second joint rule.

Mr. MORTON. I suggest to the Senator that the rule is exactly the reverse in the two sections, and of necessity. Where there is one set of returns, this bill provides that the vote of a State shall not be rejected unless both houses agree to it; but where there are two sets of returns and the two houses disagree, then who is to decide? I will suppose, as in the case of Louisiana, here are two packages sent to the Vice-President. He opens them, and finds that each one purports to be signed by the governor of Louisiana; that there are two sets of electors, each assuming to vote for President and Vice-President. Who is to decide which is the correct return, who is the governor of Louisiana, and which set of electors was entitled to cast the vote of that State? Will you leave it to the Vice-President alone? If you do not provide for settling it by the two houses, he must decide that question. He is the absolute arbiter, and there is no appeal from his decision. Here are two sets placed in his hands. He may take a political view of the question, and he presents that set to the two houses to be counted which he thinks ought to be counted, and there is no possible escape from it. You cannot even know what are the contents of the other package; you have no means of knowing. You leave him to decide what this bill provides that both houses shall decide.

There is the precise danger to be avoided. If there are two sets of returns and there is no means by which the two houses can pass upon them, who is to decide that question? We cannot read both sets; both cannot be counted, because the State can have but one vote or series of votes according to its population. Somebody must decide it. If the two houses do not decide it, the President of the Senate must decide it, and that is just the authority which Mr. Mason assumed in 1857, when he refused to entertain a motion to reject the vote of Wisconsin. In that case the vote of Wisconsin was clearly illegal. It was not cast by the electors on the day fixed by law. A motion was made to reject the vote. That was before the adoption of any rule on the subject. Mr. Mason, then President *pro tempore* of the Senate, refused to entertain the motion, declared it out of order, directed the tellers to read the vote and to count it, and the vote of Wisconsin was counted, clearly in violation of the Constitution. As soon as that was done, the two houses separated, and an angry debate took place in both houses. The power of Mr. Mason was denied; but there was no rule on the subject, and it all came to nothing. Happily, in that case the vote of Wisconsin was not important. Mr. Buchanan was elected by a large majority, even counting the vote of Wisconsin for Mr. Frémont. It became unimportant, as it would have been unimportant if we had had no rule on the subject three years ago and the Vice-President had determined that he would count this or that set of votes from Louisiana in 1873. But suppose that the election of President had turned upon it, we can then see the danger and the trouble to result from it. Where there is but one set of returns, it is right to provide that no vote shall be rejected unless by the concurrent vote of both houses; but where there are two sets, somebody has got to choose between them. And who is it? Will you leave it to the President of the Senate? You cannot leave it to one house, because one house may choose one set and the other house choose the other set. You must trust to the judgment, you must trust to the integrity of Congress act-

ing under the Constitution and under their oaths, just as you do in the passage of a bill on an important subject. You must believe something in the integrity of me, and in that case it is safer to leave it to both houses than it is to leave it to one house alone. It is safer to leave it to both houses than it is to leave it to the Presiding Officer of the Senate, because there is where the power must rest if it is not placed in the two houses of Congress.

Mr. WALLACE. Will the Senator allow me to make a suggestion? Suppose that the Senate should use the remedy that the Constitution provides in the case of the election of President when it goes into the House, that the States by their representation shall settle this question when there shall be two returns, and that a vote by States be taken in the joint body. I would suggest such an amendment as this:

"When the two houses acting separately shall disagree in their decision as to which is the true and valid return from any State, or as to any other question which they may have separated to decide, the joint meeting shall finally determine the same by a vote by States, the representation from each State, including the Senators therefrom, having one vote; but if such representation shall be equally divided, the vote of such State shall not be counted."

This I have drawn hastily, and it is a mere suggestion thrown out. It seems to me it would solve this difficulty. There are two returns from a State; we are in joint convention; the States themselves by their votes could settle the question, the representation from each State having a single vote. It is a mere suggestion, which I throw out for what it is worth.

Mr. MORTON. As between the method provided in this bill and leaving it to the votes of the States, I should much prefer this as being the most democratic and as being the fairest in every point of view. I think the weakest part of our Constitution to-day is that part which provides for the election of President by the States, each State having one vote; the smallest State in the Union having the same voice in the election of President as the largest one. That experiment has been tried twice; twice it endangered the existence of the Government; and it is to be sincerely hoped that it will never be tried again. The remedy of electing by the States was the last provision put in the Constitution of the United States after the convention had tried in various ways to settle the question. It was put there finally with but little consideration. It is unjust to the people; it is dangerous; it presents the greatest temptation for corruption that can possibly be presented.

But I was discussing the question in regard to two sets of electors in a State, where two sets of votes come here, where there are two persons each claiming to act as the governor of the State, two bodies of men claiming to be electors. Two packages come here. Somebody must settle that question; and how shall it be done the most safely to the country and the most satisfactorily? Unless you provide for settling it in this way, you must leave it to be settled by the Presiding Officer of the Senate. In my judgment it would be more conducive to the peace and safety of this country to provide for settling it by the action of the two houses of Congress, just as you make the important laws and carry on the business of this country. You cannot leave it to one house alone; they do not agree. You cannot read both sets; you can only read one set, and therefore read that set which both houses of Congress, supposing men to be patriotic and to be honest, and acting under the obligations of the Constitution and their oaths, shall decide to be the true and valid return. I think that is the fairest way.

Mr. EATON. Suppose they do not agree on the same return, what then?

Mr. MORTON. The vote goes out, the State has no vote, because, unless there is some tribunal to settle which vote shall be counted you cannot count both, and therefore you cannot count either. You must have some tribunal to settle that difficulty; and what tribunal is safer than the two houses of Congress, I ask my friend from Connecticut?

Mr. WITHERS. I suggest that it would be better that some tribunal should be provided for settling this question of duplicate returns, which is not provided for in the bill at all. If the bill is passed in its present form, it will be in the power of a small faction or a large one in any State, which wished to deprive that State of its voice in the electoral college, to send up a set of returns claiming to be the electoral returns, and if there was anything like strong partisan feeling in the houses, and they were divided politically, each party having a majority in one house, the effect of such returns would be to deprive that State of its vote. It might be engineered solely for the purpose of producing that result. It seems to me the bill would be in better form if some arbiter were provided to decide what should be the return from the State in that case.

Mr. MORTON. In the case suggested by the Senator from Virginia, where a faction gets up another set of returns of electoral votes for the purpose of depriving a State of its vote, something must be left to the integrity and judgment of Congress. Take that very case where a faction works up a false set of returns, and they are sent to the President or the Senate. If you do not provide for the two houses settling that ques-

hon, you necessarily leave him to pick out the package that he thinks ought to be counted. He is as liable to be swayed by political considerations as both houses are, or either house is, and therefore the same difficulty returns. Now, in regard to another tribunal, I presume my friend refers to a court, or something of that sort, to decide. That, under the Constitution, cannot be done, as will be seen when we come to consider its phraseology:

"The electors shall meet in their respective States and vote by ballot for President and Vice-President, one of whom, at least, shall not be an inhabitant of the same State with themselves; they shall name in their ballots the person voted for as President, and in distinct ballots the person voted for as Vice-President, and they shall make distinct lists of all persons voted for as President, and of all persons voted for as Vice-President, and of the number of votes for each; which lists they shall sign and certify, and transmit, sealed, to the seat of Government of the United States, directed to the President of the Senate."

The certificates are to come to the President of the Senate sealed. Nobody knows the contents of them. Whether the electors have been certified to by the governor as elected, whether they have voted for persons living in different States for President or Vice-President, as required by the Constitution, or whether they have voted by ballot as required by the Constitution, none of these facts can be known until the two houses assemble to count the votes, because the packages are not to be opened except in the presence of the two houses at the precise time when the votes are to be counted. You cannot examine in advance and see if there are any irregularities and have them corrected, or submit them to a court to decide questions. These questions cannot arise until the two houses have assembled to count the votes, and then the packages are opened for the first time.

"The President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates and the votes shall then be counted."

Then and there. You cannot refer to any other tribunal; you cannot get the case before the Supreme Court of the United States or before any special court to be created for that purpose. These votes are then to be opened, and then and there they are to be counted. I will read on:

"The person having the greatest number of votes for President shall be the President, if such number be a majority of the whole number of electors appointed; and if no person have such majority, then from the persons having the highest numbers, not exceeding three, on the list of those voted for as President, the House of Representatives shall choose immediately."

It contemplates, and the history of the debates shows that the Constitution contemplates, that when the votes have thus been opened and counted, if no person is found to be elected, the House of Representatives shall without adjournment proceed to elect a President, so that there shall be no interregnum—that there shall be no delay in the choice of an Executive of the United States.

MR. WILKINS. The view which is stated by the Senator from Indiana in regard to the necessity of an immediate counting of the votes is undoubtedly correct; and so as to the inability of remanding the decision of the question to the Supreme Court; but I am not prepared at this time to give my assent to the doctrine that the two houses would be better prepared or qualified in any sense to decide this question than would the joint representation of the States, acting by States, as suggested by the Senator from Pennsylvania; or even than the Vice-President of the United States, because we all know that where responsibility is devolved specifically upon an individual occupying a position as high as the Vice-President occupies he will proceed to the discharge of that duty with a fuller knowledge of that responsibility, and, I think, with less probability of having his judgment warped by purely partisan considerations than would either house of Congress. But I have merely thrown out these suggestions, not that I am prepared now to offer an amendment which would meet the difficulty I have suggested, but to call the attention of the distinguished chairman of the committee to it, and elicit such information with regard to arguments and reasons which caused the committee to report the bill in its present form rather than to propose a remedy for them.

MR. MAXEY. I desire to call the attention of the Senator from Indiana, the chairman of the Committee on Privileges and Elections, to sections 1 and 2. It occurs to me that section 1 is predicated on the principle of law that, where a certificate is presented, all presumptions are in favor of that certificate being regular. Hence, according to law, that presumption remains unless it is set aside by the joint action of both houses. If the houses disagree, the presumption remains; and therefore you count the vote of the State. I can understand that to be the doctrine, and I think that follows rightly. But when we come to the second section, there is trouble in my mind; and all I want is to get the thing right. Where two sets of certificates are presented, and the houses disagree as to which is the right certificate, what are you going to do about it? Certainly one or the other is right, because the State has certainly voted. If the two houses differ, then, according to this bill, the vote of that

State falls. There is the trouble in my mind. Can there not be some means devised whereby a sovereign State will have a right to have her vote counted and not be cast out of that vote by reason of the failure, or, if you please, the fraud of the certifying officers in sending up the wrong certificate? Is there not some way of getting at that and counting the vote? I can readily see that if the President of the Senate were the arbiter or umpire between the two houses when the two houses disagree, that umpire, as in many other cases, would settle the question; but where the houses disagree and there is not an umpire to settle the question, the inevitable result will be that a State is deprived of its vote in the electoral college. I would like to hear from the Senator if there could not be some means devised by the Committee on Privileges and Elections to save the right of each State to vote.

MR. MORTON. I think the bill is intended for that. To come right back to the point where there are two sets of electors, two persons purporting to act as governor, and two seals, each purporting to be the seal of the State, and when, as in the case of Louisiana, they are precisely alike, so that nobody can tell the difference between them, when such a contingency occurs somebody must decide; and the only question is what is the safest tribunal. Is it safer to leave it to one man, however high his character and his ability may be, as the Vice-President, or is it safer and more in harmony with our institutions to leave it to the two houses of Congress?

MR. MAXEY. If the Senator will pardon me, the point was where the two houses disagree, one house votes in favor of one certificate, and the other house in favor of the other certificate. In that case, if I understood the Senator correctly, the vote of the State falls; and it was to get over that difficulty that I asked him if a remedy could not be devised.

MR. MORTON. Where there are two sets of votes and the houses disagree, they must both fall, unless you go to some other tribunal. Who can decide that question? What other tribunal can decide the question? You cannot have it decided by a court, for that would be clearly in violation of the Constitution. If the two houses disagree, supposing of course that they are acting honestly and patriotically—if they cannot agree, who shall settle that question?

MR. MAXEY. Is not the spirit of the Constitution in that case like a case here in the Senate? When the Senate divides equally, the Vice-President as President of the Senate, who ordinarily has no vote at all, gives the casting vote. Here you have the two bodies divided; one favors one certificate, the other the other. The State has to lose its vote altogether or leave it to some umpire. I ask, would it not be within the spirit of the Constitution to let the Vice-President decide?

MR. MORTON. If, when the Senate comes to decide the question which is the correct return, if there is a tie vote in the Senate, and the Vice-President is presiding, not a President *pro tempore*, he can cast a vote in that case, deciding the question in the Senate; but there is no provision in our Constitution authorizing the Vice-President or any other officer of Government to come in and settle the question where the two houses disagree. If there is a tie vote in the Senate, the Vice-President can cast the deciding vote; but it is not in conformity with the spirit of our Constitution to provide for some officer who shall settle between the two houses when they disagree. Therefore it seems to me that this provision is a matter of necessity. You have got to leave this disputed question somewhere, and is it not safer, is it not more democratic, more republican, to leave it to the two houses than to any single officer? You cannot take it into a court; that is clear.

MR. MAXEY. The Senator is correct if the two houses can agree; but what I am trying to reach is where the two houses disagree, how are you going to save the right of a sovereign State? We ought to do that if we can.

MR. BOUTWELL. Mr. President, I cannot assume that I entertain the same opinion of the wisdom of this measure that is entertained by the honorable chairman of the committee, nor do I anticipate that if adopted it will prove efficacious in that moment of imminent peril when it is expected to be operative and guard the interests of the country. We have gone on nearly a century without legislation. For three presidential periods we had a joint rule, a very bad one to be sure, for it augmented our difficulties rather than diminished them, and increased the apprehensions which careful and judicious men naturally entertained concerning the possibilities of danger to the Republic in passing through the great crises of its existence.

In the examination which I have given to the provisions of the Constitution relating to the election of President and Vice-President, I have become more and more convinced, as my reflection and examination have been extended, that not only did the framers of the Constitution do all that was possible in order to secure safety in the counting of the votes for President and Vice-President, but that in fact they did substantially all that was necessary. I do not accept at all the suggestion that the Vice-President of the United States has anything more to do in the business of counting the votes for President and Vice-President than that specific duty which is prescribed for and enjoined upon him by the Constitution. That duty is, in the presence of the

Senate and House of Representatives, to open the certificates. There being no other duty assigned to him, I infer naturally that he is to do nothing more.

Almost always, I think, when the subject has been discussed here, the question has been presented whether Congress is to count the votes; and by that I mean the two houses met in convention, according to the terms of the Constitution. Our best answer to that is the fact that from the first convention that assembled until the last, the two houses in convention always did count the votes. A teller was appointed by the Senate, two tellers by the House. The votes, or certificates, or returns, whatever they are called, were handed by the Vice-President, after he had opened them, to the tellers. The tellers were the organs, the instruments, the hands of the respective houses. The votes were counted by the tellers, and being counted by the tellers they were counted by the two houses; and therefore there never has been any difference of practice, and no different practice could have arisen under the Constitution. The two houses in convention have from the first until now counted the votes.

I agree entirely with the suggestion made by the honorable chairman of the committee in regard to the power to count the votes and the duty to count the votes, that one was conferred upon Congress and the other enjoined upon Congress. The power and the duty are in Congress. Congress must exercise the power and perform the duty, and it is not possible under the Constitution to transfer it to anybody else. If that be so, then the suggestion of the Senators from Virginia and Texas is answered, whether some device may not be resorted to by which there can be an arbitration and a judgment when a case shall arise such as is provided for in the second section of the bill. There can be, under the Constitution, no tribunal to decide that or any other question arising in the course of counting the votes, because it is a duty imposed upon the two houses of Congress. They alone can perform it, and they have not the power to transfer its performance to anybody else. Whether this power is there for weal or for woe, there it is; and until the Constitution is altered there it must remain.

I say I have not the faith in the wisdom of this measure that is probably entertained by the honorable chairman of the committee; and yet I expect to vote for the bill. I have not the faith in it because I do not see the constitutional force that can be given to this bill, so that when it becomes a law it will be imperatively operative upon the two houses of Congress that may assemble under it. I can understand that a joint rule adopted by each Congress would be operative upon that Congress that might be called upon to count the votes in a particular case, not only in good conscience, but in such a general judgment of the whole country that we may say, speaking in the ordinary use of language, it would not be possible for either house to violate the obligation imposed upon it by the joint rules and receive any support from any party in the country; but I think a law would have somewhat less force upon a Congress or upon one branch of a Congress that might find it convenient not to obey the law.

Here is a duty imposed upon Congress by the Constitution; it is a duty to be exercised at stated periods. The provision of the Constitution does not operate upon every Congress, but it operates upon particular Congresses. Now, can a Congress to which or upon which the provision of the Constitution does not attach at all legislate and bind the conscience and the judgment of a Congress that is to perform a duty imposed by the Constitution especially upon itself? I have great doubt upon that point, whether, if the exigency should arise when it would be thought desirable, so desirable as to be expedient, for one branch or the other of Congress to disregard the law, (and that would be just the exigency when probably the law should be observed,) we should not find one body or the other willing to take the responsibility and, upon the argument that could be presented, to go to the country for justification. Nevertheless it is true that, if we can devise a wise and just system, a system in harmony with the practice of the country and the judgment of men as to the constitutional provision, its enactment into law—such is the respect of the American people for law—might do something, and I think would do something, to secure the country against the evils that might otherwise arise; and therefore I am disposed to vote for the bill substantially as it is presented to us; and yet without feeling absolutely secure that it so rests in the power of Congress under the Constitution that a Congress called upon to observe it might not feel authorized to disregard it.

Still further, Mr. President, I think the counting of the votes, in the language of the Constitution, means something more than a mere examination of the certificates returned from the electors of the respective States. There are several precedents, I think, which go to show that our predecessors have also entertained that opinion. But it must, in the nature of the case, mean something more. Under the first section of this bill the votes are to be counted unless the two houses concur in the rejection of them. The reason for this, it seems to me, is plain. The presentation of a single certificate in the usual form is *prima facie* evidence of the truth of what the certificate contains, and there being no testimony controverting that *prima facie* case, it certainly ought to stand until it is overruled by the concurred judgment of the two branches of Congress authorized to pass upon the question. But when two certificates are returned from the same State it cannot be said that there is a *prima facie* case for either

of these certificates, and with less reason can it be said that there is a *prima-facie* case for both of these conflicting certificates, and therefore there is not a *prima-facie* case for anything.

Then two consequences follow from this state of things: First, that the counting of the votes under the Constitution means something more than the mere examination of the paper certificate; otherwise there would be no possible means by which Congress, when there were two certificates returned from a given State, would have the power of ascertaining what the truth is. And hence, in the very nature of the case, there is power under the Constitution vested in the two houses of Congress, if the occasion demands it, to go behind the certificate and inquire into the facts; and that is a general power lodged in all tribunals and assemblies of men where there is authority to ascertain the truth in regard to an election. Secondly, it follows that neither of these certificates can be accepted and a result deduced from it unless the two houses concur in accepting that certificate; and from that a third conclusion necessarily results, that if, unfortunately, through accident or intrigue or the machinations of persons hostile to the true interests of the country, two returns come in from a given State, and it is not in the power of anybody to demonstrate to the two houses which is the true return, that State must lose its vote. That is what happens in all cases where the truth cannot be ascertained: some one suffers as a consequence of that inability, and no scheme that we can devise will rid us of that difficulty.

We have to rely something upon the integrity and intelligence of the people first, secondly upon the electors and representatives of the people in the respective States, and at last, notwithstanding the divisions of opinion upon party questions, notwithstanding the diversity of interests, notwithstanding the clash and the hostility of diverse purposes among men, we have in the end to rely much upon the integrity of the tribunals constituted by the Constitution to pass upon great questions involving the integrity and the continuance of the Government itself. All governments are exposed to danger. Not yet has human wisdom devised a government free from danger. The machinations of men hostile to the perpetuity of a government always create apprehensions, and when by constitutional provisions you have set up every safeguard and interposed every check which human wisdom or human ingenuity can devise, there still remains the element in unmeasured quantity of danger.

But the people of this country have confided something to Congress, and this is one of the powers confided to Congress, a solemn duty resting upon it. We have, with all the confidence we can command, to believe that each succeeding Congress when called upon to act in this critical period of national life will do its duty.

In this view of the case as I am able to present it, I am disposed to vote for the bill: and yet I am not sure but that the Constitution, interpreted in its natural sense and in the light of the usage of the country for nearly a century, would after all be as good security for the peace and the continuance of the Government as any measure we can devise.

MR. THURMAN. Mr. President, this is no new subject to me. Soon after the count of votes at the last presidential election I took occasion to say in the Senate that in my judgment unless something were devised to obviate the danger to the country that might grow out of the count of the vote for President, we might find the country plunged into civil war upon the question who has been elected President of the United States. That count was calculated to make every one reflect, to make every one feel how dangerous is our situation. We saw more than one State deprived of its electoral vote on that count where the two houses were divided in opinion; we saw States lose their vote entirely; and fortunate it was for the country that the rejection of those States did not change the result. If the case had been that the votes of those States, if counted, would have changed the result, it is almost too much to expect of human nature that that count would have been peaceably acquiesced in. Very soon after that, or I believe at the beginning of the next session, the Senator from Indiana [Mr. Morton] introduced a resolution and spoke upon it, referring this subject, if I recollect aright, to the Committee on Privileges and Elections for a report.

MR. MORTON. It was three weeks before that count.

MR. THURMAN. Before that count; perhaps it was. The Senator spoke somewhat elaborately upon it. The subject was referred to the committee and a bill was reported by that committee. Glancing over this bill, I find it to be substantially the bill that was reported then. I do not know what changes have been made in it particularly; but I do not discover, on a hasty reading of this bill, any material changes that have been made.

Now, sir, I wish to say that for the second section of this bill, to which exception has been taken, I must assume a portion of the responsibility, for I believe that it was upon my suggestion that the Senator from Indiana introduced this second section into the draught of his bill. I ask my friends to consider what this bill would be if the second section were stricken out. We all agree, I think I am right in saying, that the duty of the President of the Senate is simply ministerial: that he is not constituted the judge to decide whether a return is valid or not. The whole history of the coun-

try, I think, is against any such interpretation of the Constitution as would confer on him that power; and the fact that more than once the Vice-President who presided over the joint convention was himself a candidate either for the office of President or Vice-President would seem to be quite sufficient to show that it never was the intention of the framers of the Constitution, or of the people who adopted it, that this great power of judging of elections should be decided by one man and he a candidate.

Mr. MORTON. Will the Senator allow me to refer to that?

Mr. THURMAN. I will thank the Senator.

Mr. MORTON. In the remarks I made in 1873, and to which I have before referred, I made this statement:

"Upon the hypothesis that the President of the Senate has the power to open and count the electoral votes, and that the two houses are to be present merely as witnesses, and have no jurisdiction over the subject either jointly or separately, everybody must perceive that it is a vast and dangerous power to repose in the hands of one man, especially when he may be ardently devoted to the fortunes of a great party, or when he may be personally interested sitting as a judge in his own case; for it has happened six times in the history of our Government that the President of the Senate has opened and counted the votes for himself, either for President or Vice-President. In 1797, John Adams, as Vice-President, opened the votes for himself, and declared himself elected President. In 1801, Jefferson, as President of the Senate, opened and counted the votes for himself when he and Burr were the candidates for President. In 1821, Vice-President Tompkins, as President of the Senate, opened and counted the votes for himself, he being a candidate for re-election; and in 1837 Mr. Van Buren, then Vice-President, counted the votes for himself as President, and declared himself elected. In 1841 Richard M. Johnson, then Vice-President, opened and counted the votes for his re-election as against Mr. Tyler, the opposing candidate; and in 1861 Mr. Breckinridge, then President of the Senate, opened and counted the votes for himself as a candidate for the Presidency."

Mr. THURMAN. I am obliged to the Senator for recalling to our memories those facts.

Mr. EATON. May I be permitted to ask the Senator from Indiana from what he read?

Mr. MORTON. I read an extract from the speech that I made some three years ago.

Mr. EATON. I did not suppose myself that the Vice-President counted the votes at all.

Mr. THURMAN. That was exactly the conclusion I would have come to, that the counting is not by the Vice-President, and these facts show that it never could have been contemplated that he should be the judge of the election. What his duty is, is prescribed in the Constitution:

"The President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates, and the votes shall then be counted."

There is no duty devolved upon him but to open the certificates in the presence of the House of Representatives. That is all the function that is devolved upon the President of the Senate, and that is all the duty he has to perform. We do not disagree about that. The votes then are to be counted. How are they to be counted? They have been counted by a sort of common understanding as to the mode of procedure. They were up to the time of the adoption of the twenty-second joint rule. But now that joint rule, it is held, has been abolished by the Senate receding from it, or by its falling at the end of a Congress. So, at least, I understand a majority of the Senate to hold. How then are the votes to be counted? In answer to what is said by the Senator from Massachusetts about a law being inoperative and some remarks that seemed to favor the regulation of this matter by rule, I have this fundamental principle to assert: that where a power is vested in any department of this Government, and the particular mode of exercising that power is not prescribed in the Constitution, that mode is to be prescribed by law. I never thought that a joint rule was the proper mode. I repeat, when a power is vested in any department of this Government, and the mode of its exercise is not prescribed by the Constitution, the prescribing of that mode belongs to the law-making power, the Congress of the United States; and, therefore, in this case, where the Constitution simply says that these votes shall be counted, without prescribing in detail the mode of their count, it follows necessarily from the structure and genius of our Government, and from the very nature of legislative power, that that mode is to be prescribed by law. I never believed, therefore, that a joint rule was the proper mode. I believe that a law is the proper mode; and I believe that that law binds everybody, binds each house of Congress as much as any law binds us until it is repealed. I have no difficulty therefore with this being a law. I think it proper that it should be in the shape of a bill to become a law.

Now, I ask my friends to consider what this bill would be if the second section were stricken out. The first section provides, in accordance with the Constitution, that the returns shall be opened and laid before the convention of the two houses. If there be no objection to a return it is counted as a matter of course; but if there be

an objection to a return, then the first section provides that the Senate shall retire, and each house shall consider the objection, and that return shall be counted unless both houses concur in rejecting it; and if both houses concur in rejecting it, then it is to be rejected; but if either house is in favor of counting it, it shall be counted. But suppose there are two returns from a State; the Presiding Officer, the President of the Senate, is the man who is to open the returns; he opens the return first which he sees fit to open, and it would not happen one time in ten thousand that he would not know whose return that is; he would know whether that return was in favor of the candidate of his party, or whether it was a return in favor of the candidate of the other party. He then selects the return which is in favor of the candidate of his own party, and lays that before the joint convention of the two houses. Objection is made; the Senate retires; one body votes for that return, and the other body votes against that return. Under the first section that return must be counted. Thus by that means you have put it completely in the power of the Presiding Officer of the Senate, by presenting one return before another, to cause that return which he first presents to be counted as the vote of the State.

MR. MAXEY. I do not think the Senator states it precisely as the second section reads.

MR. THURMAN. I am speaking of the first section.

MR. MAXEY. There is no objection to that so far as I know; but the question raised by the Senator from Ohio was as to the propriety of striking out the second section. I presume no one is in favor of striking that out entirely, but the second section reads that if there are two returns from the same State, both those returns shall be opened by the President of the Senate, not one submitted to be disposed of and then another, but both shall be opened. Now the query arises: One of the houses is in favor of sustaining one of those returns, and the other is in favor of sustaining the other return; the houses divide. There is no presumption in favor of those certificates, because they are of equal dignity. As the section now stands, the vote of that State falls, is not counted either way. The question which I have endeavored to raise is: Can there not be, by the Committee on Privileges and Elections, some means devised whereby the vote of the State in that case may be saved and counted in the selection of President and Vice-President? That is the point.

MR. THURMAN. I am coming to that presently. I was endeavoring to show what would be the result if the second section were stricken out. If it were stricken out it would be absolutely in the power of the President of the Senate to determine, by presenting one return before another, which return should be counted as the vote of the State.

Then we all agree that the bill ought not to stand upon the first section alone, and that provision ought to be made for the case of two or more returns from a State. Is there any likelihood of such a case occurring which makes it necessary to legislate in respect to it? Yes, sir. We had two returns from Louisiana at the last election, and we had two returns from Arkansas at the last election; so that the case of two returns from a State is not simply a possible case, but it may be said sometimes to be a probable case; at all events it having occurred, it cannot be said that it is a far-fetched idea which need not be taken notice of by practical statesmen. It has occurred, and it may occur again.

MR. KERNAN. Permit me to ask did the Vice-President produce both returns under the clause of the Constitution?

MR. THURMAN. He did produce both.

MR. KERNAN. And open both?

MR. THURMAN. Yes.

MR. KERNAN. So that somebody had to decide which was the true return?

MR. THURMAN. He did open, according to my recollection, both from Louisiana, and both from Arkansas, and they were both rejected, if I recollect aright. Louisiana was, I know.

MR. MORTON. There was but one set from Arkansas.

MR. THURMAN. There were thought to be two.

MR. MORTON. There were supposed to be two at first; but there turned out to be only one.

MR. THURMAN. There were certainly two from Louisiana. Then, in order to prevent the President of the Senate from forestalling judgment by simply presenting one of the returns, this second section requires him to present them all. There is no objection to that. Then comes the question, where there are two returns how are we to decide between them? We are to decide between them, as I suppose, according to the provisions of some law which we shall enact, which will enable us to come to a decision. This second section undoubtedly may have the effect if there be no amendment to it, and no remedy can be found, to cast out the vote of a State because the two houses cannot agree which is the correct return.

MR. BAYARD. That leaves a veto power to either house.

MR. THURMAN. I do not care by what name you choose to call it; that is the result.

I suppose that in any other case that should come up for decision before any tribunal, if there were a question which of two papers, for instance, was a valid paper, and which was a forgery, and the court was composed of equal numbers, and two of them should decide in favor of one paper, and two decide in favor of the other, both papers would be excluded. The only question, and the difficult one, is this: Is the Constitution so impotent that we cannot provide a remedy or a tribunal to decide where the two houses disagree? As I have said, the mode is to be decided by law. It is submitted to the law-making power to provide the mode by which it shall be ascertained which is the true return; and I must say that I am not prepared just now to assert that we cannot provide some mode by which this difficulty, where there is this disagreement between the two houses, may be decided.

Mr. EATON. Allow me to suggest that that is just the fault in my mind with the second section—that it does not provide a tribunal to decide; it dodges the question. It throws out possibly both returns, and thus the State is disfranchised. I hope my friend from Ohio will be able to find some tribunal which will determine the matter. I think I can suggest one by and by.

Mr. THURMAN. I hope those who have devoted some attention to this subject will be able to find some tribunal or some mode of deciding; and I am sure that I shall give my support to any constitutional mode that is reasonable and proper and just in itself by which this difficulty arising from a disagreement between the two houses can be decided.

Mr. MAXEY. Will the Senator from Ohio allow me to make a suggestion at that point?

Mr. THURMAN. Yes, sir.

Mr. MAXEY. Every practicing lawyer knows that there is sometimes a case omitted falling within the purview of the law, and which ought to fall within the purview, that is not discovered at the passage of the law, but it is discovered in practice. Here we do discover before the law is enacted that if this law is enacted as it now stands, there may be an important omitted case. It is to meet that that I have been so persistent in this matter. I can readily perceive that a case may arise where two certificates will come from the same State. I can conceive that one house would adopt one certificate and the other house the other; and, as the bill stands, the inevitable result would be that the vote of that State would not be counted. Now, can there not be—and I address that question to the Committee on Privileges and Elections, because it is their peculiar province—some mode devised whereby, in the event of a disagreement of the two houses, the vote of the State can be counted, and that too in compliance with the Constitution?

I will add that I believe, as has been stated by the Senator from Ohio, that this matter should not be left to a rule, but it should be done by a law which binds all from the highest to the lowest, Congress and everybody else. Let us make a law which will provide for every contingency. This contingency which has been so persistently urged as being proper to be provided for is, in my humble judgment, of very great importance; and, as the matter is open, I would ask, can there not be some means devised for counting the vote of a State in the event of a disagreement of the two houses, as mentioned in the second section?

Mr. THURMAN. I have already stated, Mr. President, that I would not undertake to say that no mode could be provided, and I shall hail with joy any reasonable and constitutional mode that shall be proposed, for we ought by all means to avoid depriving any State of its vote. That is the first and most important thing, and just so far as we can go pursuant to the Constitution, just so far as we can provide for the contingency of two returns and of the two houses disagreeing in respect to them, just so far as we can go to provide for the solution of that difficulty, just so far we ought to go within the limits of the Constitution.

Now, sir, I am not prepared at this moment to suggest how this problem should be solved. It is full of difficulty. But in order to aid a little in solving it, I wish to say that it is not Congress in its legislative capacity that counts the votes; it is not Congress as a law-making power that counts the votes. Laws can be enacted by Congress only in pursuance of the Constitution, in the mode provided by the Constitution. When Congress acts upon these returns, it is not acting in the exercise of its law-making power; it is not acting under its legislative power. Congress can provide by law the mode of counting these votes. The only question is, what limitations are there on our power to provide that mode?

I know it was suggested, and I think a proposition to that effect was offered at a previous session, that the votes should be counted in case of a disagreement between the two houses by the Supreme Court. I for one must say that I hardly see how that could be done. The Supreme Court is a part of the judicial system of the United States. It is a distinct department, clothed with judicial power and no other powers; and I for one am not able to see how Congress can devolve on the Supreme Court any powers that are not judicial. It has certain original jurisdiction conferred upon it by the Constitution. It is no part of that original jurisdiction to count the votes for

President and Vice-President, or to decide any question relative to the election of President or Vice-President. Then what other jurisdiction has it? All the rest of its jurisdiction is appellate jurisdiction, such appellate jurisdiction as shall be conferred upon it by Congress. And now, what is meant by the appellate jurisdiction of the Supreme Court? It is the jurisdiction by appeal from the decisions of inferior courts. It is not meant appeals from the decisions of the executive department; much less is it meant appeals from the decisions of the legislative department or from the two houses of Congress when they are assembled together to count the votes for President and Vice-President. I do not see, therefore, that you can confer this power upon the supreme judges as judges, sitting as a Supreme Court, to decide this question, because it is not a judicial question within the meaning of the Constitution of the United States. And to say that you could confer it upon them as nine individuals is to say that you can confer it upon any other nine individuals in the United States.

I do not see, then, that we can get out of the dilemma by making the supreme judges the empire between the two houses of Congress. Then we shall perhaps be brought to this conclusion, to decide whether or not we shall give to the decision of one of the two houses of Congress a predominance over the decision of the other. I am afraid it will come to that. But if some one has the ingenuity to devise some other method I shall hail it with great pleasure; and I hope the discussion may last upon this bill until some such mode can be found, if it exists, consistent with the Constitution. If it can be, I shall vote for it. If it cannot be, I shall vote for the bill without it.

MR. WHYTE. MR. President, it is eminently proper that there should be some act of Congress regulating the decent order of proceedings in counting and ascertaining and declaring the electoral vote of the States. Therefore I shall vote for a bill looking to that, and to that only. The bill presented by the Senator from Indiana, as the chairman of the Committee on Privileges and Elections, does cover that part of the case. There are other portions of his bill which, in my judgment, are thoroughly and entirely unconstitutional.

It was wise at the beginning of this session of Congress that the Senate of the United States should undertake the work of reform and annihilate a joint rule which was an enormity, a rule which passed this body almost without debate, which was not intelligently discussed at all or its defects properly pointed out. It passed through the Rotunda to the other side of the Capitol, and there at a night session, without debate, under a suspension of the rules, a rule of such a grave character as that received the votes of a majority of the Representatives of the people. That rule put it in the power of either house of Congress to defeat the will of the people expressed at the preceding presidential election. It was extraordinary in its character, and I was glad to see the Senate of the United States so soon repudiate it.

I differ with most of the Senators whom I have heard discuss this subject. The Senator from Indiana seems to have objection to the place where the privilege of counting and announcing the result of the electoral vote is now lodged, and he asks us, where is it safest to put it? I say put it where our fathers put it; put it where the Constitution puts it, and leave it there. It seems to me there can be no difficulty if we stand upon the provision which our fathers made for that case. It belongs to the President of the Senate to count the electoral votes. I differ with the Senator from Massachusetts when he speaks of the two houses counting the electoral votes. I differ with Senators who doubt for a moment that our fathers meant to leave it in the power of the President of the Senate to open the certificates, to state the votes of the people of the States, and to declare what the people had determined should be in the future their will. I am surprised that we should stop here to-day to discuss the question whether we have a right by legal enactments to take away from the people that power put in the Constitution of the United States for their benefit merely authorizing the Vice-President of the United States to enunciate their will.

MR. MORTON. Will the Senator allow me to ask him a question?

MR. WHYTE. Certainly.

MR. MORTON. Where there are two returns, each purporting to be the returns of a State, does the Senator hold that the Vice-President is authorized to select the return which shall be counted? Does he construe the Constitution in that way?

MR. WHYTE. I do hold that the Vice-President of the United States is the proper person to state which vote shall be counted, because the Constitution has put it in his hands. I do say that, probably, except for the military interference, there never would have been any question as to what was the right return or the proper exhibit of the popular will in any of the States of this Union. Our fathers lodged the power with the people, in their legislatures, in their States, to regulate the election of electors, and only left it to Congress to enunciate the voice of the people, the result of the action of the people in the several States. The Constitution puts the power in the President of the Senate in plain and unmistakable words. It is merely a ministerial duty. He has nothing more to do. It is his duty to open the certificates. The election has taken place in the November preceding. He knows who is governor of

the State. The presumption is all of us know who is legal governor of the State. The law prescribes the mode in which the electoral colleges shall meet, in which they shall cast their votes, in which they shall make certificates and lists, and provides for the certificate of the governor of the State.

Mr. MAXEY. If the Senator from Maryland will allow me, the reading of the Constitution upon that point is this:

"The President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates, and the votes shall then be counted."

It does not say that the votes shall be counted by the President of the Senate.

Mr. WHYTE. No; it did not mean to impose upon the President of the Senate the mere clerical duty of writing down the votes before him, as the Secretary of the Senate now does on every vote we cast here. It did not mean to impose upon him the clerical work of writing down the number of votes cast and making the calculation; but it did impose upon him the duty of making the actual count and announcing the result of the popular will. So, as I will show the Senator from Texas in a moment, Congress acted upon that theory when the first Congress met. Let us look at the question as stated in the Constitution:

"The President of the Senate shall, in the presence of the Senate and House of Representatives"—

That is all they have got to do with it. It is to be done in their presence, so that the eyes of the representatives of the people in the House and the eyes of the representatives of the States in the Senate shall see that, as an American citizen, holding the high position of President of the Senate, he is discharging his duty faithfully before the people, that great duty confided to him, of opening the certificates and counting the votes and announcing the result of the action of the people in their several States.

"The President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates, and the votes shall then be counted."

Counted how? Under his direction, under his eye; calculated, I care not whether by the Secretary of the Senate or by the Clerk of the House of Representatives. That is all that the House of Representatives have to do; that is all that the Senate have to do; to be personally present and see the formality gone through with, in order that the Vice-President or the President of the Senate might not, in his chamber or his retiring-room, open these certificates and announce to the world what the result had been. Say some Senators, the Vice-President has no power, and would you not rather trust the Senate or the House of Representatives than one man? No, Mr. President, not in performing a ministerial duty.

Mr. MORTON. I would ask my friend if choosing between two sets of votes is a ministerial duty?

Mr. WHYTE. Yes; it is announcing what is the vote of the State; it is counting the vote of the State under the Constitution. Our fathers understood that to be the duty of the President of the Senate. It is no new idea of mine. Our fathers recognized the President of the Senate as the proper officer to count the votes of the electoral colleges, for when they sent the Constitution to Congress to be transmitted to the people of the States, what did they say? They had provided for a Vice-President in the Constitution to preside over this body. The Constitution made him the presiding officer of the Senate. Therefore who was to count the votes? Congress? Congress was here; Congress was elected; Congress was supposed to be in session. Then, if Congress counted the votes, there was no difficulty about it; but what did our fathers say when they transmitted this Constitution to the States? They sent down with it over the signature of George Washington this direction to the Congress first assembled after the presidential election. After the other details it was resolved:

"That the Senators should appoint a President of the Senate, for the sole purpose of receiving, opening, and counting the votes for President."

Our fathers trusted the President of the Senate. Our fathers told the first Senate that assembled, "In order to meet the provisions in regard to the President of the United States, you must have a President of your Senate." For what purpose? To receive the certificates, to open the certificates, and to stop there and leave it to Congress to count them? No; for receiving the certificates, for opening the certificates, and counting the votes for President of the United States. So it is to-day as it was under the first Congress that met after the adoption of the Constitution, and they have acted under it. Congress after Congress has acted under it; and this very twenty-second joint rule and the act proposed by the Senator from Indiana down to the words "two houses" on the twenty-first line of the second page, with the exception of changing the date, is nothing more nor less than embodying the practice of Congress from the foundation of the Government down to 1865. It is nothing else than the practice that has preceded. They appointed a teller on the part of the Senate and two tellers on the part of the House. These two made an actual manual count, and the President of the Senate announced to the two houses and to the country what the result of that count was.

It would be a monstrous thing to say that either house or both houses of Congress can defeat the will of the people of the States, with whom exclusively is lodged the power of electing a President and Vice-President through their electoral colleges. The Constitution in article second left with the people of the States the arrangement of their electoral vote:

"Each State shall appoint, in such manner as the legislature thereof may direct, a number of electors, equal to the whole number of Senators and Representatives to which the State may be entitled in the Congress."

So that the whole power is in the people. The power is left with the people. Under the act of 1792, after they have sent here a certificate of their will from the States, all provided for regularly, these two houses have nothing to do with it but to obey their will; and in order that that will may be properly ascertained, the act of 1792 expressly provides the mode in which it shall be certified to Congress:

"That the executive authority of each State shall cause three lists of the names of the electors of such State to be made and certified, to be delivered to the electors on or before the said first Wednesday in December, and the said electors shall annex one of the said lists to each of the lists of their votes."

Then the act requires Congress to be in session:

"On the second Wednesday in February succeeding every meeting of the electors; and the said certificates, or so many of them as shall have been received, shall then be opened, and the votes counted, and the persons who shall fill the offices of President and Vice-President ascertained and declared, agreeably to the Constitution."

That is, by the President of the Senate, under the provisions of the Constitution. It was intended to leave it to the people, and it was intended that the Senate of the United States should have nothing to do with the election of President of the United States. I would rather vote for a bill leaving it to the House of Representatives to interfere than a bill which provided that the Senate should have anything to do with the election of President of the United States. We do not represent the people here. We represent the Legislatures of the States. We represent the States themselves, the governments of the States, and not the people in their primary sovereign capacity. The other house comes from the people. Every two years Representatives come to the other side of the Capitol to speak the voice of the people; and I would rather let the House of Representatives interfere than vote for any bill that permits the Senate to have part or lot in determining who shall or who shall not be President of the United States. The framers of the Constitution denied it to us. They denied it to us upon the very ground that we represented the States; that we were elected for the long term of six years; that we did not go back to the people often enough to be responsible to the people. Therefore, although when this clause of the Constitution was originally presented to the convention, it left it to the Senate to elect a President and Vice-President of the United States in case of a failure on the part of the people to elect, the convention would not allow the Senate to have anything to do with it, and they struck out the Senate and put that clause in the Constitution which now remains, placing it in the power of the House of Representatives to elect where there is a failure on the part of the people, making them vote by States in order that some regard may be paid to the voice of the people of the States.

I said it was safer to leave a question of this character in the hands of one man than in the hands of many. Divide the responsibility, and it becomes so small, so infinitesimal, that scarcely any man feels it; but center it in one man of honesty and integrity, put him before the people liable to impeachment for high crimes and misdemeanors, hold him accountable for speaking the voice and will of the people, and my word for it there is a greater protection to the body of the people than in a majority, which are often more tyrannical than any single man.

I shall vote for that part of the bill, if it can be so dissected and divided as will make a regular and orderly mode of procedure in the count and enunciation of the vote for President and Vice-President; but I will vote for no bill which takes away the power of announcing the vote, the power of counting the vote, the power of opening the returns, from that officer whom in my judgment our fathers designated as the proper depository for such power.

Mr. COOPER. Mr. President, as one of the Committee on Privileges and Elections, I felt that the great difficulty in framing a bill and passing it into a law, to meet the troubles which we all feared might arise, would be found in meeting the question suggested by the provisions of the second section. As the debate this morning has developed, the same fear exists in the Senate and the same difficulty. It is conceded that difficulty may arise in the count of the votes giving proper expression to the will of the people expressed in the choice of electors for President and Vice-President. The Senator from Maryland has discussed with earnestness and ability the question which troubled some members of the Committee on Privileges and Elections, who I am sorry to say are not here to-day to participate in this debate and press those objections more fully before the Senate.

I confess that I can see no objection to a law providing for the mode and manner of

counting the vote. I desire by that law of course to reach what is in fact the will of the people. Having been present at the count of the votes of the last presidential election and witnessed the decision of the two houses where there were two returns from one of the States, I could very well see and feel the danger which is liable to occur in the future. I do not suppose our fathers thought of that want of political integrity which would induce separate returns from a State, or ever imagined that the people would be so lost to their rights as to permit such a thing to occur, or that Congress would ever assume to itself the right to interfere within the limits of a State in settling that question for the people. The Constitution in providing for the election of a President and Vice-President evidently intended that it should be made by the people of the different States, acting through laws enacted by the States themselves, because it will be remarked that the Constitution vests no power in Congress to provide either for the mode or the manner of choosing electors, but leaves that duty wholly to the legislatures of the several States.

The difficulty that has arisen, as was very truthfully said by the Senator from Maryland, has been caused by the interference of the military power of the Government of the United States in the internal affairs of the States, and by placing persons in power and retaining them contrary to the will of the people. The framers of our Constitution imagined that the people of the States were capable of governing themselves; that they were capable of expressing their will at the ballot-box and inaugurating those as their rulers whom they may have thus chosen at the ballot-box, and scarcely imagined that the Federal Government would interfere to prevent them from thus installing the rulers of their choice. Consequently the Constitution left to them and to the legislatures chosen by themselves the province of choosing electors to select the President and Vice-President. Whatever may have been their intention, however, we must meet facts as they exist. We do know that the difficulty which the second section seeks to provide against has arisen and may arise in the future; and the great question to be determined, it seems to me, is, where shall we lodge the power of deciding in such an emergency what has been the expressed will of the people of a State who may by some abnormal condition in their political affairs send two returns to be counted purporting to be the vote of the electoral college of that State?

The bill as reported by the committee proposes to vest this power in the two houses of Congress acting separately. It provides that they must concur before the President of the Senate or the proper officer shall be permitted to count either of the returns thus made. It seems to me that, if we would avoid a conflict where such a difficulty arises, it would be better to vest the choice of which is the proper return in somebody who will determine it and not leave it between the two houses, which may be composed, as at present, of opposite politics, and which would be apt in that case to disagree and thus exclude the vote of any State that might thus send two or more returns.

The suggestion was first intimated by the Senator from Pennsylvania and afterward by the Senator from Maryland that, as the Constitution has vested the House of Representatives, who are directly from the people, with the power to choose a President in default of an election by the people, it gives us the proper idea of what would be the safest body with which to intrust this power of choice in the event of a difference of opinion or of two returns coming from any one State. It strikes me to be more consistent with the theory of the Constitution of the United States that this power should be vested in that body thus pointed out by the Constitution to choose a President where the people themselves shall fail to make a choice than that it should be placed elsewhere. I therefore have prepared an amendment to the second section, which I offer for the consideration of the Senate, carrying out this view to vest in the House of Representatives, the representatives of the people, the choice of the proper returns to be counted in the event that two or more returns are sent up. I move to strike out in the second section all after the word "which" in line seven, to the end of the section, as follows:

"The two houses acting separately shall decide to be the true and valid return."

And in lieu thereof insert:

"The House of Representatives, voting by States, in the manner provided by the Constitution when the election devolves upon the house, shall decide to be the true and valid return."

So that, if amended, the section will read:

"That if more than one return shall be received by the President of the Senate from a State, purporting to be the certificates of electoral votes given at the last preceding election for President and Vice-President in such State, all such returns shall be opened by him in the presence of the two houses when assembled to count the votes; and that return from such State shall be counted which the House of Representatives, voting by States, in the manner provided by the Constitution when the election devolves upon the House, shall decide to be the true and valid return."

Mr. FRELINGHUYSEN. Mr. President, it had always appeared to me that the provision of the twelfth article of amendments to the Constitution, which declares that

the President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates, and omits to say that he shall do anything more, was equivalent to the exclusion of the idea that any other duty was to be performed by him, and that the Constitution left it open as to who should count the votes otherwise than by stating that they should "then be counted." There is some force, however, in the resolution of the convention to which our attention has been called by the Senator from Maryland; and as we are making suggestions, it has occurred to me that the second section might be amended by adding:

"And if the two houses do not agree as to the true and valid return, then the President of the Senate shall determine which is the valid return."

I do not mean to say that, on deliberation, that is the best provision; but it is very clear from the amendments which have been offered that it is within the compass of our power to provide for that omission which exists in the bill. It is not likely that any vote will be taken on this bill to-day, and I have no doubt the reflection of the different Senators will provide the remedy which is sought for.

MR. MAXEY. Mr. President, I listened with great attention to the able argument of the Senator from Maryland, [Mr. Whyte;] and, as I had his permission to read a clause from the Constitution, I wish to state that it was with a view to the point suggested by the Senator from New Jersey:

"The President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates."

There is a positive, unequivocal duty devolving upon the President of the Senate. What is that duty? That duty is, in the presence of the Senate and House of Representatives, to open all the certificates.

Then what follows:

"And the votes shall then be counted."

It does not say "by the Vice-President of the United States." My study of the Constitution has taught me that it is the most guarded and best-expressed instrument that I have ever read anywhere.

"And the votes shall then be counted."

If it had been meant, as is contended, to devolve upon the President of the Senate the duty of counting the votes as well as the opening of the certificates, I ask why was not the clause so worded as to read thus?

"The President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates and count the votes?"

It does not so read.

"And the votes shall then be counted."

That is the way it reads, implying clearly, in my judgment, that it was the duty of the President of the Senate, in determining who was elected President and Vice-President of the United States, to open the votes in the presence of the Senate and House of Representatives, and that they should be witnesses to that great event; but there was another reason for that. It was that the House of Representatives, the direct representatives of the people, and the Senators, the ambassadors of the sovereign States, should be there; that when the expression was used, "and the votes shall then be counted," it was intended that the votes might be counted in the mode and manner which the ambassadors of the States, constituting the Senate, and the representatives of the people, constituting the House of Representatives, might point out. It was meant that they had the power to point out the mode and manner in which the votes should be counted. That at least is my construction of the Constitution.

As I said on a former occasion, I regard the twenty-second joint rule as an iniquity. It is a blot upon the mode and manner of counting the votes of the electoral college. It gives to either house of Congress the right to stab to the death a sovereign State of this Union. It is for that reason that I have so earnestly protested against the rule. It is a perversion of every known principle of law; for, when a certificate of election comes up *prima facie*, that is good enough until it is removed; and where the two houses differ, one saying that it is not good and the other that it is good, according to every construction of law that we have learned the certificate stands in full force and effect. But according to the twenty-second joint rule that is reversed. If one of the houses says that it is not good, then the balance of the authority, which is the other house, and distinct in itself, is to be overcome by one. That is against every construction of the law. By that rule the great right of a State, the privilege of a State, to say who shall be its President and its Vice-President may be stricken down.

So far as the first section of the bill is concerned, I apprehend there can be no serious objection to it. It provides clearly in regard to the counting of the electoral votes. The only remaining question, then, is raised in the second section, where two certificates of electors come up from the same State. That section provides that in that case both the certificates shall be opened by the President of the Senate and shall be submitted to the two houses, and if the houses agree upon one of those, that shall be counted; but if the houses disagree, then the omitted case stands in full force, and

the vote of the State is not counted in an election of President and Vice-President of the American Union. It is to provide a remedy for that loss of the vote of a State that I have so earnestly requested of that committee most competent to judge to make a provision to meet the case.

The view which I have and which I suggested in the outset is, that the President of the Senate is, by the authority of the Constitution, to open these votes. By the Constitution he is the presiding officer over the joint assemblage of the Senate and the House. If these two houses disagree, a State should not be deprived of its great right of voting for President and Vice-President; and the omitted case, in my judgment, can be provided for by giving to the Vice-President, presiding over the joint assemblage of the Senate and House, the right to determine as between these two certificates when the houses themselves divide. That, it seems to me, would cut the knot. It seems to me that it would meet the case which is omitted in the second section as reported, and would give to every State the grave and inestimable privilege of saying for themselves whom they prefer for President and Vice-President. As I have stated more than once, I do not want to leave this an open question. I do not want to see more than once a sovereign State deprived of its franchise by being thrown out by one of the houses. In one of the presidential elections the presiding officer made an announcement that struck the American people as perhaps the most extraordinary announcement that was ever made by a presiding officer over any body of men. I do not want to see any rule established which would justify, authorize, or tolerate such an expression as once fell from the lips of a presiding officer over the joint session of the Senate and House: but I want to see a provision made whereby each one of the sovereign States of the American Union can come up, and, beyond all peradventure, beyond all doubt, cast its vote for President and Vice-President. I believe that such a provision may be made. I do not present it as the best mode, but I simply suggest that, where the two houses do differ, the decision might safely and constitutionally be lodged in that event—because we must leave it somewhere or deprive a State of its right—in the President of the Senate, who is the presiding officer over the joint session of the Senate and the House.

The PRESIDING OFFICER. (Mr. Wright in the chair.) The question is on the amendment of the Senator from Ohio, [Mr. Sherman.] The chair was under the impression that the only pending amendment was the one offered by the Senator from Tennessee, [Mr. Cooper.] He is now advised that the first amendment in order is the one offered by the Senator from Ohio.

Mr. BAYARD. I ask that that amendment be reported.

The PRESIDING OFFICER. The amendment of the Senator from Ohio will be reported.

The CHIEF CLERK. The proviso to the third section of the bill reads:

"That after such debate has lasted two hours, it shall be in the power of a majority of each house to direct that the main question shall be put without further debate."

It is proposed to amend that proviso so that it shall read:

"*Provided*, That after such debate has lasted two hours, it shall be the duty of each house to put the main question without further debate."

Mr. BAYARD. I ask that the amendment of the Senator from Tennessee may be read, because that relates to the section we have been considering. The amendment of the Senator from Ohio really relates to a section of the bill subsequent to that which has been under consideration by the Senate.

The CHIEF CLERK. The amendment proposed by the Senator from Tennessee [Mr. Cooper] is to strike out in section 2, lines 7, 8, and 9, the following words:

"The two houses acting separately shall decide to be the true and valid return."

And insert in lieu thereof:

"The House of Representatives, voting by States in the manner provided by the Constitution when the election devolves upon the House, shall be the true and valid return."

Mr. COOPER. I ask leave to modify my amendment, instead of striking out to leave the section as it now is and add the words:

"And if the houses do not agree on which return shall be counted, the House of Representatives, voting by States in the manner provided by the Constitution when the election devolves upon the House, shall decide which shall be the true and valid return."

So that the question shall only be left to the house voting in that way in the event that the two houses acting separately cannot agree.

Mr. BAYARD. The amendment of the Senator from Tennessee commends itself very favorably to my mind. It is very true that when the time shall come that the governor of a State or any considerable number of persons claiming any authority shall certify a false certificate, a certificate of a false claim of election in a State, to affect the choice of the people of the United States of their Chief Magistrate, and there shall not be in both houses of Congress a sentiment of honor and integrity that shall make such plans impossible of success, then the body-politic will be sick indeed, and we may well begin to despair of this experiment of men to govern themselves. Nevertheless we have seen, we did see in 1872, a conflict in respect of the electoral vote of one of

the States of this Union, and, without going back to the history, the very sad and disgraceful history of that time, we must yet recognize the fact that that which has been may again occur, and that, although fortunately the preponderance of the electoral vote was so strong as to make this attempt inefficient for any purpose, still we ought to contemplate the possibility that such an act might have been the turning point in the choice of the President and Vice-President of this country in 1872, or may be in 1876, or some year of the future.

Now, sir, it is important that in settling this question we should do so satisfactorily to the judgment of the whole country, what I may call the sense of common honesty and right of the people, as well as the provisions of the Federal Constitution under which we assume to act. Grant, therefore, that no State is to be disfranchised without the concurrent vote of each house of Congress, and there is some security there; but where there are duplicate returns, or more than one return sent up from a State, then the question arises which is the true return and which should be counted? As the section now stands, it undoubtedly provides for the disfranchisement of a State in the event of the Senate and the House not being of the same mind with regard to those returns. If there shall be two returns, say, from this same State of Louisiana, one casting the electoral vote for one candidate and the other for another candidate, and the Senate shall decide that the votes in favor of A shall be received and the House shall decide that the votes in favor of B shall be received, between those two, the difference being irreconcilable, both votes fail and the State is disfranchised. Sir, such a proposition is not in accordance with justice; it is not in accordance with the genius and intent of our frame of Government. Ours was to be a represented people and not a people stifled into silence by the action of either house of Congress, much less by the action of the Senate of the United States, for, be it observed, although the presidential office was not intended to be the office of popular election, for he was intended to be an officer chosen by a selected body of men, the electors as a college were to be interposed between the people and the President to be chosen; but custom is stronger than law; usage has become stronger than law, and so in effect the presidential office has become an entirely popular office; and, so far as any useful purpose is concerned, the electoral college might, in my opinion, be as well abolished, because in fact and practically men vote for a candidate for the Presidency or the Vice-Presidency just as directly in effect as if they did not vote for A, B, C, D, E, and F, who were to vote for him as their representatives.

The Constitution has provided, however, that in case a majority of the electoral votes cannot be discovered upon a fair count to have been cast for any one of the candidates, then the popular branch of Congress, the Representatives of the people, shall have the power, voting by States, to choose the President whom the electoral college has failed to choose. The House of Representatives, voting by States, has been said to be the ultimate arbiter of choice of this high officer. The plan of the committee, as reported in this bill, would, in the event of the disagreement of the two houses, disfranchise a State and render all its efforts to elect a nullity. The amendment of the Senator from Tennessee prevents the possibility of that, and giving first in a proper form the right for all parties to be heard and all certificates emanating from what purports to be lawful authority to be presented to the two houses in joint meeting for the purpose of being counted, authorizes first a separation of the Senate and the House for the purpose of deciding which of these several returns is the just and true one, and in case they should not be able to decide, then it relegates the question to that body acting in that form which the Constitution has prescribed for the election of President in case election has failed in the electoral college. The proposition seems to me to run in the current of the constitutional provision. It seems to me to recognize the broad fact that where from confusion, where from error, where from any cause there cannot be an undisturbed, definite, distinct count, satisfactory to all men as to its accuracy, made of the electoral votes, then the people of the country, acting through their Representatives voted for immediately by them, shall express their choice. The proposition of the Senator from Tennessee relieves us from the possibility of seeing a State disfranchised in the vote for President and Vice-President. That should be satisfactory to us all.

I trust and pray that no occasion for the use of this second section may arise, and that no questions will come affecting this choice as between two sets of electors. We know they cannot honestly exist. We know there must be a decision, and that if it does come it comes as the offspring and child of violence and fraud, as came the votes from Louisiana in 1872, two certificates certifying directly opposite facts. But if it should come, if it be our shame and misfortune that such things shall be presented in the coming year, then let us provide the machinery to meet it, and to meet it in accordance with the spirit, the intent, what I may term the genius, of the Constitution of our country.

Take the case that from any State there come up two certificates. The houses separately consider them, and there shall be, much as I should regret to see it, a difference of opinion between the Senate and the House of Representatives as to whether one

certificate or the other is the proper one to be opened and the votes to be counted. If they do so differ, however, this amendment of the Senator from Tennessee will place the case exactly as though there had been a failure to elect by a majority, and remand it to the House of Representatives, the Representatives of the people, where the States voting as States shall decide the question in accordance with the original provision and intent of the Constitution.

It seems to me that this amendment of the Senator from Tennessee has the effect of procuring an ultimate arbitration, constitutional, fair, and just, one which cannot be alleged to be in the interest of any party, because this law is not meant for one election or another. I would not stop to consider whether the effect would be ultimately, in case of a difference of opinion between the Senate and House, to throw the result in favor of the man who had my vote or that of the party with whom I acted. I have not made it a calculation, nor do I think I am capable of making it the basis of consideration in such questions as are before us; but the amendment has the merit that it prevents the disfranchisement of a State, and it provides for an arbitration to settle the question according to the very theory and meaning of our Government; that is, when the people speaking by their own voice shall not have made a decision, then, in accordance with the Constitution, those who are directly elected by the people and come freshly from them shall be suffered to speak for them. I can see in this amendment a great deal that is satisfactory, and if it is adopted by the Senate I shall vote for the bill.

MR. KERNAN. Mr. President, with very great respect to the Senator from Maryland, [Mr. Whyte,] I am compelled to dissent from his view of the constitutional provision. I cannot believe that the true construction of this clause is that the President *pro tempore* of the Senate, in the event of a question arising as to what is a return of electoral votes, is the conclusive and final arbiter of that question. I think that view is very contrary to the spirit of the Constitution, and certainly, as was well said by one or two Senators, the language does not require any such construction. He is simply the person to whom votes are to be sent from the States. The Constitution declares that he shall open all the votes received, substantially, and then they are to be counted; and I think it would be a very unnatural construction to say that if he opens two sets of returns from the State of Pennsylvania he shall decide which of them is the true return. I think then that we have to decide, or provide for deciding by some other tribunal than the President of the Senate, in the event of two returns coming from a State or a return being challenged from a State, whether it shall be counted or not.

I appreciate the serious objection there is to the second section, wherein it declares that if the Senate shall vote one way in separate session, and the House of Representatives the other, a State shall not have a voice in reference to the election of President. I am solicitous, if we can, to provide some other mode than that for disposing of the question. I think, as the duty is devolved upon the two houses to count the votes, where there is a question as to what vote shall be counted, we must have power to decide how the bodies here assembled shall decide. My objection to the amendment of the Senator from Tennessee, [Mr. Cooper]—and I only suggest it to see if we cannot remedy it—is that, while it does not disfranchise a State, it certainly does or may annul the will of the people; because, voting in that way, a State which has a single Representative in the other house, and population only for a single Representative, will have a vote on that important question equivalent to the vote of four millions of people in another State.

I suggest that it is desirable, and the intent of the Constitution is, that the President shall be elected by the people and not by the States. It is true there is a provision that in a certain contingency, where the people fail to elect, the House of Representatives shall elect, each State having but one vote. But I submit whether it would not be more in accordance with the intent of the Constitution as to the election of President, if a question is to be decided bearing upon that, as we have contemplated there may be, although I hope there never will be, instead of leaving it to the House of Representatives to decide it, each State giving one vote as indicated by the amendment, it should be left to the House of Representatives by a majority of the votes of the members; because certainly, so far as that shall have any bearing, they will more nearly represent the majority of the people of the United States who should elect the President. As this question is probably not to be decided to-day, I only suggest this, to the end that each Senator may think upon the subject; and if we are to adopt the amendment, I think it had better be modified so that the Representatives of the people in the other house shall decide the point which shall arise in reference to which returns shall be counted in the event that there are two.

MR. ANTHONY. I should like to make one suggestion to my friend from New York. Would it not be better, instead of having the House of Representatives decide, to have it delegated to the democratic national convention of the preceding year? [Laughter.]

MR. KERNAN. I am of opinion that that is where the people probably will delegate it this year; but I do not want any constitutional or legal provision here made with that view. I do not think my friend puts a fair question. The people will act for

themselves in each convention, and I hope they will decide it, and that we shall never have it come here. But there was no such motive in my suggestion as the inquiry implies. The House of Representatives may be the other way at some other election. We expect that there will be such unanimity this year that no sort of counting can defeat the will of the people, and that the democratic convention will name the man. [Laughter.] But I do not want to talk that sort of thing in this question. I am simply talking about providing for all time. I should hope there never would be a body of men here that would fail to count the votes as they really were; but we are contemplating the contingency that, through fraud or through faction in States, there may be two sets of returns opened by the President of the Senate, and we have to decide upon them. It is suggested—and I treat that with great respect—that there are provisions of the bill to guard against it. I am talking about it in no partisan spirit, and I said no word that seriously should have led the Senator from Rhode Island to suppose I was talking with a party view.

Mr. ANTHONY. I did not think so, of course. I only made that suggestion.

Mr. KERNAN. My friend from Iowa [Mr. Allison] says I really talk as if I was against such a thing, and I meant to be so understood.

I have been looking at this bill with care and I should regret to see it enacted into a law as it is, though it is better than nothing, in my judgment, because we do lay down some rule of action by it. It makes it the duty of the President of the Senate to open whatever comes to him certified by one acting as governor. He may find two sets from the State of New York, two sets from the State of Louisiana, two sets from another State. In view of that contingency we should now make a rule for the future that we shall be willing to abide by, no matter what party shall be in power in the two houses or in either. I think we should do what we can to provide as wisely as we may that the question shall be decided whenever it does come.

Mr. FRELINGHUYSEN. I wish to ask my friend from New York whether, inasmuch as the Constitution now provides that the House of Representatives, when they vote, shall vote by States, he expects the number of little States that are represented in this Congress to give to New York and Pennsylvania the preponderance they would have by voting according to representation?

Mr. KERNAN. I do not know. I think it is worthy of consideration. The Constitution now gives the election to the House when there shall be a failure to elect. The framers of the Constitution were not contemplating such troubles as have arisen. They meant when the people have so voted that they have not indicated the will of a majority, then it shall be decided in the way they prescribed. But I am assuming that the trouble may arise here, though the people have really given a vote indicating what is the popular majority. We are contemplating that a question may arise about what returns shall be counted from a State in that case, the consideration of which may be swayed by feeling in reference to the result. Where the people have not failed to choose, but we have failed to count, I would remit it to that tribunal elected by the people, which will most nearly represent their will in the other house of Congress. That is all I mean to say.

I hope no such difficulty will occur. I hope, if it should, that every man in Congress would vote on his judgment as to what was right; but if it comes to a division between the two houses—and it is not very likely there will be a division if the majority in both houses is of the same party—if a division arises on counting the votes and one body elected by the States is of one party, be it the democratic to which I belong, and the majority in the other, Representatives just elected at the same presidential election, is the other way, I should think it was in accordance with the spirit of the Constitution and the theory of our Government to say “we will leave it to the popular branch just elected by the people to declare which returns shall be counted if that question affects the result and we cannot agree with them.”

Mr. MORTON. Mr. President, the amendment offered by the Senator from Tennessee is that, where there are two returns from a State, and the two houses acting separately cannot agree which one shall be counted, then the decision of that question shall be left to the House of Representatives voting by States, each State to have one vote; Delaware to have one vote; New York to have one vote; Nevada, with one Representative, to have the same voice in settling a judicial question with New York, which has thirty-three Representatives.

Mr. MORRILL, of Vermont. And that by a House elected two years before.

Mr. MORTON. And that by a House elected two years before. When Senators talk about representing the will of the people, can they devise a scheme for getting further away from the will of the people? because in electing a President by States the will of the people is not counted. Some time ago, two or three years ago, I had occasion to consider this very question of the election of President by the House of Representatives, and I made a little calculation, and the same facts and the same inequalities would exist in the decision of this question which it is proposed to leave to the House voting by States. I then said:

“In the election of President in the House of Representatives under the present ap-

portionment, each State having one vote, forty-five members out of two hundred and ninety-two may make the election, as follows"—

And so forty-five members of the two hundred and ninety-two may decide the question which it is proposed to leave to the House—

"Delaware, Nebraska, Nevada, and Oregon have each one member, and four members would cast the votes of those four States; Rhode Island and Florida have each two, and four members would cast the votes of those States; Minnesota, New Hampshire, West Virginia, Vermont, and Kansas have each three members, and two votes in each, or ten members in all five, would cast the votes of those five States; Arkansas, California, and Connecticut have four members each, and three in each, or nine in all, may cast their votes; Maine and South Carolina have each five members, three of whom in each, or six in both, may cast their two votes; Maryland, Mississippi, and Texas have each six members, and four in each, or twelve in all, may cast the vote of those three States. This makes nineteen States, or a majority of the States in the Union, and forty-five members may cast their votes and elect a President of the United States against the wishes of the other two hundred and forty-seven members of the House of Representatives.

This is a process for getting at the will of the people!

"Again, these nineteen States have an aggregate population, by the census of 1870, of a fraction over eight millions of people, while the remaining eighteen States have an aggregate population of about thirty millions. So that nineteen States, having scarcely more than one-fifth of the entire population of the United States, may elect a President in the House of Representatives against the wishes of the other four-fifths; and this, by courtesy, has been called republican government!

"Such a combination and result as above exhibited may not be likely to occur; but they are possible under the present system of electing a President in the House of Representatives by a majority of States; and no system admitting such possibilities should be tolerated. In 1825 it did happen that Mr. Adams was elected in the House over General Jackson, who had received a larger proportional majority of the popular vote than has any President elected since that time, and who had also a large plurality of the electoral votes."

Mr. President, one of two constructions of the Constitution must be adopted, I think.

"The President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates, and the votes shall then be counted."

One construction is that the President of the Senate shall open and count the votes cast and settle all these questions; and the other is that the President of the Senate after opening the certificates shall submit them to the two houses, and that the two houses, acting separately as the Senate and as the House of Representatives, shall count the votes and settle all questions growing out of them. The idea that the Senate and House of Representatives, in case of a disagreement, shall provide an umpire that shall settle disputed questions between these two houses, seems to me, to say the least, remarkable. If we can make the House, voting by States, the umpire, then we can make the Vice-President the umpire, then we can make the President the umpire, we can make a justice of the peace the umpire just as well and just as constitutionally. It is one or the other. It is either that the President of the Senate shall decide this question himself, as argued by the Senator from Maryland, or it is that the two houses, acting in their normal capacity—the Senate acting as a Senate, each Senator having one vote, and the House acting as a House, each member having one vote—shall decide this question; and in case they cannot agree, who shall decide it? It is not defeating the will of the people; but it is simply an inability to find out what is the will of the people, and what government does actually represent the people. A contingency of that kind may occur; it would be a misfortune, and not perhaps the fault of our system of government. It is one of those things that may happen in regard to the passage of any law, the most necessary law to the existence of the nation, appropriation bills for carrying on the Government. If the two houses cannot agree, the bill must fail; and the necessity of passing a bill never put it into the heads of the framers of our Constitution that we should call in an umpire to settle an appropriation bill in case the two houses could not agree.

Mr. BAYARD. I wish to ask the Senator a question. Is not the latter portion of his argument fatal entirely to that which preceded it? He is claiming a power for the two houses to act conjointly. That is an affirmative power. He is claiming a right in either house acting separately to exercise a negative power, a power of veto, that is quite as complete for the purpose of controlling this question as the affirmative power to permit a vote to be counted. If he claims that power, and claims for the Senate the right to put its veto upon the count of an electoral vote, how can he deny the power of the Senate to vest that same power in the House? He speaks of the House and the Senate acting in their normal capacity, whatever that may mean. They are differently constituted, constituted for different purposes, with very different constituencies, upon very different principles, the one representing numbers, the other representing separate communities. But if the Senator denies the power of the Senate and

House to give the House in one event the power of arbitration, he may just as well and as consistently deny the power of either house to have the right of negating the action of the other, which he has claimed by his bill in the second section.

But it was not necessary for the Senator to read from his former report on this question of counting the electoral votes to show that there was an inequality under the Constitution of the Union as to mere numbers in the formation of this Union. The States as separate communities formed it, and they had in the composition of this council which we constitute powers given to them as States, an equal suffrage to them irrespective of the population within their limits; and had that not been given, the Union never would have been formed. The principle is recognized by the Constitution when it provides that in the matter of selecting a Chief Magistrate on a failure to find a majority of votes in the electoral college, then the States as States, voting one equal with the other, shall take the place of the people and determine it.

This was not intended to be a purely popular government, and the features of its frame-work show that it was not. There were to be checks upon numbers as well as checks upon mere local sovereignty. It was the blended form that made it complete, and that attests its wisdom; and the principle, dislike it though the Senator may, and argue against it though he may, and ridicule it though he may, in his reports—the principle stands that this Union is one of separate States, and the rights of the weakest stand level with the rights of the greatest; and so it will be until the Constitution shall be trampled under foot and our form of government broken up.

The amendment of the Senator from Tennessee invokes that very principle which the Constitution itself is so replete with, the recognition of State sovereignty and State existence upon important occasions, and one of those occasions is when a Chief Magistrate comes to be chosen and the electoral college has failed to declare itself by a majority of its votes in favor of one or the other candidate; then and in that event the result is imperative and the duty is imperative, and the power is complete in the States meeting as States, and each one for itself, with equal voice, proceeding to represent the people and elect a President for them. It is because that provision is found in the Constitution, it is because I do respect the Constitution and am sworn to obey it, that I did recommend the adoption of this amendment, which provides, in the event of the failure of the Senate and House to concur as to which is the true certificate to be received by them of the electoral vote of the State, that then the House shall exercise its function properly as established by the Constitution and declare for them.

I have no objection at all in the event of the States being equal in number, and therefore a tie vote between them arising, that we should accept the amendment of the Senator from New Jersey and make the Vice-President the ultimate arbiter, so that he shall decide in case from these causes you have not reached a decision. But it is all-important that the States should not be disfranchised, that we should have a decision, and that we should come at that in a way that shall give satisfaction to all parties, and upon which we may rest all with confidence.

MR. MORTON. Mr. President, when it is said that this Union is composed of States, I agree to it; but when it is said that this is a government of States, I disagree utterly. It is a government of the people, and is not a government of States.

MR. BAYARD. Is it not a federal government?

MR. MORTON. It is not a compact of States. The Constitution was formed by the people of the United States and rests upon the broad shoulders of the nation.

Mr. President, the clause in the Constitution providing for an election of President of the United States finally by the States voting as States is the most illogical provision in it, and was so recognized at the time it was adopted by at least one distinguished member of the convention, and has often been since. First, our fathers did not recognize an election by a plurality vote of the electors. The successful candidate must have a majority of all, so as to make him more nearly represent all the people of the United States; but in case he cannot get that, then the question was to be referred to the States voting as States, each being equal, under which, as I have just shown, one-fifth of the people of the United States may elect a President; under which, forty-five members of Congress out of two hundred and ninety-two may elect a President, and forty-five members may decide every question proposed to be referred to that house under this amendment of the Senator from Tennessee. Sir, we cannot afford to go any further in that direction; and I undertake to say that if we were now called upon to frame the Constitution, with our present ideas with regard to the rights of the people and the safety of electing directly by the people, and not by intermediate bodies, no such provision would be placed in the Constitution of the United States.

The idea of Congress having a right by a bill to provide an umpire to decide in case the two houses disagree, it seems to me is so utterly foreign to our system of government that I can hardly regard it seriously. In a matter which belongs to the two houses of Congress, if it belongs to them at all, and not to the Vice-President, that they can delegate their power to the House voting by States, or to the Court of Claims,

or to the Supreme Court of the United States, or to any distinguished private person, is utterly at war with our whole theory of constitutional government.

Mr. FRELINGHUYSEN. I do not mean to say that my friend from Indiana is not right; but there are a good many analogies for it. In Wisconsin they elected a governor, and yet after one man was proclaimed the governor there was an umpire in the shape of a court of justice that declared another man elected and turned him out. We have in the discussion over Pinchback's case a good many times referred to an umpire, who, after the people of Louisiana had decided, settled the question as to which was the governor. Now it seems to me that, where the Constitution commits a subject to Congress and yet leaves it so undefined, so general, we have a power according to our discretion by law to carry out the authority committed to us; but while I say this I want to reserve my right to vote against the suggestion that I have made, because the Senator may convince me that I am wrong; a thing which does not often occur, however, I notice in the Senate.

Mr. MORTON. Mr. President, I believe under the constitution of Wisconsin it was held that the question of a contested gubernatorial election might be decided by the courts of that State. Just the reverse was held in the State of Arkansas. It depended upon the wording of the constitution. The legislature decided a question of contested election between contending candidates for governor. The supreme court of that State assumed the jurisdiction to decide the same question and awarded the office to another man. That is a very recent thing and within our recollection here. The Attorney-General and, if I mistake not, the Judiciary Committee of the Senate, of which my friend from New Jersey is a very distinguished member, were consulted, and they decided that the jurisdiction belonged exclusively to the legislature of Arkansas and that the supreme court had no jurisdiction over it. I may be wrong about my recollection of the affair, but that is it. I speak of the general principle that, where powers are devolved upon a legislature or upon Congress—questions to be decided by the legislature of a State or by Congress—the decision of those questions cannot be delegated to an umpire or to any third tribunal. That is the general principle, which I think may be safely asserted here.

Mr. President, I understand that there are Senators who desire not to have this vote taken to-day; and, as I am not at all urgent about it, I will move that the Senate proceed to the consideration of executive business.

IN SENATE, March 14, 1876.

The Senate, as in Committee of the Whole, resumed the consideration of the bill (S. No. 1) to provide for and regulate the counting of votes for President and Vice-President and the decision of questions arising thereon, the pending question being on the amendment of Mr. Sherman to strike out in lines 7, 8, and 9 of the third section the words:

"In the power of a majority of each house to direct that the main question shall be put."

And insert in lieu thereof:

"The duty of each house to put the main question."

So that the proviso will read:

"Provided, That, after such debate has lasted two hours, it shall be the duty of each house to put the main question without further debate."

Mr. MORTON. I do not know that I have any objection to that amendment. It is possible objections might arise to an electoral vote that the Senate and House might want to consider longer than two hours; but at the same time, as there might be danger of the final determination of the result of the vote being too long delayed, I shall not especially oppose the amendment which will close the debate peremptorily at the end of two hours.

The amendment was agreed to.

The PRESIDENT *pro tempore*. The question will now be on the amendment proposed by the Senator from Tennessee, [Mr. Cooper,] which will be read.

Mr. EDMUNDS. On that amendment I ask for the yeas and nays.

The yeas and nays were ordered.

The PRESIDENT *pro tempore*. The amendment will now be read.

The CHIEF CLERK. At the end of the second section it is proposed to insert:

"And if the two Houses do not agree as to which return shall be counted, then that vote shall be counted which the House of Representatives, voting by States, in the manner provided by the Constitution when the election devolves upon the House, shall decide to be the true and valid return."

Mr. JOHNSTON. Is it in order to offer an amendment to that amendment?

The PRESIDENT *pro tempore*. It is.

Mr. JOHNSTON. Mr. President, yesterday the Senator from Pennsylvania [Mr. Wallace] suggested an amendment, and if he does not offer it I wish to offer substantially the same amendment. I offer the following amendment to the amendment, as a substitute for it:

"But if the Senate should vote for counting one certificate and the House of Repre-

sentatives another, the joint meeting of the two Houses shall finally determine which shall be counted, by a vote by States, the representation from each State (including the Senators therefrom) having one vote; but if the representation of any State shall be equally divided its vote shall not be counted."

The PRESIDENT *pro tempore*. The question is on the amendment of the Senator from Virginia to the amendment of the Senator from Tennessee.

Mr. JOHNSTON. It is evident that the bill is defective in one respect. The author of the bill himself admits that in a certain contingency this bill will not be operative; that where there are two returns from a State and the House of Representatives votes for accepting one return and the Senate the other, in that event the vote of the State will be lost. It seems to me in a bill of so much importance as this there ought to be no omission of that sort, but that the bill ought to be complete and provide for every contingency that may arise. It is not only the right of Congress to provide for counting the electoral votes, but it is an imperative duty and we ought to perform that duty. It seems to me that Congress itself is the only body to determine this question. The Constitution provides that where there has been no election by the people the House of Representatives shall decide who shall be President, but the same Constitution provides that where there shall be no election of Vice-President the Senate shall decide who shall be Vice-President. The second article of the Constitution in the second section has this provision. After providing for the election of President by the House, it says:

"The person having the greatest number of votes as Vice-President shall be the Vice-President, if such number be a majority of the whole number of electors appointed; and if no person have a majority, then from the two highest numbers on the list the Senate shall choose the Vice-President; a quorum for the purpose shall consist of two-thirds of the whole number of Senators, and a majority of the whole number shall be necessary to a choice. But no person constitutionally ineligible to the office of President shall be eligible to that of Vice-President of the United States."

It seems, then, according to that provision of the Constitution, that in a certain event the Vice-President shall be chosen by the Senate. There is provision for the failure of an election by the electoral college of President and Vice-President; in one event the House elects the President, and in another event the Senate elects the Vice-President. The returns of the election of both officers are embraced in the same certificates. It would seem to me therefore proper, as the election is for both, that the two Houses should be the joint tribunal to determine the question. In that view I think the amendment I have offered is the proper solution of this question.

Mr. EDMUNDS. I should like to have the Senator from Virginia explain to me where he finds the constitutional authority for making this provision or for making the provision proposed by the Senator from Tennessee. What is the nature of the power we are conferring upon one House or upon the two Houses by voting together as a consolidated committee? Is it a legislative power, or a judicial power, or what sort of a power? The Constitution, it appears to me, regulates what is to be done on this occasion without conferring any powers upon the House of Representatives or the Senate; or else it provides, as it does here, what shall be done, and then leaves it, as all other questions arising under the Constitution are left, to judicial determination, if any dispute should arise. It seems to me that there is very great difficulty indeed in holding that we have the power by law to say that in case of a dispute about a return on the occasion referred to in the Constitution, the House of Representatives shall determine that dispute. The legal objection to it, to my mind, is just as great as it would be to our saying that the common council of the city of Washington shall determine that dispute. If we have the power to legislate at all otherwise than to regulate the congressional action of the two Houses as independent bodies, as has been the practice hitherto, we have the power, of course, to select who shall be the canvassing board in case of dispute, who shall be the deciding board in case of dispute, in reference to the very act of reaching the result, not in reference to who may have the title afterward, because we do not undertake to dispose of that in any way except as the Constitution does, that the man who has got the most electoral votes—and of course that means legal and constitutional votes—shall be the President. Nobody would contend if one was declared by the President of the Senate to have been elected, and it turned out that the returns from half of the States were entirely fabricated and had never been sent by those States at all, that the person he so declared to be elected on that day was constitutionally the President, I should suppose. But certainly if you were to say that, it is one thing to say that the Constitution has confided to Congress the congressional power, acting as two independent bodies but concurrently, to dispose of this question; but to say that we may by law (not in the exercise of our function to confer powers upon some judicial tribunal described in the Constitution to settle something) confer powers upon a body not judicial and not legislative in a constitutional sense, is to my mind going entirely outside of any authority that we possess.

I therefore, Mr. President, without going into the practical inequalities and tempta-

tions that would exist in respect of either of these amendments, vote against them both upon the ground that, as it appears to me, they are plainly in violation of the Constitution.

Mr. FRELINGHUYSEN. I shall propose an amendment when the proper time comes, which I will now read:

"If the two Houses shall not agree, the difference shall be immediately referred to the Chief-Justice of the Supreme Court, the presiding officer of the Senate, and the Speaker of the House, whose decision shall be final. If the Chief-Justice is absent or unable to attend, the senior associate justice of the Supreme Court present in the Capitol or other place of meeting shall act in his place."

This is a judicial question; a question of law and of fact; but judicial, whether of fact or law; and it seems to me that there is a propriety in referring it to the presiding officer of the judicial department. It is true that it is judicial, and yet it is political in its nature. The Constitution has imposed certain duties upon the presiding officer of the Senate, and the presiding officers of the Senate and of the House are competently associated with the Chief-Justice. If it be said that nothing will result excepting the loss of the vote of one State unless we make this arrangement, the loss of one State is a great loss; it is an organic loss; it is a loss that may change the character of the whole election; it is a loss that the people of this country would not quietly submit to. It seems to me it is very important that before we pass this bill we should make such arrangement as will secure the vote of every State, for thereby we may avoid civil war.

Those who have written upon this part of the Constitution have predicted that the greatest peril to this country is just at the very point we are now considering; and I see nothing in the amendment which I have offered which is in violation of the Constitution. The Constitution is silent on the subject. It imposes upon the Legislature the duty of making provision for counting the votes. This amendment, it seems to me, is an equitable, just, constitutional provision; and, besides, it is dignified, conservative, and proper. It comports with the magnitude of the great question that we should call the head of the judicial department of the country to decide it. The matter referred is a difference between the two Houses. That might be only a question of law. The two Houses might agree on everything excepting a dispute as to some principle of law. The difference between the two Houses is the matter which the amendment proposes to refer.

I make these suggestions now rather than when the amendment is taken up, because it may have an effect upon the vote which shall be given upon the pending amendments.

Mr. THURMAN. I am not prepared just now to vote upon any of the propositions which have been suggested; that is, I am not as well prepared as I would like to be. This subject is full of difficulty. For reasons that I gave yesterday, I do not think a matter of disagreement can be referred to the Supreme Court. I do not believe you can confer upon that court as a court any such power. I have seen no reason to change the opinion I expressed yesterday.

Then to give the House of Representatives the right to decide it may be a matter of necessity, and yet there are very grave considerations there, for you put the House under the temptation to disagree with the Senate, so that the result of the disagreement may be that the House will have the decision alone. So, take it any way you will, there is difficulty. I do not believe that we can or ought to confer this power, in the case of disagreement of the Houses, upon the presiding officer of either House. I do not think that can be done. What I desire is that we may, in the situation in which we find ourselves placed, one House having a majority of one party and the other House having a majority of the other party, endeavor to come to some understanding that, being agreed upon, will command the support of reasonable men of all parties. I should hope that, if we came to a conclusion satisfactory to the Senate generally, the bill that passes here would receive the approbation of the House of Representatives. If it is made a party question, I do not know what might be the result. I have no right, however, to urge that consideration upon the Senate; but it seems to me very material that we should, if possible, arrive at as harmonious a result as can be reached.

In order that we may study the various propositions that have been submitted more than we have yet had time—at least I speak for myself—as well as other propositions which Senators may desire to lay upon the table, I move that the further consideration of the bill be postponed until one o'clock to-morrow, and that the amendments already suggested or that any other Senator may wish to lay before the Senate be printed.

Mr. RANDOLPH. I should like to offer an amendment in the shape of a new section, differing somewhat from either of the amendments that have been offered. I do not wish to speak to it now, and do not know that I shall address the Senate upon it at all. Something better may be offered, but, with the view of facilitating the progress of the work, I ask that my amendment may be put with the others and printed in due form.

The PRESIDENT *pro tempore*. The Senator from New Jersey proposes an amendment

It is not in order now, but it will be submitted and printed with the three amendments already pending.

Mr. MORTON. Let it be read for information.

The PRESIDENT *pro tempore*. The proposed amendment will be read.

The CHIEF CLERK. It is proposed to insert as an additional section the following:

"SEC. —. Should the two Houses of Congress, acting separately, fail to agree as to which is the true and valid return of such State, then, and in that event only, it shall become the duty of the President of the Senate to make a decision of the question: *Provided*, The President of the Senate shall render his decision in favor of such return as shall have received a majority of all the votes of both Houses of Congress considered by him as if both Houses had cast their votes in joint meeting assembled."

Mr. HOWE. I shall acquiesce in the motion to postpone very readily, for it will not be regarded as surprising that I should find myself quite as unprepared to vote satisfactorily to myself as the Senator from Ohio professes himself to be. But I want, before the bill goes over, to make one suggestion which has occurred to me, and which is a suggestion of the difficulty that is presented to my mind as the most obvious one and the one most difficult to meet.

It seems to me that the question of determining what votes shall be counted and what shall not is either a political or a judicial question. If a judicial question, I think it ought to be submitted to some one of the judicial tribunals recognized by the Constitution, and not to a special tribunal manufactured for the purpose. If it is a political question, then shall it be determined by any political department of the National Government or by the political department of the State government? It is manifest to my mind, from looking at the Constitution, that those who framed that instrument never anticipated that the Congress of the United States would be stumbling over a difficulty of this sort. They said that each State shall appoint the electors in just such way as the Legislature may see fit; and it did not apparently occur to the men who made the Constitution that such a scandal as two bodies of men claiming to be the Legislature of a State would ever appear in American history. I wish we could say that no such scandal ever had appeared. It did not occur to the men who made the Constitution that there would be ever, I think, two sets of papers sent up here pretending to be the vote of a State. Therefore it seems to me that they intended to delegate to these two Houses no judicial, no political, no discretionary authority whatever, but simply the ministerial act of opening a letter and reading the contents in the presence of the picked men of all the States; that is all.

We are not now quite one hundred years old as a nation, as a Government considerably less, and we have already been shocked by the appearance of two letters declaring very different results in the same State upon a presidential vote. The thing we want to guard against, if we can by any possibility, is the appearance of any such dispute in the convention hereafter. If you can legislate in any way so as to prevent the appearance in any of the States of two bodies of men claiming to be a legislature, or two bodies of men claiming to be an electoral college, then I think you have accomplished the object. Clearly there can be but one Legislature in a State; there can be but one electoral college of a State; but one body having the right to send the letter declaring the will of a particular State in the choice of President and Vice-President. Dozens of pretenders may appear. Only one is true, and all the rest are sham. A dozen bills may be put in circulation of the same number, the same letter, claiming to be issued by the same authority and to rest upon the same credit. One is genuine; all the rest are counterfeit. You have provided laws for punishing everybody who puts in circulation all the sham notes; and if you can provide by law for punishing adequately those who shall forge or counterfeit or issue sham letters or certificates of election, that is a sort of legislation that I would like to engage in. You send the man who issues a forged or counterfeit note to State's prison or somewhere else where he will be out of the way. Precisely where you should put those men who send up to the Congress of the United States a false and counterfeited certificate of the result of a presidential election in a State I am not prepared to say. There is no punishment I can conceive of ever inflicted upon crime too heavy to visit upon the head of such miscreants. Whether those penalties should be imposed by the States, or should be imposed by the national authority, is a question we might well consider; but I do not see this morning how, if you allow such papers to come up here, you are going to provide a tribunal which shall instruct the two Houses which of the two papers is a true one and which is a false one.

Mr. MORTON. As this is a very important question, I shall not object to the postponement, but I venture to express the hope that when we take up the bill to-morrow we shall consider it until it is disposed of, either on to-morrow or as soon thereafter as possible, without a further postponement.

Mr. FRELINGHUYSEN. I move the amendment which I read to the Senate as an amendment to the amendment suggested by the Senator from Tennessee, [Mr. Cooper,] to come in after the word "agree."

The PRESIDENT *pro tempore*. The Senator from New Jersey moves to amend the amendment of the Senator from Tennessee by striking out all after the word "agree," and inserting what he has read, which is to perfect the text while the substitute is pending offered by the Senator from Virginia, [Mr. Johnston.] The Senator from Virginia proposes a substitute for the whole amendment, striking out all after the word "and." The rule permits a perfection of the text. The question will be first on the amendment proposed by the Senator from New Jersey. All these amendments are to be printed, and the question now is whether the whole subject shall be postponed until to-morrow at one o'clock.

March 16, 1876.

The PRESIDENT *pro tempore*. The morning hour has expired, and the special order is now before the Senate.

The Senate, as in Committee of the Whole, resumed the consideration of the bill (S. No. 1) to provide for and regulate the counting of votes for President and Vice-President, and the decision of questions arising thereon.

The PRESIDENT *pro tempore*. The Senator from Tennessee [Mr. Cooper] proposed an amendment for which the Senator from Virginia [Mr. Johnston] moved a substitute, and the Senator from New Jersey [Mr. Frelinghuysen] has moved to perfect the text of the amendment of the Senator from Tennessee by an amendment which is now the pending question. The Secretary will report it.

The CHIEF CLERK. The amendment of the Senator from Tennessee [Mr. Cooper] is to add to the second section of the bill:

"And if the two houses do not agree as to which return shall be counted, then that vote shall be counted which the House of Representatives, voting by States, in the manner provided by the Constitution when the election devolves upon the House, shall decide to be the true and valid return."

The amendment of the Senator from New Jersey [Mr. Frelinghuysen] is to strike out all after the word "agree" in the first line of the amendment of the Senator from Tennessee, and insert:

"The difference shall be immediately referred to the Chief-Justice of the Supreme Court, the Presiding Officer of the Senate, and the Speaker of the House, whose decision shall be final. If the Chief-Justice is absent or unable to attend, the senior associate justice of the Supreme Court present in the Capitol or other place of meeting shall act in his place."

Mr. THURMAN. Mr. President, the amendment offered by the Senator from New Jersey proposes to refer the difference between the two houses to the umpirage of three individuals: the Chief-Justice of the Supreme Court, the President of the Senate, and the Speaker of the House of Representatives. It is plain that this is not referring it to any judicial tribunal, and if such a reference as this can be made, then it is equally clear that a reference might be made to any other three individuals. There is nothing in the fact that the three individuals named in the amendment are officers of the Government. If this reference can be made to them it may be made to three private citizens, and it can only therefore be justified upon the ground that Congress, having power to provide by law the mode of counting the votes, its power is almost or quite unlimited in the choice of the means: I shall not undertake to say what are the limits upon our power of legislation in this respect. It is always dangerous to undertake to set fixed limits to a power of the Government before the case arises, for the plain reason that no one can foresee all the cases that may arise in the history of the country.

But it seems to me perfectly clear that this proposition is not consistent with the spirit of the Constitution. The Constitution provides—and I beg pardon for occupying the time of the Senate in saying what has been said and what is known to every Senator; and yet the importance of this subject will be perhaps a sufficient excuse—

"The President of the Senate shall, in presence of the Senate and House of Representatives, open all the certificates, and the votes shall then be counted."

From the plain language of the Constitution, no function or duty is devolved on the President of the Senate except to "open all the certificates in the presence of the Senate and House of Representatives." It is not said that he shall count them, nor is it said in express words that they shall be counted by the two houses in joint convention, and the practice of the Government has not been entirely uniform. The Senator from Maryland [Mr. Whyte] called our attention the other day to the proceedings when the vote was counted at the first election, the election of General Washington as President of the United States, and Mr. Adams as Vice-President, and it is true that those proceedings did give some color to his proposition that the power of counting, and therefore the power of determining what is the true return, is vested in the President of the Senate. I say those proceedings seemed to give some color to that proposition, because, in that case, "John Langdon, esq., one of the Senators from the State of New Hampshire, was elected President of the Senate for the sole purpose of opening and counting the votes for President and Vice-President of the United States." That

language would seem to import that he was to do the counting, and yet it does not necessarily follow, because a President of the Senate was necessary in order that the votes might be opened, and therefore in order that they might be counted; and nothing, I think, of any great force can be gathered from the use of that language in the resolution appointing Mr. Langdon President of the Senate. The proceedings, however, go on further. On the 6th of April, 1789, it was ordered by the Senate—this was immediately on the election of Mr. Langdon—

“Ordered, That Mr. Ellsworth inform the House of Representatives that a quorum of the Senate is formed; that a President is elected for the sole purpose of opening the certificates and counting the votes of the electors of the several States in the choice of a President and Vice-President of the United States.”

The same remarks that I have made in reference to the resolution by which Mr. Langdon was appointed will apply to this part of the order that the fact be communicated to the House of Representatives. Then the order goes on further:

“And that the Senate is now ready in the Senate Chamber to proceed in the presence of the House to discharge that duty.”

What “duty” is here spoken of? What duty is it that the Senate is to discharge? If you take the language of the order, it can only be the duty of counting the votes. It then proceeds further:

“And that the Senate have appointed one of their members to sit at the Clerk’s table to make a list of the votes as they shall be declared, submitting it to the wisdom of the House to appoint one or more of their members for the like purpose.”

That was the order of the Senate, and Mr. Ellsworth subsequently reported that he had delivered the message. Then—

“Mr. Bondinot, from the House of Representatives, communicated the following verbal message to the Senate:

“Mr. President: I am directed by the House of Representatives to inform the Senate that the House is ready forthwith to meet the Senate to attend the opening and counting of the votes of the electors of the President and Vice-President of the United States.”

“And he withdrew.”

That sheds no light on the subject.

“The Speaker and the House of Representatives attended in the Senate Chamber for the purpose expressed in the message delivered by Mr. Ellsworth; and after some time withdrew.

“The Senate then proceeded by ballot to the choice of a President of their body *pro tempore*. John Langdon, esq., was duly elected.

“The President elected for the purpose of counting the votes declared to the Senate that the Senate and House of Representatives had met, and that he, in their presence, had opened and counted the votes of the electors for President and Vice-President of the United States, which were as follows.”

Then follows the table. Certainly it must be admitted that, looking at that record alone, it would seem as if the idea at the commencement of the Government was that the President of the Senate was not only to open but that he was to count the votes. I am told—I have not seen it and referred to it myself—that these proceedings which I have read from our Manual are not quite complete, and that a reference to the Journal rebuts to some extent the presumption arising from what I have read, that it was considered then that the duty of counting the votes devolved on the President of the Senate; but I do not think that much weight can be attached to that precedent, even though it was set by those who met immediately after the adoption of the Federal Constitution. No question was then made; there was no contest for the Presidency; General Washington had received every vote; and there was no contest of any consequence for the office of Vice-President. There was nothing to do but the ministerial duty of making a table of the electoral votes and adding it up. That was all; and a precedent set under those circumstances, without any discussion whatsoever and where there was nothing to raise any discussion or question, is not one entitled to any great weight in settling a matter so important as this.

For reasons which I have already stated, and which I shall not bore the Senate with repeating, it seems to me quite inadmissible to adopt the theory that the counting of these votes, and consequently the function of judging which is the true return, is devolved upon the President of the Senate. The bare fact, which we are to presume must have been foreseen by the framers of the Constitution, that the Vice-President might himself be a candidate for the Presidency or for re-election, shows that, if the counting of the votes were devolved upon him, if the judicial function of deciding upon the validity of the returns were devolved upon him, it would be devolved upon a man who was a judge in his own cause. There is no provision in the Constitution that if he is a candidate he shall not act in the premises; on the contrary, the provision of the Constitution is so mandatory that, as was shown by the Senator from Indiana [Mr. Morton] the other day, in no less than six instances has the Vice-President opened the votes when he himself was a candidate either for the office of President or

for re-election to that of Vice-President; and to say that our Constitution is so defective that it makes the determination of who has been elected the Chief Magistrate of the republic to depend upon the will of the very man who is a candidate for that office is to condemn the Constitution beyond redemption. No, sir, the Constitution is not so defective as that. Nothing but the strongest, clearest, and most precise language could drive us to an interpretation of that sort. I therefore think, with great deference to my friend from Maryland who took that ground the other day, that that interpretation is not the correct one, and while the twenty-second joint rule was in my judgment an improper rule, and while the subject was not one to be regulated by any joint rule of the two houses, but to be regulated by law, yet I think that the determination then arrived at, after discussion, after a full consideration of the subject and in the light of the experience of the republic, is worth much more than this precedent set by the first Congress in counting the votes for General Washington.

MR. CONKLING. Will the Senator allow me to ask him a question, if I do not interrupt him?

MR. THURMAN. With great pleasure.

MR. CONKLING. I was diverted for a moment during part of his argument. I beg to inquire whether the Constitution, as he understands it, means in the words, "the votes shall then be counted," that the counting must be by the two houses? He has been explaining himself touching the function of the Presiding Officer. My inquiry is, whether these words which he understands, commit to Congress, or, more exactly speaking, to the two houses of Congress then assembled, the duty of counting the votes; or whether the words "the votes shall then be counted," leave a discretion to the law-making power to provide by whom the count shall be made?

MR. THURMAN. The Senator from New York was not, I think, here on the former day when I gave to the Senate my view—

MR. CONKLING. I was not. I would not have interrupted him if I had been. I was necessarily absent that day and did not hear the discussion.

MR. THURMAN. I have no objection to restating, and I will endeavor to do it briefly, my view on that subject. I think that the spirit of the Constitution requires that these votes shall be counted in some mode by Congress, or the convention of the two houses. But what shall be the mode? Now, I repeat what I said the other day: that it is a fundamental principle that where any power is conferred upon the Government, or any Department or officer thereof, and the mode of exercising that power is not prescribed in the Constitution itself, it belongs to the law-making power to prescribe the mode. I said the other day that that was a fundamental principle of the Government, but I need not have gone to any general principles of government, because it is expressly declared in the Constitution, as we all know in the very familiar paragraph, the last of section 8 of article 1, in which, after enumerating the powers of Congress, it is said:

"The Congress shall have power to make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the Government of the United States, or in any Department or officer thereof."

What could be broader than that? It is well known that that was only put in out of abundant caution. That those powers would have belonged to the Congress by necessary implication, even if that clause were stricken out of the Constitution. But it is not in there that there may be no question about it that Congress has these powers.

Now, the power to count these votes must be a power of the Government or of some Department or officer thereof. If it is, then Congress has power to make all laws necessary and proper for carrying into execution that power. I have, therefore, thought from the beginning that a joint rule was not the proper mode, but that a law was the proper mode, and that that law would be binding upon Congress, as well as upon everybody else, as long as it remained in force. Then comes the question, What mode shall be prescribed? I have said before that I do not undertake to place limits arbitrarily upon the mode which we may adopt. Definitions are very dangerous, as every lawyer knows. It is not safe to undertake beforehand, and before the case arises, to make an arbitrary, absolute definition, the boundaries of which can never be passed, no matter what may be the exigency. That is always unsafe. Therefore no wise man is apt to go beyond the case in hand, whether he is sitting as a judge or sitting as a Senator.

I do not undertake, then, to say what are the boundaries of our power, in the execution of our legislative duty, to provide for the mode of counting these votes; but this I do say, that the spirit of the Constitution requires that this matter shall be settled, if it is possible to settle it, by the Senate and the House of Representatives, either acting separately or acting in joint convention. Either one way or the other, the spirit of the Constitution requires that it shall be settled in that mode. The Senators and Representatives are to be present when the votes are counted. They are to be opened in their presence. The usage of the Government has been to appoint tellers from the two bodies; and it seems to me that it never was contemplated that the determination

of any question which should arise upon that count should be decided by some other tribunal or body of men.

This being my view, I cannot concur with the idea that this power can be devolved upon the Supreme Court, as was suggested, if I am not mistaken, by no less eminent a Senator and distinguished a jurist than the present chairman of the Judiciary Committee at a former session. You cannot compel the Supreme Court to execute any such power as a court; that is very certain. The Supreme Court, as a court, has nothing but judicial power; and its original jurisdiction is expressly defined in the Constitution; and determining any question of election is not one of the original powers thus conferred on the court. Then the other powers of the Supreme Court are appellate powers. It has such appellate jurisdiction as may be provided by law; that is, as Congress may confer upon it. As I said the other day, the appellate jurisdiction spoken of in the Constitution is appellate jurisdiction from the inferior judicial tribunals of the country. That I am right in this has been settled by the Supreme Court again and again. If my memory is not at fault, there is an old case away back in Dallas's Reports, in which the Supreme Court held that they could not determine an appeal from one of the Executive Departments of the Government. But we have lately had the most marked case, the most important case that could possibly arise on that question perhaps, thoroughly investigated by the Supreme Court. It will be remembered that when the Court of Claims was established its sole power was to hear and decide whether a claim was valid or not, without any power to give judgment. It could simply report its finding to Congress; it had no power to give any judgment whatsoever. That was the Court of Claims as originally constituted. An act was passed authorizing an appeal to the Supreme Court from this finding of the Court of Claims. The Supreme Court after an elaborate discussion decided that no such appeal could be entertained by the Supreme Court, because the Court of Claims as then constituted, having no power to render a judgment, was not a judicial tribunal at all, but a mere commission, and that the power of appeal to the Supreme Court was limited to appeals from judicial tribunals, and therefore it was held that the appeals would not lie, and it was dismissed. Congress, to remedy that defect, then passed the present law giving to the Court of Claims the power to render judgment; and since that appeals to the Supreme Court have always been entertained by that court. This is the latest and most authoritative decision after great discussion and great consideration, that the Supreme Court can entertain no appeal except from judicial tribunals, and exercise no function that is not judicial. I do not, therefore, believe that this power can be given to the Supreme Court as a court, and for that reason I am strengthened in the belief that it is a question which ought to be settled by the Congress.

Mr. CONKLING. Will the Senator let me interpose there for a moment?

Mr. THURMAN. Yes, sir.

Mr. CONKLING. The Senator has just concluded an argument addressed as I understand it to the incompetency of one agency to receive a delegation of this power. He has argued to show that the Supreme Court as a court is such a creature under the Constitution that it cannot be charged with this function. That is all. If it does not interrupt or unpleasantly dislocate the argument of the Senator, I wish he would tell us what his opinion is as to the power of the two houses, the law-making power, to deposit it with some agency or instrumentality whose function is not so limited by the Constitution that it cannot receive and perform this duty. That is the question to which my mind addresses itself—the Senator, I am sure, will apprehend me—whether the law-making power may create an instrumentality for this purpose, although it may be true that the Supreme Court as such is an instrumentality which by the laws of its own being would be incompetent to become such an instrument.

Mr. THURMAN. I had already said that I would not undertake to define our legislative power in providing a mode for the solution of this problem, for the reason that I stated it would be dangerous to attempt it. But this I have intimated, and this I say now more distinctly, that in my judgment we shall act most within the spirit of the Constitution and nearest to its letter if this matter shall be decided by the Senators and the Representatives of the people, and that we ought not for one moment to think of going outside of the Congress if we can find a proper and safe mode for deciding this question within the halls of Congress.

That brings us to the question, Can we devise such a mode? The whole difficulty arises from the fact that two or more returns may be made from a State. That is no fanciful apprehension, for that fact has occurred in the past and may occur again in the future. To let the first section of this bill stand and strike out the second section would, as I said the other day, have the effect to throw the determination of the question, in cases where there were two or more returns, into the hands of the President of the Senate, and that I do not think there are many Senators on this floor who would agree to. Such, I think, is not the Constitution.

Then you must provide some other mode. The second section of the bill provides that all the returns shall be opened and laid before the convention that is assembled. That prevents the President of the Senate, by merely presenting a single return and

suppressing the other, from determining the question; and it is obviously proper that he should be required to lay all the returns before the convention. In fact, the Constitution declares that he "shall open all the certificates;" and if he is not invested, as I have argued, with the power of determining which is the valid certificate and which is not the valid certificate, then it follows that it is his constitutional duty to open all the returns and to lay them before the joint convention. But as there might be some question about that, this second section very properly makes it his duty to do so. Then what does it provide? It provides that that return shall be counted which the Senate acting separately, and the House acting separately, shall decide to be the valid return. But then arises the difficulty immediately, the possibility, nay, it may be the probability, that one house may decide in favor of one return, and the other house in favor of another return, and that therefore neither return could be counted, and the vote of the State would be lost.

The paramount duty of Congress is to see that no State shall lose her vote, that no State shall be deprived of her voice in the selection of the Chief Magistrate of the nation; and therefore we cannot, as it seems to me, with propriety put any scheme upon our statute-book which is so radically defective as this. We ought to provide for the ultimate decision. When we come to provide for the ultimate decision there is great trouble. If we take the proposition of my friend from Tennessee, [Mr. Cooper,] that the voice of the House expressed in the manner provided in his amendment shall predominate over that of the Senate, we place before the House a very strong temptation to disagree with any conclusion at which the Senate may arrive, because the effect of the disagreement is to throw power into the hands of the House. That is certainly a very serious objection; for although we are bound to consider that the House of Representatives is a responsible part of the Government, and not to impute to it or to its members any improper motive, yet we do know that, so weak is human nature, the best prayer that was ever uttered was "Lead us not into temptation."

In view of this, and believing that this matter ought to be settled by the Senators and Representatives in Congress, and looking also at the Constitution, which requires the votes to be opened and to be counted in the presence of both houses, I have come to the conclusion that the proposition of the Senator from Virginia [Mr. Johnston] is the nearest to the Constitution in its spirit and in its letter, and probably in practice would be the best that could be adopted. In counting the votes Congress does not act in a legislative capacity. We all agree to that. The Constitution convenes both houses together, as it were in a joint convention; and although it does not declare that that joint convention shall act as a convention, although it confers upon it by no direct or express words any function at all, either of decision or of legislation, certainly none of legislation, yet the idea of the Constitution is that the Senate is to be there, the representatives of the States, as well as the members of the House, the representatives of the people, and that all are to participate in the decision of this great question, who has been elected to the Chief Magistracy of the republic? And therefore it does seem to me that we are abiding by the Constitution more closely, both abiding by its letter and its spirit more closely, when we make both the Senate and the House of Representatives acting together the ultimate umpire where the two houses have disagreed. I see no other solution that is likely to be as satisfactory to the people, to the country, to the States, and to the requirements of justice and truth. Hence, unless something shall be urged that shall alter my opinion on this subject, I am inclined to favor the proposition of the Senator from Virginia. That, if adopted, will require the Senate to act as well as the House. That will not be an abnegation of any power on the part of the Senate, as it might seem that the proposition of the Senator from Tennessee would be. That will require of us to perform the function which reason and our presence there when the votes are counted as required by the Constitution would seem to impose upon us.

Then the only point that remains, if I am right in this view, is, how shall that question be decided? Shall it be decided by a vote of the two houses sitting as a convention, a vote in which the ballot or the voice of each Senator and each Representative is to count one, as if it was one body; or shall it be, as the amendment proposes, that the vote shall be taken so that each State shall have one vote? Upon that question a great deal can be said on both sides. A great deal can be said in favor of a vote in the joint convention just as if it was one body, or a vote as proposed by the amendment by States; and it is very difficult indeed to make a satisfactory argument, owing to the fact that there is so much ambiguity in the Constitution upon this subject. But if I am right in saying that the mode of counting is left to the law-making power, it would follow that we have a right to adopt any mode which is fair and just and consistent with the spirit of the Constitution. I have endeavored to show that it is not consistent with the spirit of the Constitution to devolve this power upon the Supreme Court, nor consistent with the spirit of the Constitution to devolve it upon any tribunal or body of men outside of the halls of Congress. That is my opinion now, without undertaking to say that possibly I may not be in error. Then, with that limitation, that we must confine ourselves to the halls of Congress, if we have the right to approve the

mode by law, the only limit upon our discretion is the limit placed by eternal truth, the principles of eternal justice, and the spirit of the Constitution under which we act. Any mode, then, consistent with the spirit of the Constitution, and that is not opposed to any express provision of the Constitution, and that is consistent with truth and justice, we are at liberty to adopt.

I think, therefore, after much reflection on this very difficult subject, that it is competent for us to adopt the mode proposed by the Senator from Virginia; and then the only point that remains is, is that the mode most consistent with the spirit of the Constitution? As I said, there might be some difficulty about that; but, inasmuch as it is somewhat in analogy to the way in which the vote of the House is taken when the House elects a President, a pretty far-fetched analogy, I am compelled to admit, I am inclined to think that that is the best mode in which we can solve this enigma.

I thank the Senate for having listened to me again on this subject, and promise not to trouble them any more.

MR. CHRISTIANCY. Mr. President, so meager is the provision of the Constitution in reference to the counting of votes for President and Vice-President of the United States, and so entirely blank is that instrument as to any mode of deciding upon the authenticity or validity of the certificates, that it would almost seem, and some Senators appear really to be of the opinion, that our fathers in framing the Constitution must have acted upon the Irishman's plan of constructing a cannon; which was to make first a large hole and then cast the cannon around it. The Constitution, in one view of it, certainly seems to have taken one step in that process, and seems to have left to us only the ingenuity of taking the other, unless we find upon examination that what at first seems to be a vacuum is in fact filled, and becomes solid by some implication from the affirmative provisions of the Constitution itself.

As to the affirmative provisions which it has made, it is very clear that no joint convention of the two houses for the counting of the presidential vote is contemplated where the votes of all are to be taken collectively. It is not even expressly provided that the two houses shall meet, though this is clearly implied, as the votes are to be opened and counted in the presence of both houses. The language is this:

"The President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates, and the votes shall then be counted."

It does not say by whom the votes shall be counted; and as it does expressly provide that the President of the Senate shall open all the certificates, and then immediately declares that "the votes shall then be counted," without saying by whom, there is, as it seems to me, a fair though not conclusive inference that it is not made the duty of the President of the Senate to count them, because, if this had been intended, the language in that connection would naturally have been, as already suggested by several Senators, "the President of the Senate * * * shall open all the certificates and count the votes."

Now, as this counting is required to be in the presence of the two houses, and no provision is made by whom the actual count shall be made, it seems to me that the counting may be considered as, in legal effect, the work of the two houses, for which each is responsible. Not that each member of each house shall actually count all the votes and make the necessary lists, which would be practically very difficult, but that each house should appoint some member or members of its own to count them; in other words, to act as tellers, and to perform their work in the presence of the two houses. This is the mode provided in the twenty-second joint rule, now repealed, and in the first section of the bill now before us, and this mode is, I think, the fair result of the interpretation of the Constitution above indicated; and the matters of mere detail for the purpose of accomplishing this mode of counting and of deciding, as provided in the first, third, and fourth sections of the bill, would, I am inclined to think, come fairly within the constitutional power of Congress.

As to the question between the provisions of the twenty-second joint rule, preventing any vote being counted except by the concurrent vote of the two houses, and the provisions of this bill, that no vote or votes from any State shall be rejected except by the affirmative vote of the two houses, the question is not so clear as it might at first appear; the difference between the two houses would necessarily be upon the authenticity or validity of the return or certificate, as there could be no other ground upon which either house could honestly reject the votes, and a dishonest rejection the framers of the Constitution certainly did not attempt to provide for. But a difficulty arises here from the silence of the Constitution, which does not seem to have contemplated the possibility of any disagreement of the two houses upon the authenticity or validity of the certificate; and yet we all know that such difference of opinion and such disagreement not only may arise, but have actually occurred. Still this question of the authenticity of the certificate, though not provided for or apparently thought of by the framers of the Constitution, is actually and necessarily involved in the counting of the votes, which they did provide for, and therefore within every recognized principle of interpretation must be considered as having been contemplated by

them, and yet they have made no express provision for the decision of the question arising upon such a difference. But is no mode for its decision to be fairly implied?

If the mode of deciding such a difference between the two houses is implied or fairly inferable from the provision actually made, that implication is as much a part of the Constitution as if expressed, and no different mode of deciding the question would be within the power of Congress.

Now, if it be true that under the Constitution the counting is to be considered, in legal effect, the act of the two houses; and if, as I have suggested, the question of the due authentication of the certificates of election is necessarily involved and included in the counting provided for, then, as there is an absence of any express provision for any other mode of decision, it would seem almost of necessity to follow that the decision upon the authenticity and validity of the certificates should be decided by the same bodies who make the count; in other words, by the two houses, whose act in legal effect the counting is. But if a decision by the two houses, or, as claimed by some, the decision by the President of the Senate, is by fair implication from the Constitution the mode of decision intended, then very clearly no other mode can be provided by Congress any more than if the implication claimed had been an express provision of the Constitution.

Up to this point no difficulty could arise if both houses agree in their decision; nor could there be any difficulty if the two houses were acting strictly in joint convention, so that the vote of each member of that joint body should count as part of the aggregate of the whole. But if they are to act and decide separately, and not jointly, as seems to have been conceded, each house may come to a different conclusion; one for allowing the certificate and counting the vote, and the other against it. And a similar difficulty would arise in reference to the first section of this bill when there is but one return from a State, as under the second, when there are two sets of certificates. The question is, who or what tribunal shall decide when the two houses acting separately disagree? If the authority of the two is equal and opposed to the other in its decision, how much greater reason is there for saying that the certificates from any State shall be admitted and the vote counted than for holding that it shall not be admitted or counted? Certainly it cannot be said that there has been any decision in its favor; and there may be much difficulty in finding any more intelligible ground for holding that the vote should be counted than that it should be excluded. It was, I suppose, upon considerations like this that the twenty-second rule was adopted. And yet the result, I confess, does not strike my mind as favorable or just, since it puts it in the power of either house alone to disfranchise a State. Just reasoning should lead to just results; and when it does not, a lurking fallacy is to be suspected. And we should seek to find where it is; or, if not found, then whether the difficulty does not arise from the actual deficiency of the Constitution itself.

It was said yesterday that when the two houses disagree, their authority being equal, the equilibrium might be overcome and the scales turned in favor of the admission of the certificate and the counting of the vote by the presumption in favor of the authenticity and validity of the certificate. That would be so if the validity and authenticity were conceded; but it is precisely this which is not conceded, and about which the two houses disagree. And if we are to base our presumption upon the face of the papers alone and the signature and seal, it would seem to be begging the whole question at issue between the houses to overcome the difference between them by such a presumption from the face of the papers alone. But when we take a little broader view of the matter, and consider the stupendous wrong of disfranchising a State, and the more significant fact that but one return or certificate has been sent up from the State, that no other return is sent up, and no conflicting claim is presented by other certificates or returns, and the strong probability that such would have been presented had there been any ground for them, the probability is so strong that the one sent up is correct as to amount to a moral certainty; and it is very difficult to see how either house could honestly decide against its admission, and a dishonest decision of one house against its admission ought to be disregarded rather than to disfranchise the people of a State. These considerations seem to me to lead to the conclusion that in the great majority of cases of the kind, justice would be much more likely to be reached by admitting the returns and counting the vote, when the two houses disagree upon a single return from a State, than by excluding it; and that this conclusion is more in accordance with the tacit assumptions of the Constitution itself, which seems to assume that the vote is to be counted. I can, therefore, as at present advised, vote for the first section of the bill; and the more readily because it seems to me the same result would follow from the Constitution without the bill, and that the bill only embodies in a compact and authentic form the conclusions fairly resulting from the Constitution itself.

But I am far from being very confident of the correctness of this conclusion or the reasoning by which I have reached it, and may change my opinion entirely in the course of the discussion. The silence, the apparently utter hiatus in the Constitution,

makes it very difficult to find any landmarks by which I can, with any confidence of certainty, guide my course. And I feel some of the same kind of uncertainty as I can imagine I might feel if thrown out into void space beyond sight of the stellar universe, and should there undertake to ascertain courses and distances and to divide that void space into definite areas. From such a position, so obscured by distance, I feel no strong confidence of being able to shed so strong a light upon the questions before us as to remove all the doubts of others or even my own.

But take now the case provided for by the second section of the bill, where there are two certificates or returns, or two sets showing the election of a different ticket or different men, one house deciding for one and the other for the other, and let us consider the question as it would stand upon the Constitution without the aid of this bill. If the two sets of returns were equally well authenticated, and other things being equal (and a disagreement can hardly be supposed if they were not) no such presumption would arise in their favor as in the case where there is but one return from a State; and the two houses being divided in opinion, there is nothing to turn the scale in favor of either, what would be the result without this bill? Could the vote be counted? Certainly not; unless the President of the Senate is to decide, for otherwise there is no decision, and one cannot be counted unless both are counted; and if both are counted, they would neutralize each other, and the result would be the same as if neither had been counted.

The Constitution has provided no tribunal for the decision upon such a disagreement, unless, as I have suggested, that by implication the President of the Senate is to make the decision. And if, as already suggested, there be any implication in the Constitution that the two houses are to decide upon the validity of the returns or certificates, or that the President of the Senate is to decide it before or after the houses have disagreed, then this implication, being as much a part of the Constitution as if expressed, it would be a violation of the Constitution for Congress to pass an act providing any other mode or tribunal for its decision.

It is only in the event that the Constitution has made no provision by implication (for there is none expressed) that it could be competent for Congress to establish a mode or tribunal for the decision. If there be no implication of any mode, and the Constitution can be said to have entirely omitted to provide for the decision, then, perhaps, it might be said the intention was to leave the mode of decision to the discretion of Congress. But the tribunal for this purpose must be one which can act and decide immediately upon the occurrence of the disagreement, for the Constitution evidently requires immediate decision.

"The President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates, and the votes shall then be counted."

If Congress can provide such a tribunal at all, it must be in their power to select that which in their opinion is best adapted to effect the object—a fair and speedy decision. But there are so many obvious objections to giving the power to the House of Representatives, voting by States, or to them with the two Senators of the State voting by States, and either of these methods is so obviously calculated to defeat the majority of the people of all the States interested, that I could in no event vote for any such tribunal. It would be far better to provide for a joint vote of the Members and Senators of all the States, as in joint convention. But the insuperable objection to this would be that it would be in manifest violation of the affirmative provision of the Constitution, meager as that provision is: for in providing for the counting of the votes in the presence of the two houses, the Constitution clearly enough indicates that it is not to be a joint convention, but that each house is to act in its separate capacity.

Of all the modes suggested for the decision of the question, when the two houses disagree, if there be power to establish any tribunal, I am most inclined to that suggested by the Senator from New Jersey, to call in the Chief-Justice or one of the justices of the Supreme Court to act with the Speaker of the House and the President of the Senate, and making the decision of the majority of these final. I think, however, it would be still better to call in the Chief-Justice and the next senior justice, or, if there be no Chief-Justice, then the two senior justices, (according to date of commission,) to act with the President of the Senate and the Speaker of the House, and making the decision of the majority of these four final. This would be certainly better and more likely to secure a fair and impartial decision when the President of the Senate and the Speaker of the House happen to be of the same political party. But, for the reasons already suggested, I doubt the competency of Congress to provide any tribunal at all for the decision of such a question, and as yet incline to the opinion that the two houses in their separate capacity are the tribunal of the Constitution, and I am inclined to think the only safe mode to remedy the evil is by an amendment to the Constitution itself.

But, with my present views, I have come to the conclusion to support the present bill; but I am still open to conviction, and hope to derive more light from the discussion.

The Senator from Ohio [Mr. Thurman] said that it was incompetent to devolve this

duty upon the justices of the Supreme Court; and his objection apparently seemed to be based upon the idea that it would be devolved upon them as a court. I do not understand this to be the fact, but it is only a mode of designating certain persons who are to act with the Speaker and with the President of the Senate. I am not sure that even that would be competent; but I wish to hear further discussion upon the subject.

Mr. FRELINGHUYSEN. The amendment which I offer is to add at the end of the second section these words:

"The difference"—

Between the two houses—

"shall be immediately referred to the Chief-Justice of the Supreme Court, the Presiding Officer of the Senate, and the Speaker of the House, whose decision shall be final. If the Chief-Justice is absent or unable to attend, the senior associate justice of the Supreme Court present in the capital or other place of meeting shall act in his place."

The word "capital" is printed "capitol" instead of "capital." That correction should be made.

I was somewhat impressed by the argument made by the Senator from Maryland [Mr. Whyte] for the purpose of showing that the Constitution contemplated that the vote should be counted by the President of the Senate; but I am satisfied, on reviewing that subject, that my first impressions were correct, and that the Constitution does not contemplate that the President of the Senate should count the vote. The fact that the Constitution does in terms provide what duty the President of the Senate is to perform, to wit, that he is to open all the certificates, and omits to provide that he shall count the vote, I think is conclusive that it was not intended that he should do more than he is expressly authorized to do by the Constitution.

On examining the resolution of the convention that formed the Constitution, (passed September 17, 1787,) I think the Senator from Maryland gives it a misconstruction. That resolution had for its object the setting the wheels of this Government in motion, and after giving direction for the election of electors and having the certificates returned, the resolution provides:

"That the Senators and Representatives should convene at the time and place assigned; and that the Senators should appoint a President of the Senate for the sole purpose of receiving, opening, and counting the votes for President."

Or, to read it otherwise, "That the Senators shall have some person to preside for the sole purpose of receiving, opening, and counting the votes for President."

It is true that by the Constitution the President of the Senate is to receive and open the votes; but the phraseology of this resolution is to be construed according to the well-known rule, "*Reddendo singula singulis.*" The words of the resolution are to be taken singly, and the only intention of that resolution is that they shall have a presiding officer, in order that the votes may be received, opened, and counted, as provided in the Constitution.

Mr. THURMAN. From what page does the Senator read?

Mr. FRELINGHUYSEN. Page 357 of the Manual.

The bill under consideration, as it stands, in effect says that when more than one return is made from any State and the two Houses disagree as to which is the true return, the vote of that State must be lost. Permit me to say to Senators that we all know that is a result that the Constitution did not contemplate. Whatever errors we may make in acting on this subject, we know that we commit an error if we enact a law leaving the election of the President in that position. It would be a great calamity to the country to have the will of the people defeated in the election of President by the failure to count the vote of one State. It might lead to results that we do not even dare to contemplate. It is our duty to make such enactment that the vote of every State shall certainly be counted.

We must, then, take some action. The Constitution being silent, it is perhaps impossible to invoke its affirmative sanction for any plan that we may propose. No proposition can be put forward in support of which its advocates can turn to the Constitution and say, "Here is the positive authority for the proposition." The best that can be said for any plan is that it is not in violation of any provision of the Constitution. If I may have the attention of the Senator from Ohio, [Mr. Thurman,] it seems to me that the plan which he favors comes near to being a violation of the Constitution. The Constitution has told us what part the House of Representatives shall take in the election of President, and we may not say that instrument intended that the House should take other or further action than that stated by it. It has declared and defined what shall be the province of the House in the election. It has said that if no person has a majority of the whole number of electors, then the House, voting by States, shall, from those having the highest number, not exceeding three, choose a President. The Constitution has told us when and how the House of Representatives is to vote for President, and I think we have no right to assume that it contemplated that the House should vote in any other manner than is plainly stated in the Constitution.

We conclude that the President of the Senate is not to count the votes, because the Constitution says he is to open the votes, and does not say he is to count them. And by the same reasoning we conclude that the House is not to vote in the exigency we are contemplating. The Constitution declares when and how the House is to vote.

The amendment which I have proposed is not contrary to the Constitution, and the duty is on us to meet the difficulty in some way. The question to be submitted, and upon which a difference arises between the two houses, is a judicial question. It is a question as to the authenticity of a return, and it is also undoubtedly a political question. It is no less a question than who shall be the Chief Magistrate of the nation; and the tribunal to make that determination should be one having judicial and political characteristics. The amendment suggests that it shall be the head of the judiciary, the President of the Senate, and the Speaker of the House. Thus we have the representative of the States in the Presiding Officer of the Senate; the representative of the popular branch of the legislature in the Speaker of the House of Representatives. They probably, in a difference between the House and the Senate, would in opinion represent their respective houses, and being a judicial as well as a political question, we invoke the aid of the head of the judiciary. The high character of this tribunal, composed of men who have been selected by the nation, gives security against all partisan and all unjust decisions. Their determination would be made with the eyes of the nation upon them. The tribunal comports with the dignity of the great question, and would be safe and conservative; and I doubt whether it is possible to adopt a better.

It is said that the votes are to be counted in the presence of the Senate and House. That is true; but the difficulty we are meeting is that of there being votes which they cannot count, where the Senate says, "Count them," and the House says, "Let them not be counted." Intervention thus becomes necessary. Therefore let us establish this tribunal, representing each house, and invoking the aid of the judiciary to determine what is the vote, that it may be counted in the presence of the two houses.

MR. JOHNSTON. The amendment offered by me is not properly printed. It purports to strike out all after the word "and" of the amendment of the Senator from Tennessee, [MR. COOPER,] and insert my amendment. Instead of that, it is to come in at the end of the second section of the bill, being an addition to that section. On the top of the second page of the printed amendment the word "voting" is omitted before "by States." Then, in order to perfect the amendment, I desire to add after the word "vote," in the fifth line on the second page, the words, "a majority of such representation shall cast the vote of the State."

THE PRESIDING OFFICER, (MR. CAMERON, of Wisconsin, in the chair.) The amendment will be reported as modified.

THE CHIEF CLERK. It is proposed to insert at the end of the second section of the bill the following:

"If the Senate should vote for counting one certificate and the House of Representatives another, the joint meeting of the two houses shall finally determine which shall be counted, voting by States, the representation from each State, including the Senators therefrom, having one vote. A majority of such representation shall cast the vote of the State, but if the representation of any State shall be equally divided its vote shall not be counted."

MR. JOHNSTON. I suppose, although strictly speaking the amendment of the Senator from New Jersey is the one before the Senate, it is not improper to consider all the amendments which are before the body. It seems to me that the amendment offered by the Senator from Tennessee is liable to several objections. In the first place, it provides for the decision of a question by one body where the two bodies disagree. In the event that the Senate should decide in favor of one set of returns and the House in favor of another, the amendment of the Senator from Tennessee provides that the question shall be decided by the vote of one of these bodies, excluding the vote of the other. The amendment is objectionable in that respect, for in a matter of disagreement in regard to the vote of a State each body should have a right to express their opinions and be heard. Each body should be allowed a vote in the final arbitrament of that question, and it should not be left exclusively to one of the two houses to decide. That would be proper, according to my view, in any question arising between the two houses, and it is rendered particularly proper in the consideration of this particular question.

The bill is one relating to the election of both President and Vice-President. The first and second sections refer to counting the votes for both officers; but the second section especially says that the returns of the election for President and Vice-President in such States shall be opened by the Vice-President "in the presence of the two houses when assembled to count the votes." And the amendment of the Senator from Tennessee proposes a mode of settling a disputed question in regard to the election of both officers.

The twelfth article of the Constitution of the United States declares that where there has been no election by the people the House of Representatives shall elect the

President and the Senate of the United States shall elect the Vice-President. We are now considering a measure in regard to the election of both these officers, not the President only, but the President and Vice-President also. The bill is applicable to both of these officers, and we must therefore frame a law so as to be operative as to each of those officers, and not to one alone, and that shall not deprive either body of its constitutional right. While the Constitution declares that the Vice-President shall be elected, in the event that there is no election by the people, by the Senate of the United States, the amendment of the Senator from Tennessee proposes to take away entirely from the Senate any voice in his election. I think, therefore, that the amendment of the Senator from Tennessee is liable to the fatal objection that it deprives the very body which the Constitution itself provided shall decide that question of any choice in the matter.

Mr. EATON. Will my friend allow me to ask him a question ?

Mr. JOHNSTON. Certainly.

Mr. EATON. Does the logic of the Senator's argument carry it to the extent that under certain circumstances a President might be elected of one party and a Vice-President of another party ?

Mr. JOHNSTON. I think not, under the amendment I propose.

Mr. EATON. I speak of the logic of the argument, not of the words of the amendment.

Mr. JOHNSTON. I think that the suggestion made by the Senator from Ohio in regard to the amendment of the Senator from Tennessee has great weight. He suggested that in times of high party excitement, times which lead not only men but public bodies from what they might do in cooler moments, the House of Representatives might attempt to usurp the functions of the Senate by intentionally differing from the Senate. Take the case of the two houses being under the control of two different political parties. A question arises in which the Senate votes one way and the House another. Then in the face of a disagreement between those two bodies the House under the amendment of the Senator from Tennessee would have a right to determine the whole question. That might be an inducement to the House to differ from the Senate in order that they might thus be enabled to exercise this whole important function. It seems to me that we ought not to put any such power as that in the hands of anybody ; that we ought not by adopting such an amendment to enable the House of Representatives by differing designedly from the Senate to acquire the right and power to decide the question themselves to the exclusion of the other body. Therefore that amendment is objectionable on that account.

Nor do I think the amendment of the Senator from New Jersey is the proper solution of this question. I believe that the Constitution intended in the beginning that Congress should decide these questions. I do not think it was ever contemplated by the framers of that instrument, or that it is in accordance with its spirit, that anybody or any set of men but the Congress should decide these very important questions ; yet the amendment of the Senator from New Jersey calls in an entirely new body, one not recognized at all by the Constitution, a body to be created now by law, never thought of at the time the Constitution was framed, having its whole existence in this proposed law and originating on this particular occasion. Such a body is no part of the regular Government of the United States, but it is a new body to be brought into existence for the first time.

I respectfully suggest to the Senator from New Jersey that the Speaker of the House, as such, is not recognized in the Constitution in regard to the count of the votes for President and Vice-President, but is only a member of the House. He performs no function ; he does nothing more than any other member of the body and has no greater power. He is ignored in the Constitution. When they meet in joint assembly, the President of the Senate presides over the body. The Speaker does not preside. He is there as a member of the House, but not as Speaker of the House. He has nothing to do, therefore, beyond any other member of the House on that occasion, and the selection of him to discharge any important duty as Speaker is therefore outside of the original purpose of the Constitution, and if he has to have any especial powers, they have to be given to him now. The same is true in regard to the appointment of the Chief-Justice as a member of this new tribunal. That was never contemplated by the Constitution. It was intended in the beginning that any questions which might arise on this matter should be decided by Congress alone, and by nobody else. If we adopt the amendment of the Senator from New Jersey, we create a body of men who are to act when the circumstances arise, who have been contemplated by no previous law, by nothing in the Constitution of the United States itself, and who are to solve and settle a question which, according to my view, the Constitution intended Congress itself to settle.

It is agreed upon all hands that it is the duty of Congress to provide for a contingency in which there may be two returns from a State when the question arises as to which of those returns shall be counted. All agree that nobody in the beginning contemplated, and no one contemplates now, that the fair vote of a State should be excluded. The right of every State to vote lies at the very bottom of our constitutional

rights. If it is ever conceded that a contingency may arise in which the fair vote of a State shall be excluded, then we at once lay a foundation for the destruction of our Government. The Constitution intended that not only the votes of one State or two States should be counted, but that the votes of all the States should be counted; every State; not nineteen out of twenty, not thirty-six out of thirty-seven, but the whole thirty-seven. Each and every State has a right to have its vote counted in the election of President and Vice-President. Therefore, this being a fundamental right lying at the very foundation of our Government, it is imperative on us to find some mode to provide against a contingency which may defeat the vote of a State. What seems to have been the original purpose of the Constitution? It appears to me there can be no doubt on that subject. It does not seem that there was any idea, either in the framers of the Constitution or in the Constitution itself, that anybody could exercise that right except the Congress of the United States.

The Constitution provides that where there is no election by the people the House of Representatives shall elect the President, and where there is no election by the people the Senate shall elect the Vice-President. It provides that the two bodies shall meet in joint session. The joint convention shall separate only for certain specified purposes, namely, where questions arise to be decided touching any return. In that case the two bodies are to separate and each shall decide for itself. There may be a contingency in which the two bodies acting separately may differ. One may decide in favor of one set of returns and the other in favor of another. It does not seem to me that the powers of the Congress of the United States are insufficient to provide for a contingency of that sort. The fact being admitted that it is the duty of Congress to provide for the counting of every vote of a State, (and that fact cannot be disputed,) if the Constitution itself fails to provide for the mode of doing this, can there be any doubt of the power of Congress, under the general section read by the Senator from Ohio, to provide for this emergency? If the machinery is not provided by the Constitution itself, the power to provide that machinery is given to Congress. The Constitution says that the votes of the States *shall* be counted. If it omits to provide how it may be done in each and every emergency when an unexpected difficulty arises, under its general power Congress can give each State its vote, in order to preserve the spirit of our institutions. The Constitution in substance allows the two bodies together by law to provide a mode in which that difficulty shall be removed and that the vote of that State shall be counted. The question is, What mode is most in consonance with the spirit of the Constitution? What did the Constitution intend in the beginning? What did the framers of the Constitution intend? What mode is most likely to be the one which was originally intended, and which would carry out the spirit and intention of the Constitution most effectually?

As the Constitution has mentioned no other body but Congress, as there is no reference anywhere in the instrument to this duty being performed by any body but Congress, whenever we go outside of Congress to get any man, or any set of men, for the purpose of deciding this question, we go outside of the spirit of the instrument, and outside of its letter. The right course to pursue is to see what the spirit of the instrument is, what was intended in the beginning, what the purpose of it was, that whatever remedy we do adopt we may adopt the one nearest to the spirit of the instrument. The amendment proposed by myself answers that end. Here is a law providing how the certificates as to the election of the President and the Vice-President, two great officers, shall be determined. We have to count the returns for both, and we must provide by law for counting them both. Then in attempting to do that we must look to see what the Constitution intended. It is clear that the Constitution intended that, in a certain contingency, the election of President should be settled by the House and the election of Vice-President should be settled by this body. To propose that the House should have the complete right to settle both these questions is not in conformity with the spirit of the Constitution. I cannot see that there is any other solution of the question. If we adopt any other we go outside of the letter and outside of the spirit of the Constitution, and, therefore, it seems to me that the amendment proposed by myself is the only proper solution.

Mr. HOWE. Mr. President, I would not trouble the Senate with any remarks at this time if it were not for the fact that I hold some impressions upon this question which I have not heard yet expressed by any Senator who has preceded me in the debate. I speak of them as impressions rather than as a belief; but, whether they are one or the other, they are so strong upon me that I think it worth while for me to give them to the Senate.

I agree with all other Senators that this is one of the most important pieces of legislation that I have seen before this body since I have had the honor of a seat here; and I may be allowed to say that to me it is altogether the saddest piece of legislation. It is to me, as I doubt not it is to the Senate at large and the country as well, a melancholy reflection that we should at this early period of our history require additional legislation, special legislation, in order to execute properly the very simple trust which the Constitution confided to the States and to the Congress of the United States. When

the constitutional convention, after a great deal of discussion, after prolonged deliberation, finally invented the plan of having the States make known their choice for President through an electoral college, and had declared to that end that they might appoint a prescribed number of electors in any way the legislature of the State thought best, I do not think it was contemplated by any one member of that convention that it would ever be a doubtful question, in fact, among honest men who had been appointed by the legislature of any given State. When the convention said that at a given time the two houses of Congress should be convened together, and that there the votes which had been returned from the different States should be spread open, and, in the presence of all the members of Congress, those votes should be counted, I do not think it ever entered into the mind of one member of that convention to suppose that a difficulty should ever arise in that joint convention as to which missive purporting to come from a State should be respected as the message of that State. But already we know historically that that convention was overconfident either as to the sagacity or the integrity of the men who were to come afterward. Questions of great difficulty have already arisen; and this bill, as well as all the amendments proposed to it, is full of prophecy that like difficulties may occur hereafter. If such difficulties are to come, we ought to deliberate very carefully and very conscientiously how we can best avoid them, or how we can best meet them and deal with them if they must arise.

I have given undoubtedly much less attention to this subject than I ought to have done. I will say right here, however, that, upon such consideration as I have bestowed upon the subject, if I am called upon to choose between the different expedients already laid upon our desks, I should prefer myself the provisions of the bill reported from the Committee on Privileges and Elections to any of the amendments which have been offered. Before telling why, I want to make another preliminary remark; and that is, that I am one of those who supposed that all the power of every kind which the constitutional convention intended should ever be exercised by the Government of the United States that convention vested in one or the other of the three departments which it created under this Constitution; and I cannot help feeling to-day that there is no power which the Government can exercise which is not in its nature legislative, executive, or judicial. If it be executive, it belongs to the executive department of the Government in express terms by the Constitution. If it be legislative, it belongs to the Congress of the United States, to the legislative department of the Government, in express terms by the Constitution. If, on the contrary, it be judicial in its nature, it belongs to the judicial department of the Government, as fixed by the Constitution; it does not wait for an act of Congress to vest it there; it does not need a tribunal or that you pass an act of Congress for it.

Is this power executive in its nature? What is the power that you propose to exert? Briefly this: There is the State of Rhode Island, which is entitled to four votes upon the election of your next President and Vice-President. I suppose the legislature of that State has provided that those electors shall be chosen by the people, or does the legislature appoint them itself?

Mr. ANTHONY. They are chosen by the people.

Mr. HOWE. Suppose it shall so happen that next autumn there comes to the President of the Senate a letter from Rhode Island signed by four men who claim to be the electors of the State, and who say that they voted for Brown for President and Wilkins for Vice-President, and that there shall come another letter from the same State, signed by four gentlemen claiming also to be electors of that same State, saying that they voted for two other and different people. Or, to suggest another case which presents precisely the same difficulty, suppose there come two letters from the State of Rhode Island signed precisely the same, but one letter says that the State of Rhode Island voted for Brown and Wilkins, and the other letter says that it voted for two different men. There the question is presented. In the first case, you know that everybody voted; that one set of those fellows who claim to be elected is absolutely the right set. In the other case, everybody knows that one of those letters is a forgery. One is true, the other is false. You want to ascertain how to determine in the one case which of the letters is the true letter and which is the forged; or, in the other case, which set of four men was legally authorized by the State of Rhode Island to declare its wishes in the presidential election. Now, what is the nature of that question? What is the nature of the power which determines that question? If executive, clearly the President should determine it; but then no one will say that it is executive, or at least no one has yet said that. Well, is it legislative? This bill, and each one of the amendments, and all the discussion to which I have listened seem to go upon the supposition that it is legislative power. If it be, I wish Senators would consider for a moment whether they can abdicate, transfer, transmit the exercise of that power to any other body in the world. The Constitution says that legislative power is vested in a Senate made so and so, and in a House of Representatives made exactly so, and in no other way. Those two bodies, under the correction of the President, are to wield all legislative power, and for the very gravest reasons in the world the Constitution vested this legislative power in these very peculiarly constituted bodies. Now, can you delegate

the exercise of any part of legislative power to any other tribunal? I simply state the question. I do not argue it.

Mr. EDMUNDS. And do not answer it.

Mr. HOWE. No; I do not answer it. I will give my own opinion. My own opinion is that it cannot be delegated; and therefore if I were driven to the conclusion that the decision of this grave question, this momentous question, this question upon which, under conditions entirely conceivable, may hang the issues of civil war—if I were driven to the conclusion that that is a legislative question, I should say that, when the question arises which one of these letters from Rhode Island shall be respected as the voice of Rhode Island, it must be settled either by the joint convention or by the several houses acting separately; nor can it be left to arbitration, no matter who may be the arbitrators. There is but one way under the Constitution in which it can be settled, and that is by bill, going through all the forms of enactment, becoming a law by the approval of the President of the United States, or receiving the vote of two-thirds of each house over his veto. That is my own conclusion. I do not propose to argue it, and I do not propose to occupy the attention of the Senate any longer than to make one other suggestion—probably it already occurs to so many Senators as have done me the honor of listening to me—and that is that in my own mind the power which can definitely settle that question, conclusively settle that question which letter reflects the voice of Rhode Island, is not the exercise of executive power, is not the exercise of legislative power, but is the exercise of judicial power.

Who are interested in that question? If those four votes would change the political complexion of the executive department of the Government for four years, it is a question which interests certainly all the political parties into which the people of the United States may be divided; and in that sense it interests all the people of the United States. Nay, the political complexion of these parties may assume a hue, a color which would make the great issues of peace and war with foreign powers actually to depend upon the question which of those letters actually represents the will of Rhode Island. But then there are two or more persons who have a peculiar and a pecuniary interest in that question. Who are they? The men who are rival candidates for the Presidency. Count one of those letters true, and one man becomes President of the United States; count the other, and another becomes the President of the United States. Now, is the presidency under our system of government an office or is it not? If it be an office, why is not the selection of men to fill it as jealously guarded and as jealously controlled as the selection of men to fill any other office? If the dispute be about the choice of a municipal officer, the sheriff of a county, or anything of that sort, and a question arises before the board of county canvassers, or whatever they may be called, as to which of two letters from a certain town contains the true vote of that town, that question, everybody knows, I suppose, at this day, is under the government of all our States plainly a judicial question. The courts have so held over and over again; and in one instance to my knowledge it has been held that a dispute between two contending candidates for the office of governor of a State was a question to be settled by the judicial tribunals of the State. The sitting governor, the occupying governor, has been ousted from office, and another man has been invested with the office under the judgment of a court of law. In what respect, except in point of mere dignity, does the office of President differ from the office of governor?

If, then, this be a judicial question, it belongs of course to the courts of the United States. The Senator from Ohio says that the Supreme Court cannot take original jurisdiction of the question. He is undoubtedly right about that, for the very good reason that it is not one of the questions nominated in the Constitution over which the Supreme Court has original jurisdiction; but, if it is a judicial question in its nature, and a question which arises under the Constitution of the United States, it belongs to some court of the United States, that which has original jurisdiction. Does it arise under the Constitution of the United States? What does the Constitution say? Not contemplating that there may be any dispute, that there may be any two pretenders to the office of elector of a State, it says these two things: First, that when the two houses get together the votes given by the States shall be counted; and you do not obey the command of the Constitution by anything short of that; no matter what the dispute may be, no matter what the difficulty may be of determining what are the votes of the State, the command of the Constitution is explicit that the votes shall be counted. What more? It says this other thing, that the man who has the majority of the votes shall be President; not the man whom the president of the convention shall assert has the majority; not the man whom the joint convention shall say has the majority; not the man whom the two houses shall say; not the man to whom it may be awarded by any arbitration that may be possibly manufactured, but the man who has the majority. He is the man upon whom the Constitution, which we are all sworn to support, devolves the office of President. Therefore I think, myself, that by the express letter of the Constitution this question is a judicial question, and all the legislation you want is such as may simplify and expedite the trial and the determination of it.

I know very well that it does not matter at all who decides this question which may arise in the States touching the vote of a State, if after all the vote which the State really gave is counted in the convention and goes into the summing up of the general result, no matter who gets it, whether the president of the convention, the Speaker of the House, the Clerk, or any member; but, if there is a dispute as to which is the true vote, then it has to be decided by somebody. I admit, if you leave it to the president of the convention, he may decide it wrong; if you leave it to the two houses, they may; if you leave it to any of the tribunals suggested by the different amendments, they may decide it wrong; and I admit, if you leave it to the judicial tribunals, they may decide it wrong; and so, after all, the command of the Constitution may not be obeyed, and the true vote of a State may be rejected and a false vote substituted.

But the two reasons why I conclude that this power belongs to the courts, and to nobody else, are: First, I think it is judicial power in its nature, and so has gone by the express delegation of the Constitution to the courts; and, secondly, if I were myself, instead of being a Senator, a full-fledged constitutional convention, and were making a constitution upon this point, I would delegate this power to the courts; not because they cannot blunder or be dishonest even as well as other tribunals, but because they have less excuse for blundering and are under greater obligations to be honest than most other tribunals, the forms of procedure in the courts are so deliberate, both parties are so carefully heard, testimony is so fully adduced, and the opportunity is given for so careful a weighing of it; and they act before the whole world, their judgments are submitted to the criticisms not merely of the present generation but of all time. So, as I was about to say, if I were making a constitution, I should take pains in most explicit terms to give this authority to the courts.

Mr. MORTON. Mr. President, there are three propositions here as amendments to the second section of this bill. That section provides for a case where there are two returns of electoral votes from the same State, and further provides that only that return which both houses agree is the true and valid return shall be counted.

The first amendment, that offered by the Senator from Tennessee, [Mr. Cooper,] is that in case the two houses do not agree upon the same return the question shall then be referred to the House of Representatives, and they shall vote by States, and that return which has a majority of the States represented in the House shall be counted. The Senator from Virginia [Mr. Johnson] proposes to amend that by providing for a joint convention of the two houses, the Senators and Representatives to meet together and compose one body, but that in that capacity, each Senator and each Representative having one vote, the vote shall again be taken by States. For example the State of Delaware would have three votes in this joint convention, having two Senators and one Representative. The two Senators would cast the vote of the State, or one Senator and one Representative could cast the vote of the State. In other words, it is proposed to give the Senators a vote in the determination of the voice of the State, just as a member of the other house would have in the election of President.

The third proposition is submitted by the Senator from New Jersey [Mr. Frelinghuysen] to provide that, in case of disagreement of the two houses in determining which is the valid return, then the question shall be referred to the decision of the President of the Senate and Speaker of the House, acting together with the Chief-Justice of the Supreme Court; that they shall constitute a tribunal. Of these three propositions, that of the Senator from New Jersey is, in my opinion, much the best. It is much more fair, equitable, and republican than either of the others, in my judgment.

But, sir, I now present the question as to whether you can constitute an umpire between these two houses. In the first place, to go back to the main proposition, the Constitution declares that—

“The President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates, and the votes shall then be counted.”

Two constructions are contended for here. One is that the President of the Senate himself shall open and count the votes and shall determine all questions arising upon the certificates, or, in case there are two certificates, shall decide which is the true and valid return. That is one construction claimed. There is another that the duty of the President of the Senate is simply to open the certificates in the presence of the two houses; that the two houses are assembled not as a joint convention, but each in its separate capacity; that they are there not only as witnesses, but they are there as judges; and if a question arises in regard to the vote of a State or a part of it, it is to be settled by the two houses who are present there as the judges of the election.

We could, without doing any great violence to the Constitution, adopt either of these constructions. Each is possible under the language. The Constitution says:

“The President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates, and the votes shall then be counted.”

It does not say who shall count them; it leaves it open to inference that they shall be counted by the two houses on the one hand, or by the President of the Senate on the other. I will assume, for the sake of the argument, that you can give to it either construction. I will assume that it is open to both views. Then the question comes,

which is the more reasonable, which is the better, which is the safer of the two: to adopt that construction which gives this great power to one man, the President of the Senate, who may be counting the votes for himself, as it has turned out six times in our history; or would it be safer to leave it to the determination of the two houses of Congress, representing the States and the people? If we are open to adopt either one of these constructions, I say the latter is the safer, it is the more reasonable, it is in conformity with the spirit of our Government and of popular institutions. I then adopt the latter construction.

If the votes are to be counted by the two houses, a disagreement arising, how shall that be settled? In the first place the first section of this bill provides for the case where there is but one certificate, where there is but one set of electoral votes; there is no question that that certificate does come from the State; but it may be defective. For example, it may not state that the electors voted by ballot, as the Constitution requires; it may not show that separate lists were made, as the Constitution requires; it may not show that the vote was cast on the day the law requires; or it may not be properly authenticated by the governor, according to form. There may be doubts upon these questions; but still, the return itself being admitted to be the only one from the State, that section of the bill provides that the return shall be counted unless both houses concur in saying that some one of these objections is so clear as to require its rejection. That part of it is safe enough. There is only one return; the authenticity of it is admitted, but there is some defect about it. That defect shall not reject the return unless it is so plain that both houses concur in rejecting it. That is safe for the country.

We then come to the case where there are two sets of electoral votes—two certificates, and each on its face is *prima facie* the vote of the State. How then shall it be determined? I assume that the Senate is acting patriotically and honestly; I assume that the House would act in the same way. They may be composed of different parties, but we must leave something to the integrity of men, no difference by what political name they may be called. There are two sets. The Senate resolves in favor of one set, the House resolves in favor of the other set. There is a disagreement. The Senator from Ohio said that it was the intention that the State should have a vote, and so I say. The intention is that the State shall have a vote, but if the thing is in that condition that Congress cannot determine which is the correct vote, it will be the misfortune of the State if the vote is lost. That is all you can say about it. It is like any other case where the tribunal cannot agree. Appropriation bills are absolutely necessary to carry on this Government; and yet if the two houses cannot agree about them the bills are lost. It is the misfortune of the Government, it may be the destruction of the Government, but you cannot create an empire in that case to pass an appropriation bill and determine whether the appropriation shall be made.

MR. SARGENT. It is because the Constitution prohibits it in that case. Does the Constitution prohibit it in the other?

MR. MORRIS. I do not know that the Constitution prohibits it in that case any more than it prohibits it in the other. It provides that all the powers of this Government shall be in the three departments, the executive, the legislative, and the judicial; and when the judicial cannot agree and fails to act, that is the end of it; and so with the legislative. I know of no provision in the Constitution authorizing you to create an empire between the two houses in regard to this question any more than in regard to a legislative question. Take a case where there are eight judges on the bench of the Supreme Court, an even number, and they stand four and four. They have failed to act. The judgment of the court below may be affirmed, because the judgment of the court above is equally divided, or where affirmative action is positively required, as in the case of a mandate, the judges being equally divided, it falls. You cannot provide for an empire in that case to come in and settle the question in case of a division of the Supreme Court.

Now, I want to consider very briefly the amendment offered by the Senator from Tennessee providing that in case the two houses of Congress shall disagree, then the House of Representatives, voting by States, shall settle the question. I would say to my friend that I am opposed to that upon every ground; first, because it is inequitable, it is unjust, and I can see no logical propriety in taking a vote by States in determining a question of that kind as to which may be the true return from a State. There it may be a question arising upon the certificate, or possibly, though I cannot see how, a question of fact outside. The idea of deciding a question of that kind by the vote of States seems to me to be illogical in every respect. It recognizes a principle to which I am unalterably opposed. We have got one vote by States in the Constitution. That is enough. I undertake to say it is to-day the most dangerous provision in that instrument, and it ought to be out of it. It has been exercised but twice, and each time it brought the Government into great danger. The idea now of giving to the House of Representatives the power of voting by States to disfranchise a State, or to admit this return or that return, the effect of which might be to give to the House itself the election of a President, or to give the election to

that candidate who had a majority of States in his favor voting by States in the House, but to whom a large majority of that House personally might be opposed, is too dangerous to be tolerated. I have already shown by a calculation which has been made that you may take the present House of Representatives, and out of two hundred and ninety-two members forty-five members can elect a President against the wishes of nearly two hundred and fifty; and that nineteen States, having less than a population of eight millions, can elect a President over the other States, having a population of thirty-two millions.

Sir, if I had the time I could go into the history of the election of President in the House of Representatives in 1801 to show that it presents the most powerful temptation to corruption of any process connected with our whole Government; and if it were not for shocking the sensibilities of men, if it were not that I might detract something from that reverence which time has cast upon certain characters, I might refer to the history of that election to show that perhaps it was the most corrupt election in the history of our Government. I referred this morning to an old document that I remembered to have seen some time ago, and I read from a speech made by Mr. Bayard, of Delaware, in February, 1802, in regard to the election by the House of Representatives in 1801, a speech made in Congress by one who participated in that election. I will ask the Clerk to read from where I have marked on page 417 to page 420 of the volume (Debates on the Judiciary) which I send to the desk.

The Chief Clerk read as follows:

"The case, sir, to which I refer carries me once more to the scene of the presidential election. I should not have introduced it into this debate had it not been called up by the honorable member from Virginia. In that scene I had my part; it was a part not barren of incident, and which has left an impression which cannot easily depart from my recollection. I know who were rendered important characters, either from the possession of personal means or from the accident of political situation. And now, sir, let me ask the honorable member what his reflections and belief will be when he observes that every man on whose vote the event of the election hung has since been distinguished by presidential favor. I fear, sir, I shall violate the decorum of parliamentary proceeding in the mentioning of names; but I hope the example which has been set me will be admitted as an excuse. Mr. Charles Pinckney, of South Carolina, was not a member of the House, but he was one of the most active, efficient, and successful promoters of the election of the present Chief Magistrate. It was well ascertained that the votes of South Carolina were to turn the equal balance of the scales. The zeal and industry of Mr. Pinckney had no bounds. The doubtful politics of South Carolina were decided, and her votes cast into the scale of Mr. Jefferson. Mr. Pinckney has since been appointed minister plenipotentiary to the court of Madrid—an appointment as high and honorable as any within the gift of the Executive. I will not deny that this preferment is the reward of talents and services, although, sir, I have never yet heard of the talents or services of Mr. Charles Pinckney. In the House of Representatives I know what was the value of the vote of Mr. Claiborne, of Tennessee. The vote of a State was in his hands. Mr. Claiborne has since been raised to the high dignity of governor of the Mississippi Territory. I know how great, and how greatly felt, was the importance of the vote of Mr. Linn, of New Jersey. The delegation of the State consists of five members. Two of the delegation were decidedly for Mr. Jefferson; two were decidedly for Mr. Burr. Mr. Linn was considered as inclining to one side, but still doubtful. Both parties looked up to him for the vote of New Jersey. He gave it to Mr. Jefferson, and Mr. Linn has since had the profitable office of supervisor of his district conferred upon him. Mr. Lyon, of Vermont, was, in this instance, an important man. He neutralized the vote of Vermont. His absence alone would have given the vote of a State to Mr. Burr. It was too much to give an office to Mr. Lyon; his character was low. But Mr. Lyon's son has been handsomely provided for in one of the executive offices. I shall add to the catalogue but the name of one more gentleman, Mr. Edward Livingston, of New York. I knew well, full well I knew, the consequence of this gentleman. His means were not limited to his own vote; nay, I always considered more than the vote of New York within his power. Mr. Livingston has been made the attorney for the district of New York; the road of preferment has been opened to him, and his brother has been raised to the distinguished place of minister plenipotentiary to the French republic.

"This catalogue might be swelled to a much greater magnitude; but I fear, Mr. Chairman, were I to proceed further, it might be supposed that I myself harbored the uncharitable suspicions of the integrity of the Chief Magistrate, and of the purity of the gentlemen whom he thought proper to promote, which it is my design alone to banish from the mind of the honorable member from Virginia. It would be doing me great injustice to suppose that I have the smallest desire or have had the remotest intention to tarnish the fame of the present Chief Magistrate, or of any of the honorable gentlemen who have been the objects of his favor, by the statement which I have made; my motive is of an opposite nature. The late President appointed gentlemen to office to whom he owed no personal obligations, but who only supported what has

been considered as a favorite measure. This has been assumed as a sufficient ground not only of suspicion, but of condemnation. The present Executive, leaving scarcely an exception, has appointed to office, or has by accident indirectly gratified, every man who had any distinguished means, in the competition for the presidential office, of deciding the election in his favor."

Mr. MORRIS. That extract from a speech of Mr. Bayard, showing very clearly that the election of President by the House of Representatives or the decision of any question referred to that House where the vote was to be taken by States would be within the reach of the patronage of the President, proves the danger of that form of election. Aside from all questions of unfairness, aside from giving to the smallest State in this Union with a population of not one hundred thousand the same voice in the selection of a Chief Magistrate, or in determining some question upon which that election turns, that the great State of New York has with nearly five million people, such a plan of election is a strain upon popular government in this country to which our institutions ought never to be subjected again, if possible. There are other features connected with that election that I might refer to, going to show the same thing; but coming down to the election of John Quincy Adams, Mr. Clay, one of the most distinguished members who has ever had a seat in this body, long the great leader of his party, as a member of the House of Representatives voted for Mr. Adams when the election went to the House; and afterward, being appointed Secretary of State, he had a stigma affixed upon him from which he never escaped through a long and honorable life.

The proposition of my friend from Virginia, as well as that of my friend from Tennessee, recognizes this principle of the independence and the sovereignty of the States, thus subdividing the nation, and giving to each one a voice in the settlement and determination of this question—a principle which in its amplification and in its consequences was the foundation of the doctrine of secession, and has brought upon this country the greatest evils under which it has suffered. I can never consent, so far as I am concerned, to vote for any bill that further extends the operation of that doctrine.

If we have power at all, which I do not think we have, to create an umpire to decide where the two Houses disagree, I then submit to my friend from New Jersey as well as to all the Senate, that the safest and best proposition is to introduce the Supreme Court in that case. If upon the question of a vote of a State that may turn a presidential election the House and the Senate cannot agree, the country would not be so well satisfied with a decision made by the President of the Senate and the Speaker of the House and the Chief-Justice, a special tribunal, as it would with a decision made by the Supreme Court of the United States. If we can call in an outside tribunal, one already existing, or if we can create one, would not the Supreme Court of the United States be more satisfactory to this nation than any other one whose services we could invoke? And if, as the Senator from Ohio argued, you cannot confer the power upon the Supreme Court, because there can be no appellate jurisdiction conferred upon that court that does not come from an inferior court, as there could not be an appeal taken from the Court of Claims until you first gave the Court of Claims the power of finding a judgment—if he is technically right about that, if we cannot call in the Supreme Court as a supreme court to decide that question, still we can do this, and I invite the attention of Senators to this: If we can make a special tribunal out of the Speaker of the House, the President of the Senate, and the Chief-Justice, we can make a special tribunal to consist of the judges of the Supreme Court. I have therefore drawn up the form of a proposition, if it be the pleasure of the Senate to establish an umpire, which I will read—it is not in order now, but I will read it for information—and I avoid the technical difficulty suggested by the Senator from Ohio that you cannot confer this power on the Supreme Court as a supreme court, but keeping in mind the other suggestion, that we can create a special tribunal, then I say we can make that special tribunal to consist as well of the judges of the Supreme Court as of the Speaker of the House, the President of the Senate, and the Chief-Justice.

Mr. STEVENSON. Will the Senator from Indiana allow me to suggest to him—and I make the suggestion to the Senator from New Jersey as well—might not this question come before the Supreme Court of the United States as a judicial question, as much, for instance, as in the case of *Marbury vs. Madison*? I can very well understand how a judicial question involving this election might come before the Supreme Court in its judicial character; and it seems to me an objection, therefore, to make them decide, or at least the Chief-Justice to decide, it not as a judicial question, when he may be afterward called upon to decide it judicially.

Mr. MORRIS. I think this question cannot come before the Supreme Court judicially; certainly not under the present law that we have; but I will now read the plan of the amendment that I would suggest in case the Senate determines that we have the power to establish an umpire:

"That the judges of the Supreme Court of the United States shall be assembled in the chamber of the Supreme Court at the same time that the two houses of Congress are counting the electoral votes for President and Vice-President; and in case the two

houses shall fail to agree as to which is the true and valid return as provided for in this section, the returns shall be immediately submitted to the said judges, who shall summarily decide which is the true and valid return, which return shall be counted."

It seems to me that, if we have got to refer this question to anybody, it would be more satisfactory to refer it to the Supreme Court of the United States; and if you cannot do it in the character of Supreme Court, then let your special tribunal be composed of judges of that court, and let them decide it, and decide it forthwith.

My opinion is that there is a defect in the Constitution. I think this whole electoral college business ought to be destroyed. The purpose of it has failed utterly. It is entirely useless; it is dangerous; but until that amendment is made, my opinion is you cannot do better than to take this bill substantially as it has been reported to this body.

Mr. EDMUNDS. Mr. President, I think it quite obvious that we cannot conclude this discussion to-night. It has been valuable to us all, and the question is of so great importance that reflection upon what has been said I have no doubt will be advantageous to each Senator. I move therefore that the Senate now proceed to the consideration of executive business.

Mr. RANDOLPH. Before that motion is put I should like to bring the attention of the Senate to the fact that the day before yesterday I submitted an amendment which seems to have escaped the attention of most of the Senate, the reason being that it was then out of order and that it was not printed with the other amendments. I should like to have the amendment that I proposed laid before the Senate, in order that it, with the others, may be discussed.

Mr. MORTON. It has been printed.

Mr. EDMUNDS. It will come up in due time.

Mr. RANDOLPH. But it was printed on a separate slip, and during the whole discussion it has not entered into consideration as one of the amendments that might possibly be adopted.

Mr. MORTON. I overlooked it. I should like to hear it read.

The PRESIDENT *pro tempore*. The Secretary will report the printed amendment of the Senator from New Jersey, [Mr. Randolph.]

The CHIEF CLERK. The proposed amendment is to insert as an additional section the following:

"SEC. —. Should the two houses of Congress, acting separately, fail to agree as to which is the true and valid return of a State, then, and in that event only, the President of the Senate shall render a decision of the question, and such rendition shall be in favor of that return of a State which shall have received a majority of all the votes cast in both houses of Congress, considered as if both houses had cast their votes in joint meeting assembled."

Mr. MORTON. I will ask to have the amendment which I suggested printed also.

The PRESIDENT *pro tempore*. The suggested amendment will be read.

The Chief Clerk read as follows:

"That the judges of the Supreme Court of the United States shall be assembled in the chamber of the Supreme Court at the same time that the two houses of Congress are counting the electoral votes for President and Vice-President, and in case the two houses shall fail to agree as to which is the true and valid return as provided for in this section, the returns shall be immediately submitted to the said judges, who shall summarily decide which is the true and valid return, which return shall be counted."

The PRESIDENT *pro tempore*. This amendment will also be printed.

March 20, 1876.

The Senate, as in Committee of the Whole, resumed the consideration of the bill (S. No. 1) to provide for and regulate the counting of votes for President and Vice-President and the decision of questions arising thereon.

Mr. RANDOLPH. Mr. President, under the rules of the Senate the amendment I propose to the pending bill will not be strictly in order until a vote has been taken upon the question before us. What that vote shall be may depend upon the existence of some better plan than any now under consideration, and I therefore beg to speak to the subject for a few moments.

The committee's bill has in view the passage of a law under which the electoral vote of States shall be counted.

Debate has elicited these facts: That as to this important subject there is a vital omission in the organic law; that for many years there has been in force as a remedy for the defect a joint rule of Congress.

That rule, now abrogated, is admitted on all sides to have been iniquitous in conception, dangerous in existence, and constitutionally without warrant. With its paternity denied by all and its abrogation delayed by none, it seems to have been a political bastard, whose usefulness was contingent upon a partisan emergency and whose life closed with the first dawn of purer public sentiment.

The debate also discloses this remaining fact: That, agreed as we are as to the necessity of some new and equitable law which shall cover all contingencies likely to arise in the selection of a President and Vice-President, we are at great variance as to a remedial mode, comprehensive in its character and within our power to adopt.

The Committee on Privileges and Elections present their remedy in the pending bill; to it several amendments are offered, among them one of my own. Before presenting reasons in favor of this amendment I desire to state my objections to the committee's proposition, as well as to some of the amendments thereto.

The original bill fails in its purpose, confessedly so, in contingencies likely to arise, that have arisen heretofore. It is imperfect because it leaves the count of the electoral vote of a State entirely dependent upon the concurrent vote of both houses of Congress. Should a State be so unfortunate as to have two sets of electors returned, and fail to convince both houses of Congress as to which the true ones are, then its electoral vote is thrown out, its people wholly disfranchised.

A large majority of the House of Representatives, for instance, might declare in favor of one set of returns; in the Senate all but one vote necessary to a majority might concur therein; yet this lacking vote, representing at best but half a State, and in fact but an individual opinion, would suffice to reject the electoral vote of a State.

Clearly it was not within the purpose of the fathers to give any such extraordinary power to an individual over the people of a State, and that in deciding a question not judicial but political in its character.

There has been a general expression that the functions of members of both houses of Congress are largely, if not altogether, ministerial as to the count of the electoral vote. The Constitution could scarcely have contemplated the almost instant transmutation of a mere ministerial agent to that of a supreme judicial officer from whose fiat no appeal could be taken.

The original bill fails in comprehensiveness. Its fault is that of omission.

The second section reads thus:

"SEC. 2. That if more than one return shall be received by the President of the Senate from a State, purporting to be the certificates of electoral votes given at the last preceding election for President and Vice-President in such State, all such returns shall be opened by him in the presence of the two houses when assembled to count the votes; and that return from such State shall be counted which the two houses, acting separately, shall decide to be the true and valid return."

Simply stated, the bill provides for the count of each undisputed electoral vote. In case of dispute as to the true returns of any State two hours only are allowed for reconciling the conflicting views of the Senate and House. Even this brief time is consumed in separate session; and, failing to agree, the electoral vote of the State is wholly cast out.

The disfranchisement of a people may thus hinge upon two quite possible contingencies: first, the easily procured and presented bogus returns so called from a State; next, the virtue of one or the other of the great political parties, tested under the greatest temptation.

Practically the committee's bill gives to Congress a veto power upon the acts of States.

The danger of adopting the second section of the pending bill can be briefly illustrated by taking the case of Louisiana.

Should that State return two sets of electors and the vote of one or the other set be sufficient to determine the political ascendancy of one or the other of the parties, in the administration of Federal affairs, is it probable the Senate and House would agree as to which were the true returns? No. Then the vote of Louisiana would be rejected.

This might leave the remaining three hundred and sixty-two votes standing as follows:

For the democratic electors.....	181
For the republican electors.....	180
Total	361

This would insure a democratic President and Vice-President. Yet to the people of the country it might be made palpable that the rejection of Louisiana by a democratic House was a partisan action, and to defeat, as it only could defeat, the election of a republican President, as the count of Louisiana's vote would do. I choose this illustration, that is hypothetically against my own party, to strengthen its force with my republican friends.

Aside from this narrow and partisan result there is an objection broader and deeper. It consists in the crime of deliberately disfranchising the people of a State—in the enormity of excluding one of our own—not because her rights are not equal, but because we have not patriotism, patience, and virtue enough to defend them. Yet this defense is one of and perhaps the greatest of our mutual obligations as States to each other. It is the keystone guarantee of the Federal compact. No, Mr. President, Con-

gress has no right—never had, and never will have, if justice is to prevail—to disfranchise the people of any State. The admission of such power is fraught with danger to liberty herself. Peculiarly as to this matter the States stand as peers, nor can we, their servants in Congress, infringe the rights of the weakest of them.

Sir, it has been intimated at least that the rejection of contested electoral votes would be no fault of the Congress nor of the people of the uncontested States. This is not true. There is just as much power in Congress under the Constitution to assure the full vote of every State as to assure that of one. If we can provide by law for doing anything, (beyond the plain, though admitted imperfect, provisions of the Constitution,) we can provide for all contingencies foreseen as possible. Our duty, sir, is to leave no chance for injustice, no invitation to fraud.

The amendment of the Senator from Tennessee [Mr. Cooper] proceeds upon the theory of the constitutional provision regulating the selection of a President and Vice-President when no choice has been made by the electors. The theory seems to me to fail when applied to an equitable adjustment of the difficulty now under consideration.

The electors referred to in the Constitution were to be persons chosen by the State legislatures—not by the people. They were to be an intermediate body between the States—not the people—and the executive officers selected. Their selection of proper officials was not expected to be controlled by party conventions, as has turned out to be the fact. It was anticipated they might differ in judgment to such degree as to leave no one person with a majority vote.

So plain is this anticipation that the Constitution provides that only the three of all the persons voted for by State electors should be subsequently considered.

The electoral vote is a secret one. The power, once exercised, is ended. Thus the necessity for another tribunal, another electoral college substantially, in a contingency possible. That final tribunal, as we all know, is the House of Representatives; but only in the emergency named.

The whole of this residuary power of the House of Representatives proceeds upon the theory of a want of sufficient agreement between the agents or electors of all the States; not between people of the same State. The principle that lodged the first-named power in the House of Representatives was that of protection to the smaller States. No such principle applies in the adjustment of differences arising within a State.

The constitutional provision referred to is a remedy for what might otherwise be a fatal defect. It points to the legislative power, or a portion of it, as the proper power to decide who the Executive shall be in grave emergencies. In this view it is just now very suggestive. But it seems to me no more.

The amendment proposed by the Senator from Tennessee, to my mind, renders possible the selection of an Executive against whom the popular vote has been largely cast. It is no fair reply that this possibility already exists in another emergency. There should be no additional crevice through which the will of the majority of the people can be defeated.

The amendment proposed by the Senator from Virginia [Mr. Johnston] proceeds upon the power of the two houses to come together in joint meeting, and when together to act as a unit in legislation. This power, in Congress, is not generally admitted. Its exercise, if constitutional, is hazardous, and the line that most old-fashioned democrats deem as indispensable to true constitutional government is badly weakened by his plan, if not, for a period, absolutely lost sight of. I think the Senator will, upon reflection, agree with me that the actual amalgamation of the votes of the two houses by meeting in joint convention is open to objection.

The amendment proposed by my colleague in substance provides for a court composed of the Chief-Justice, the President of the Senate, and the Speaker of the House of Representatives. Though he does not say so in words, his amendment would seem to imply a lack of power in Congress to do that which it gives authority to its agent to do; or, if I am wrong in this construction, then it doubts the fitness of Congress to decide a question "partly judicial, partly political." Yet, Mr. President, it is just such questions this body, at least, is often called upon to decide.

But there is another objection to the amendment of my colleague that I deem fatal. This relates to the persons constituting the final tribunal named by him. The Chief-Justice or senior justice holds his appointment from the President; not infrequently, as re-elections of Presidents occur, from the person to whom he owes his original elevation and upon whose continuance in the presidential office, as a matter of fact he is called upon to decide. However just and honest his vote, this high judicial officer would stand in imminent danger of being questioned as to motive, and thus of losing his indispensable judicial influence. No part of the Supreme Court can be brought to the decision of a question that plain people would ever consider purely political without lowering public respect for the great and final tribunal.

Mr. President, I have proposed to add a new section to the bill now being considered which I will thank the Clerk, if he has the amendment, to read.

The PRESIDING OFFICER. The amendment submitted by the Senator from New Jersey will be read.

The Chief Clerk read as follows :

"SEC. — Should the two houses of Congress, acting separately, fail to agree as to which is the true and valid return of a State, then, and in that event only, the President of the Senate shall render a decision of the question, and such rendition shall be in favor of that return of a State which shall have received a majority of all the votes cast in both houses of Congress, considered as if both houses had cast their votes in joint meeting assembled."

Mr. RANDOLPH. Now, Mr. President, I hope it will be plainly seen that the adoption of this or a kindred section leaves no pretext for omitting the count of every electoral vote of all the States.

The houses of Congress, acting separately, failing to agree as to which the true returns of a State are, join in effect the aggregate vote of both, and those returns which shall have received a majority of all the votes of the members of both houses are declared the true returns. The duty of making this declaration is put upon the President of the Senate. The decision is final; the case is ended. This plan has some affinity with parts of both of those suggested in the amendments made by the Senator from Tennessee and the Senator from Virginia. Through the votes of Senators the States, as such, are directly had. By the votes of members the people speak through their more immediate Representatives. There is no exclusion of either voice. The larger States make their power felt through their greater number of Representatives; the smaller States assert their equal voice in the votes of their Senators.

It may be said that the voice of States is liable to be lost under my amendment. This may sometimes occur. Yet at all times the plan suggested by me is an important gain of power to the smaller States, as against relegating the decision of the question to the House of Representatives alone. Another view of the matter will disclose this fact. Under my plan the practical decision of the question may often rest with the States through the votes of Senators. Should the House of Representatives be about evenly divided, as is frequently the case, then the Senate, usually very unevenly divided politically, would have the controlling vote. In a word, the opportunities would be quite evenly divided as to whether the decision would be reached by the controlling vote of the Senate or the House.

So, Mr. President, the amendment proposed seems to be as reasonably free from objection as any we are likely to adopt. Undoubtedly the wiser and safer plan would be to amend the Federal Constitution in such manner as to render the disfranchisement of the people of any State impossible. Meantime our duty is to provide the best system we can. That which I have proposed may be more objectionable under the light of full discussion than it now appears.

It seeks no party advantage. It is in practice familiar to the people of all the States through the results of State legislative joint meetings. It has no small sanction from Congress itself since the passage of the law regulating the election of United States Senators. That law, it will be recollected, had for its object, almost its sole object at the time of its passage, the compulsory decision of a grave question, the selection of members of this body. The mode concluded upon as just and equitable was that of compulsory joint meeting when separate branches of a State legislature would not or could not agree. I propose to apply to ourselves the same remedy for honest differences or factious opposition that we have assured the State governments was good for them.

Mr. President, I ought to say in justice to myself that I have not been able to give that full consideration to my own amendment which I had hoped to be able to do, and it is only within the last three or four hours that I have been able to touch it at all. I submit the suggestions I have made in the earnest hope that they may to some extent lead to a true and legitimate determination of this important, if not the most important, question now before Congress.

Mr. WHITE. Mr. President, I should not attempt so soon again to make any remarks in the Senate upon this subject, were it not that it strikes me the Senate ought first to be brought to the conclusion whether this power, about which so much discussion is now being had, is not lodged with the President of the Senate, as I suggested when making the remarks I did last Monday to the Senate. If that power is lodged now with the President of the Senate, then it is idle for us to waste time in statute legislation; but it is the duty of Congress, in case we have discovered an omission, to provide for contested elections, or, in case the power is doubtful as regards the President of the Senate, to propose an amendment to the Constitution; and therefore the preliminary inquiry is whether or not a constitutional amendment is necessary. That having been concluded, then what shall be the character of that constitutional amendment?

There is a vast difference between the ministerial duty of the President of the Senate, as I maintained the other day, in counting the electoral returns, and granting a *prima facie* case to an officer, and the examination of the right of that officer to hold the place in the case of a contest, whether as regards the electoral vote of a specific

State or in regard to the aggregate votes of all the States. Therefore, whether in regard to the count there is an omission or not, it is clear that there is no provision of the Constitution for the case of a contested election of President or Vice-President before the people. Hence it is important, if we mean to make any provision in regard to the count of the vote, that we should go a step further and provide for a contested election of President and Vice-President of the United States. I say that it is essential for us now to amend the Constitution, for, after reading the able arguments of the Senators on this floor on last Thursday, I have seen nothing to change the view which I had the honor to present to the Senate on Monday of last week. On the contrary, a close examination of the question and mature reflection not only satisfy me in regard to that view of the case as presented by my own reading of the Constitution, but I do not think the precedent established when the Constitution was set in motion can be "whistled down the wind" as it was by my friend the Senator from Ohio, [Mr. Thurman.] No, Mr. President, let us look at the point for a moment, and I shall not occupy the Senate long; let us look at the proposition as I presented it to the Senate upon that occasion.

The Senator from Ohio speaks of the precedent in the count. I did not call the attention of the Senate to the precedent in that respect; I called the attention of the Senate to what the convention that framed the Constitution, to what the men who were the makers of the Constitution asked the first Congress to do, and then followed it up by the precedent established by the first Congress that assembled under the Constitution. I called the attention of the Senate to the fact that, in the resolution which sent the Constitution to the Congress of the Confederation and requested its delivery to the people of the States for ratification, the express language was:

"That the Senators should appoint a President of the Senate for the sole purpose of receiving, opening, and counting the votes for President."

That was his duty, to receive, to open, and to count the votes. That resolution went with the Constitution to the Congress of the Confederation; that Congress sent the Constitution, with this resolution, with the report of the committee, to the people of the States to be ratified by the people of the States. The people of nine States ratified it. Congress met under it; and, when Congress met, what was the action of Congress? Its action was to elect a President of the Senate in the very words of this resolution, complying literally with it; the Senate of the First Congress elected John Langdon, one of the Senators from the State of New Hampshire, President of the Senate, "for the sole purpose of opening and counting the vote for President and Vice-President of the United States." Who was John Langdon? John Langdon, a Senator from New Hampshire, was the very first man to sign the Constitution, the work of the convention, under the name of George Washington. He was one of the framers of this very Constitution; he was one of those who gave it his signature to send it to the world; he was one of those who voted for this identical resolution; and he now becomes the hand of the convention to open and to count these very votes under that very resolution which he himself had voted for in the convention that framed the Constitution.

That is not all, Mr. President. Immediately upon the election of Mr. Langdon the following proceedings were had:

"Ordered, That Mr. Ellsworth inform the House of Representatives that a quorum of the Senate is formed; that a President is elected for the sole purpose of opening the certificates and counting the votes of the electors of the several States in the choice of a President and Vice-President of the United States."

Who was to bear this message to the House of Representatives, that the Senate was now in session to attend upon the opening and counting of the votes by the President of the Senate who had been elected for that sole purpose? It was Oliver Ellsworth, who had done as much in the framing of the Constitution as any other member of the convention. Oliver Ellsworth knew what he was going to the House of Representatives for. He knew that the Senate of the United States was merely performing the duty of attending while the President of the Senate opened and counted the votes for President and Vice-President of the United States.

That is not all, sir. Who else was there? Of the ten members of the Senate at that time, six were members of the convention that framed the Constitution. Of the very Senate that passed this resolution, the very Senate that ordered Mr. Ellsworth to go to the House of Representatives and invite them to attend to witness the counting of the votes by the President of the Senate, six had been participants in framing this very Constitution. There, if I remember correctly, were Langdon, and Ellsworth, and Robert Morris, and Bassett of Delaware, and Few of Georgia. There were the very men who knew exactly what was the intention of the framers of the Constitution, and knew exactly how to carry out that intention in setting the machinery of the Government in motion. What did they do? Mr. Ellsworth went to the House of Representatives. The Senator from Ohio when he spoke about this precedent being of no great force added also that this most admirable compilation or history of the First Congress made by our worthy Chief Clerk was not an accurate account, and that an opposite

presumption might be drawn by reading the Journal. He is mistaken. I have examined another history of Congress by Mr. Blanchard of the First Congress, and it corresponds exactly; and to-day I have got the Journals of the Senate from 1789 to 1793, and they confirm, and not only confirm but make stronger, the theory that the House of Representatives and the Senate were mere attendants upon the duty discharged by the President of the Senate; they had no part or lot in it except to furnish two gentlemen on the part of the House and one on the part of the Senate to sit at the Clerk's table and make out a list as the President of the Senate declared the votes of the States. That is all. Let us see. Mr. Ellsworth proceeded to the House of Representatives and informed them that—

"The Senate is now ready in the Senate Chamber to proceed in the presence of the House to discharge that duty."

I read from the Journal:

"He informed them also that the Senate have appointed one of their members"—

To do what?

"to sit at the Clerk's table to make a list of the votes as they shall be declared"—

Declared by the President of the Senate—

"submitting it to the wisdom of the House to appoint one or more of their members for the like purpose."

He reported that he had delivered the message.

"Mr. Boudinot, from the House of Representatives, communicated the following verbal message to the Senate:

"Mr. President, I am directed by the House of Representatives to inform the Senate that the House is ready forthwith to meet the Senate, to attend the opening and counting of the votes of the electors of the President and Vice-President of the United States."

"To attend," to wait upon the President of the Senate as witnesses, to attend him as he performs his duty, but not to take any part in the performance of that duty, not to interfere with him in discharging his office of opening, counting, and declaring the electoral votes of the various States; and so it goes on. They appointed tellers.

"The President elected for the purpose of counting the votes"—

That is the record of the First Congress. The record leaves out "opening the votes;" but—

"The President elected for the purpose of counting the votes declared to the Senate that the Senate and House of Representatives had met, and that he"—

John Langdon—

"in their presence, had opened and counted the votes of the electors for President and Vice-President of the United States; which were as follows."

That is not all. John Langdon gave the certificate to George Washington of his election, and in that certificate, as the Senate will see, announced that—

"The underwritten, appointed President of the Senate for the sole purpose of receiving, opening, and counting the votes of the electors, did, in the presence of the said Senate and House of Representatives, open all the certificates and count all the votes."

He, John Langdon, did, and nobody else did; and he certified that Washington was elected, and sent messengers to the President and to the Vice-President.

That is not all. What was done at the very next election of the President of the United States when George Washington was again elected? I turn to page 480 of this volume of the Journal. The very question was brought to the attention of the two houses at that time; for there was a resolution passed by the House of Representatives to which the Senate gave its concurrence, which will be found on page 480:

"The Senate proceeded to consider the resolution of the House of Representatives that a committee be appointed, to join such committee as may be appointed by the Senate, to ascertain and report a mode of examining"—

Not of counting—

"a mode of examining the votes for President and Vice-President, and of notifying the persons who shall be elected of their election, and for regulating the time, place, and manner of administering the oath of office to the President."

Of examining the votes, not counting them. The counting was done by the President of the Senate, and nobody at that day supposed for a moment that Congress could

dislodge him from the position in which the framers of the Constitution had placed him. Now see, page 434, the report of that committee, composed of Mr. Izard and other gentlemen who had been members of the constitutional convention. James Madison was one of that committee on the part of the House; and I presume no man was more familiar with the Constitution, then but a few years framed, in which he took such a part; no man could have been more familiar with it, and no man could have known the intention and object of the framers of that instrument better than James Madison:

"Mr. King, from the joint committee appointed the 6th February, instant, reported, That the two houses shall assemble in the Senate Chamber on Wednesday next, at 12 o'clock; that one person be appointed a teller, on the part of the Senate, to make a list of the votes as they shall be declared."

By the President of the Senate, just as it had been done four years before, when he opened them and read them, and the tellers made the count under his eye and under his hand, using them merely to do the manual labor of making the list, and certifying and handing it to him that he might announce the result.

MR. SAULSBURY. I desire to ask the Senator from Maryland if the object of that resolution of the House for examining the votes of the electors of the different States was not to ascertain whether they were electoral votes or not? What was the object of examining on the part of the two houses unless it was with some view of regulating and controlling the counting of the votes?

MR. WHYTE. Mr. President, it was for the simple purpose of being a check upon the Vice-President or President of the Senate, so that the very object of the Constitution should be complied with of having witnesses who saw the certificates before the count had been announced by the Vice-President. That was the object. What is the meaning of tellers? Only to keep a tally of the votes. What power has a teller in an election but to keep a tally of the votes? He is only to mark them down and see that they correspond with the enunciation by the Chair. That is all, Mr. President.

"To make a list of the votes as they shall be declared, that the result shall be delivered to the President of the Senate, who shall announce the state of the vote and the persons elected to the two houses assembled as aforesaid; which shall be deemed a declaration of the persons elected President and Vice-President, and, together with a list of the votes, be entered on the journals of the two houses."

Therefore in the beginning the eye of Congress was turned to this very question, and they recognized that the President of the Senate was the proper depository of the votes, and that he was the proper person to discharge the duty of making the count and announcing it to the country in the presence of the two houses. If any resolution of the House shows that, it was merely to attend upon the President of the Senate when he makes this count.

I have shown, Mr. President, that this was a resolution first from the convention that framed the Constitution to the First Congress, and that the First Congress obeyed that order, and after that the Congress in session when George Washington was elected the second time confirmed everything that had been done by the preceding Congress, and that was the uniform practice from that day down to 1865, for in 1857 Mr. Mason, presiding over the two houses, did not count the vote of Wisconsin, as I shall show directly.

Some Senators seem to think that this is an extraordinary power. Why should it be so deemed? In regard to the election of President you have to find some similitude in your mode of procedure from the past. You have to look at the operations of your States, for after all we all, or certainly those of us who think the way I think upon constitutional questions generally, maintain that the Federal Government is but an aggregation of the State governments, and therefore what will apply within a State government may very well apply to the National Government so far as its method of exercising power is concerned; and does not every Senator on this floor know that the governors of nearly all the States, if not all of them, possess the same power in regard to the returns of elections of State officers? Certainly in my State, and I believe in most of the other States, the governor issues a commission upon the returns made through the clerks' offices of the various courts, or through the local boards of canvassers. He looks at those returns, and he issues the commission, and declares the party elected. Is not that so? What is his duty? The other day my friend from Indiana seemed incredulously to smile when he asked me whether I considered it a ministerial duty to decide between two returns, and I said yes. I repeat it. There is not a canvasser of any State in this Union that does not have to do that very thing, and yet everybody knows his office is ministerial.

MR. MERRIMON. *Quasi* judicial?

MR. WHYTE. No, sir; not *quasi* judicial. On the contrary it is purely ministerial, and just as ministerial as that of the clerk of a court who is authorized to record a deed, and will not record the morning newspaper if you take it to him and ask him to do it. He is bound to record a deed where the law is complied with, and he looks to the deed to see if the law is complied with and if it is a deed to be recorded. If it is

not, he is not bound to record it. Who would for a moment say that that was the exercise of a *quasi* judicial duty? Cooley on Limitations lays it down so broad that no man can doubt it, that the power of a canvasser, though you may call it *quasi* judicial if you please, is not *quasi* judicial, but purely ministerial from the beginning to the end. Take, in passing, the case of a marriage license. A clerk of a court is authorized to issue a marriage license, but not to a minor. A gentleman presents himself at his desk and asks him for a marriage license. He looks at him and doubts whether he is of age. He has a right to refuse it if he thinks proper, and subject that man to the necessity of a mandamus to compel him to perform that duty. More than that, he has a right to swear the man, and ascertain whether he is a minor or not before he issues a license. It is a purely ministerial duty. It has been recognized by everybody as a ministerial duty so far as the ordinary boards of canvassers are concerned. Such a person is a mere canvassing officer. In my judgment he represents the State. The State votes for President. Each State, says the Constitution, shall, under the direction of the legislature, appoint electors, and the President of the Senate is the canvasser for the States; and, as such canvasser, performs merely the ministerial duty of deciding, *prima facie*, who is elected President or Vice-President of the United States. Now, no Senator need answer me by saying that that decides the whole case, because there is no provision in the Constitution which looks to a contested presidential election. That may be an omission in the Constitution which ought to be supplied. Then you can take the contested election to the Supreme Court of the United States to determine who ought to be the lawful occupant of the White House; but, until some such provision is made in the Constitution, the President of the Senate, as a ministerial officer, determines who is elected President and Vice-President of the United States. Kent says so:

"The President of the Senate, on the second Wednesday in February succeeding every meeting of the electors, in the presence of both houses of Congress, opens all the certificates, and the votes are then to be counted. The Constitution does not expressly declare by whom the votes are to be counted and the result declared. In the case of questionable votes, and a closely-contested election, this power may be all-important; and, I presume, in the absence of all legislative provision on the subject, that the President of the Senate counts the votes, and determines the result, and that the two houses are present only as spectators, to witness the fairness and accuracy of the transaction, and to act only if no choice be made by the electors."

Sir, the presumption is conclusive, there being nothing else in the Constitution, the Constitution not specifically saying by whom, the presumption is, from all the surrounding language, that the two houses are only there as spectators, and that the President of the Senate is the proper person to count and to declare the vote; and, if I am not much mistaken, the distinguished Senator from Indiana thought the same way when he made his speech on the 17th of January, 1873:

"Clearly"—

Said he—

"the framers of the Constitution did not contemplate that the President of the Senate, in opening and counting the vote for President and Vice-President, should exercise any discretionary or judicial powers in determining between the votes of two sets of electors, or upon the sufficiency or validity of the record of the votes of the electors in any State; but that he should perform a merely ministerial act, of which the two houses were to be witnesses and to make record. But the exercise of these high powers may devolve upon him *ex necessitate rei*, and whatever decision he may make between the two sets of electors or upon the sufficiency and validity of the record of the votes—whether on the evidence of the right of the electors to cast votes, or whether they have been cast in the manner prescribed by the Constitution—his decision is final."

So that the Senator from Indiana clearly accepted that as the true construction, that having this ministerial power lodged with him out of the necessity of things he might be called upon on some occasion to declare which of two returns he would take, or whether the people had the right to vote or not, and the Senator stated then that he considered his decision to be final, and I agree with him. If it is to be changed, it is to be changed by a constitutional amendment, and in no other form. Let us see what else the Senator said on that same subject on that occasion:

"The Constitution provides that the President of the Senate shall be the depository of the electoral votes of the States, and that he 'shall, in the presence of the Senate and House of Representatives, open all the certificates, and the votes shall then be counted.' It has been generally conceded that this means that the two houses shall be present in their separate characters, and not as a joint convention; that they cannot act and vote as one body; that the two bodies cannot deliberate and act as separate bodies in each other's presence; that they are simply brought together to witness the result of the opening and counting of the vote as reported by the President of the Senate. The fact that tellers have been generally appointed by the two houses in nowise affects the question, for they are mere facilities to actually count and make record of such votes as the Vice-President hands to them for that purpose."

Can there be any doubt that it was the view of the Senator then that it was conceded on all hands that that was the status of the case under the Constitution of the United States? But, Mr. President, I may not perhaps be adding any strength to my argument with the Senate; but certainly to my judgment the authority I am about to quote was a high authority on constitutional questions; and therefore I ask permission to call the attention of the Senate to this question as presented by the late President of the United States and late Senator whom we regret to miss from the chair in my rear. I refer to a veto which he sent to Congress on the 20th of July, 1868—a veto which I had the honor to vote to sustain in company with Senator Hendricks and other gentlemen on this floor. It is not material to read any other portion of the message or to discuss any other part of the question raised in his veto further than this particular point referring to the power of the President of the Senate. Said President Johnson, on the 20th of July, 1868:

“The mode and manner of receiving and counting the electoral votes for President and Vice-President of the United States are in plain and simple terms prescribed by the Constitution. That instrument imperatively requires that the President of the Senate ‘shall, in the presence of the Senate and House of Representatives, open all the certificates, and the votes shall then be counted.’ Congress has, therefore, no power under the Constitution to receive the electoral votes or reject them. The whole power is exhausted when, in the presence of the two houses, the votes are counted and the result declared. In this respect the power and duty of the President of the Senate are, under the Constitution, purely ministerial. When, therefore, the joint resolution declares that no electoral votes shall be received or counted from States that since the 4th of March, 1867, have not ‘adopted a constitution of State government under which a State government shall have been organized,’ a power is assumed which is nowhere delegated to Congress.”

And so all the better reasoning in the case of Wisconsin was that way. There is no argument worthy of the name of argument that can be presented in reply to the statement of the case as made by Mr. Stuart, of Michigan, at that time, which Mr. Collamer thought so strong and so important in its character that he refused to vote for the resolution that had been proposed by Mr. Crittenden; and I ask the attention of the Senate to Mr. Collamer’s remarks on that subject. We all know that the certificate of the vote of Wisconsin showed that the electoral college had met a day after the day appointed by law for casting the electoral vote, by reason of a snow-storm. We all know that Mr. Mason did not count Wisconsin, upon the ground that it would make no difference whether Wisconsin was counted or not; the result was the same; and, therefore, the vote was not counted. A debate arose, and Mr. Toombs, of Georgia, made a violent demonstration against the ruling of the President of the Senate. The announcement was made, and the houses separated. The debate was resumed in each house, and, in the Senate, Mr. Crittenden, after a long debate, offered this resolution:

“Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That the electoral vote of the State of Wisconsin in the late presidential election, being given on a day different from that prescribed by law, was therefore null, and ought not to have been admitted or included in the count of electoral votes given in the late presidential election.”

The Senate laid that resolution on the table, after Mr. Collamer’s speech, without even a division. Now, let us see what Mr. Collamer said:

“I very much doubt whether the framers of the Constitution ever intended to leave the subject of the presidential election to the House of Representatives or the Senate, or either or both of them. There was a great deal of debate in the convention that framed the Constitution as to the manner of choosing a President of the United States. Various projects were presented. Among others, it was very gravely debated whether he had not better be elected by Congress. For some considerable time that proposition was under consideration. Various plans were put forward, various suggestions made as to the manner of choosing a President, and much difficulty was found in relation to it before a plan was arrived at, and that so soon resulted in a practical failure as to lead to the change in the Constitution to what it now is in this respect. The Constitution vested in each house the power to decide upon the election of its members; it provided carefully that it would not trust to the two houses to elect a President.”

That is what we are trying to do here to-day.

“It seems to me that if we consult history at all, and consider the probability of things even as they fall within our own observation and experience, we shall find that there is very little practical difference between leaving the presidential election to Congress and leaving Congress to decide that election.”

He could not put it better than that by the use of human language. The convention would not leave it to Congress to elect, and now Congress proposes to elect for itself.

Mr. THURMAN. Shall I interrupt the Senator if I make a suggestion?

Mr. WHYTE. Not at all.

Mr. THURMAN. Does the Senator think that the question before the Senate is

whether we can go back of a return admitted to be genuine and regular upon its face? If he supposes that to be the question, I must say that I do not suppose it to be the question; nor do I see how it is involved. I certainly do not admit that you can go back and go into a contest of the election at all. I submit that the remarks that have been made, which he has read, both by the late Senator Johnson and Mr. Collamer and Mr. Crittenden, do not refer to a case like the present at all. The question now is, what must we do when the question is which of two returns is the genuine return? When you have decided which of them is the genuine return, I admit you cannot go back of that.

Mr. WHYTE. Yes, sir, that is just what I am on. I say that Congress has no right to assume to itself to decide which is the right return, because the Constitution has put it in the hands of the President of the Senate, and until you amend the Constitution you have no right to take it away from him. That is my argument. The Senator was not in when I first commenced, or he would have known that that is precisely what I say. It is tinkering with the Constitution if you do not go a step further. You want to decide which of the two returns is the right one, and not to go behind the return and take the evidence that is to give you the power to decide judicially. What is it that is to be done? One party in the House may say one is the right return; another party in the Senate may say another is the right return; and the State is disfranchised, which our fathers never meant.

The President of the Senate is the custodian of these votes; he is the canvasser of these votes; and he is just where the governor of a State is when he is bound to issue a commission upon the returns that are sent to him. He is bound to look at the returns and see that they comply with the law, and then he is to issue a commission to the man who upon the face of the return has a majority of the votes cast. That is the state of the case. I say that is a mere ministerial duty, and I should like to be pointed to some authority to the contrary. Every governor has to discharge that duty, not as governor, not in the discharge of those executive functions which are political exclusively in their character, and which are not subject to the revision of the courts. Take the case of a governor; and I liken the President of the Senate to him, for I see no difference. Suppose the President of the Senate wantonly rejects the legitimate return from a State; is there no power to compel him to count it? Is there a power to compel the governor of a State to count a return properly certified? The Senator from Wisconsin [Mr. Howe] truly said the other day there can be but one right return and one wrong one, and our fathers never expected us to legislate for a case where there should be two executives of a State at one time. Our fathers never expected us to be in a condition that we should doubt what was the executive authority which certified to the electors in any State of this Union. The Constitution prescribes the duty to the President of the Senate. The law of 1792 shows him how the certificates are to be certified to him, shows him how he is to know who are the persons in the States claiming to be electors; and on that he has got to answer to the country and to his God that he discharges his duty faithfully. If he discharges it wickedly and puts aside a regular return which he ought to count, is he not in the same position as the governor of Kentucky, who is bound to issue a commission to the attorney-general upon the returns of the canvassers or the county clerks that he has a majority of the votes cast? When he adds them up and finds he has got a majority of the votes, he is bound to issue the commission. If he rejects the right return and counts him out, the courts of Kentucky by mandamus will compel him to issue the commission to the lawfully-elected officer. That is the law. Nobody knows better than the Senator from Ohio that governors perform ministerial duties as well as discharge their general duties as governors of States. He himself has applied for a mandamus to compel the governor of Ohio to execute a law of his own State which he claimed was merely a ministerial duty upon his part; and in my State it has been decided over and over again, not only by democratic courts but by republican courts, without any reference to politics, upon the plain, square, judicial inquiry, and I ask the attention of the Senate briefly to it. In the case of Magruder vs. Swann, governor, reported in 1866, in 25 Maryland Reports, there is a review of all the cases:

"The cases cited were used to sustain the position that the executive, in his political or discretionary powers, was beyond all judicial interference, not to sanction the application of the principle to the facts of each case."

Here is the clause of the constitution:

"All elections of judges and other officers, provided for by this constitution, (states' attorneys excepted,) shall be certified and the returns made by the clerks of the respective counties to the governor, who shall issue commissions to the different persons for the offices to which they shall have been respectively elected, and in all such elections the person having the greatest number of votes shall be declared to be elected."

The court held, in regard to the duties devolved upon the governor by these sections of article 4, that—

"These are auxiliary ministerial duties imposed on the governor preliminary to the qualification of the judges and other officers, in the discharge of which he has been

invested with no discretion, but is imperatively required by the organic law to perform in order to keep the departments of government in motion.

"The clerks' certificates determine 'who has the greatest number of votes,' or whether 'the opposing candidates have an equal number of votes.' In either event the injunction of the constitution is equally peremptory."

To go a step further, to show that this duty is merely ministerial, I refer to the case of *The People vs. Pease*, in the New York court of appeals, also decided, if I can judge from the names, by judges a majority of whom were in opposition to the democratic party. Speaking of canvassers, the court say:

"These are all the safeguards the legislature have thought proper to provide to insure the prevention of fraudulent or illegal voting, and this leaves but little discretion to the inspectors. Their duties, except in the single instance adverted to, are simply ministerial in the reception of the votes, and entirely so in counting and making returns thereof."

And then, when they come to speak further on of the board of county canvassers, they say:

"It is made the duty of the board of county-canvassers, upon the statement of votes given, to determine what person by the greatest number of votes has been duly elected to any office mentioned in said statement. * * *

"And the certificate of the board of canvassers authorized to canvass the votes given for any elective office is made evidence of the election of the person therein declared to have been elected."

I read now from the syllabus of the case:

"The inspectors of elections are not judicial, but administrative officers. Their decision is final only as to receiving or rejecting votes; but the question whether a voter was or was not entitled to vote is open to examination in subsequent proceedings upon any competent evidence." (13 New York Court of Appeals Reports, page 45.)

There is a clause in this decision in regard to county canvassers which maintains the same ground precisely.

Mr. MORTON. Would it interrupt my friend if I called his attention to a point in the line of his argument?

Mr. WYTHE. Not at all.

Mr. MORTON. I venture to suggest to the Senator from Maryland that, as I understand ministerial duty and as it is defined in books of law, it is one which is to be performed under the direction of another. Bouvier describes it thus:

"That which is done under the authority of a superior; opposed to judicial; as the sheriff is a ministerial officer, bound to obey the judicial commands of the court."

Where a duty is prescribed by law and the officer is simply to follow the law and do the particular thing the law requires, it is done by the direction of the legislature and it is purely ministerial. Take the case which was presented from Louisiana in 1873. Suppose, when the President of the Senate comes to count the vote in the presence of the two houses, he finds upon his desk two sets of returns from the State of Louisiana, each of which bears what purports to be the great seal of the State, each signed by a person claiming to be governor. The question as to which of these returns is the valid and legal return from Louisiana is a question that is not ministerial, in my judgment, at all. It is the highest form of political duty, or, as was suggested by the Senator from North Carolina, [Mr. Merrimon,] in one sense you may call it a judicial duty. If there is but one set of returns, and they are in form, and he opens them and counts them, that is ministerial; but where he is called upon to decide some question that is not determined upon the face of the paper itself, that is a political duty of the highest character, and is as far from a ministerial duty as any political duty can be.

Let me make a further suggestion. I will take the case of but one return. Suppose, when the President of the Senate opens that return, he finds that there is no statement on the face of the return that the electors voted by ballot, as the Constitution requires. Is it necessary that the return should show the fact that the Constitution has been complied with? The decision of that question is political in its highest character. One lawyer may say that it is not necessary for the return to show that the electors voted by ballot; that is presumed to be their duty. Others may say that the return must show that the Constitution was complied with. Who is to decide that question? In one sense it is a judicial question of the highest character. The decision of that question is not ministerial at all. Again, the electors are required to vote for one person for President and another person for Vice-President, who shall not both be citizens of the same State. Suppose the returns showed, as in the case of Georgia at the very last count, that the persons receiving votes for President and Vice-President both lived in the same State. That was the fact in regard to three votes from Georgia. Shall the result of that be to cast the vote out? What shall be done with it? Shall it be rejected? The decision of that question is not ministerial, but is as far from it as it can be.

Mr. THURMAN. And in the case of Georgia the vote was for Greeley, who was dead

Mr. MORTON. The question was whether the vote for Greeley should be counted. In

that case it was a notorious fact that he was dead; but it was a very important question, because it went to determine what constituted a majority of all the electors appointed. It might become a very important question in a close contest. The decision of the question as to whether the vote of Georgia should be counted or not was very far from being ministerial.

One word further. Take the case of common canvassers in an election-return created under the laws of a State. So far as their duty consists in simply counting the votes sent up, it is ministerial; but if there is a discretionary power reposed with that board of canvassers to determine certain questions that may arise, that discretionary duty is not ministerial, but it is judicial in its character. Almost every board of canvassers in every one of the States has to some extent judicial power conferred upon it. I want to call the attention of my friend to a point which I think is stated in the passage he read from Kent, that in the absence of legislation, the President of the Senate will count the vote. I quote from the report of the committee from which my friend read:

"Clearly the framers of the Constitution did not contemplate that the President of the Senate, in opening and counting the vote for President and Vice-President, should exercise any discretionary or judicial power in determining between the votes of two sets of electors or upon the sufficiency or validity of the record of the votes of the electors in any State; but that he should perform a merely ministerial act, of which the two houses were to be witnesses and to make record. But the exercise of these high powers may devolve upon him *ex necessitate rei*, and whatever decision he may make between the two sets of electors or upon the sufficiency and validity of the record of the votes—whether on the evidence of the right of the electors to cast votes or whether they have been cast in the manner prescribed by the Constitution—his decision is final."

And unquestionably so. I presume the fact is that the framers of the Constitution and those who counted the votes during the first few elections did not contemplate the fact of two sets of electors. No such contingency ever happened until the case of New Jersey, within the last twenty-five years. They contemplated simply a ministerial duty. They did not expect the President of the Senate to perform anything but a ministerial duty; but, as stated by Kent and as stated in this report, if the two houses of Congress decline to take any jurisdiction of the questions that may arise, then that duty would be devolved upon him *ex necessitate rei*. Somebody must decide it, and if he finds two sets of returns upon his table, if the two houses of Congress refuse to decide the question, then the President of the Senate must decide it. He then determines whether the Kellogg government or whether the McEnery government is the lawful government of Louisiana, whether McEnery should certify to the electors or Kellogg could do it; and in doing that it seems to me he would be exercising the very highest form of political power, entirely aside from a ministerial duty.

MR. WHYTE. Now let me ask my friend, the Senator from Indiana, a question. The Clerk of the last House of Representatives makes up a list of the succeeding House of Representatives. Suppose two sets of gentlemen claiming to represent the State of Louisiana in the House of Representatives, one with a certificate signed by Kellogg, the other with a certificate signed by McEnery, ask to be put upon the roll, so that when the roll is called they will be there to answer to their names; and the Clerk of the House puts one set on. Does the Senator from Indiana call that a judicial duty?

MR. MORTON. As I understand the law organizing the House of Representatives it authorizes the Clerk of the old House to make up the roll of members of the new one for the purpose of organization; and should there be two sets of members certified to by different persons, each claiming to be the governor of the State of Louisiana, inasmuch as the law authorizes the Clerk to make up the roll, it from necessity gives to him the choice for the time being, and that far his duty is not ministerial. It is a higher duty, but it is one devolved upon him by the law.

MR. WHYTE. I will ask the Senator another question, because I differ with him on that point. Suppose the governor of Indiana is authorized to issue a commission to the auditor-general of that State, if there is one, who shall be elected by a majority of the people of the State, and the law requires that the returns shall be made by the clerks of the courts. Suppose the clerk of the court sends two returns, or there are returns from two persons claiming to be clerk of a court, and the governor of a state decides in favor of one of them, is that the performance of a judicial duty? Is the determining whether a law has become complied with the performance of a judicial duty?

MR. MORTON. If I understand the question put by my friend, it is where the governor of a State is called upon to commission a State officer, the auditor for example, and the clerks of the counties have sent up two sets of returns. The question supposes that the governor in that case may choose between these returns and determine which is the proper return, and issue a commission accordingly. If the law of the State authorizes the governor in such a case to decide which of the two returns is the correct one, that power of decision is not ministerial; it is judicial clearly.

Mr. WHYTE. But where it is just as the constitution leaves it, and there is no provision of law?

Mr. MORTON. Then the law authorizes him to make that decision. If there are two sets of returns, both certified by competent authority, the governor has no discretionary power, he cannot issue a commission to anybody, because there is no evidence before him authorizing him to do it; but if the law of the State authorizes him in that contingency to decide which of the two is the correct return, the exercise of that discretionary power is not ministerial, but it is judicial. In some States the governors have such power conferred upon them; in other States they have not. In the State of Indiana the governor has no such power, and if he should make such a decision and issue a commission his act would be a nullity and in violation of law. But if the law gave him the power to determine which of the two returns of the county clerks is the correct and true return, then the exercise of that discretionary power would be judicial.

Mr. WHYTE. The question has been decided over and over again that where the governor is authorized and required to issue a commission upon certain returns made to him, he has to issue a commission, and the contest comes afterward. He is bound to deliver the commission as the *prima facie* title. It is his duty to do it, or the wheels of government would stop. There would be a hiatus in the office if there was no provision of law that the prior incumbent held until his successor was appointed and qualified.

Mr. MORTON. Let me say to my friend that in the case he supposes himself, there is no *prima facie* title. He supposes a case where the lawful clerk of the county has made two returns, each of which is certified by the proper authority. In that case, if the returns are contradictory, one is as *prima facie* correct as the other, and so there is no *prima facie* case about it. But if the governor is authorized to decide which is the correct return, I submit to my friend that that is not ministerial.

Mr. WHYTE. I am sorry to differ from so distinguished a lawyer. The courts, as far as I have examined the question, are unanimous upon that subject, that it is a ministerial duty, and governors have been compelled by a mandamus to perform that duty.

Mr. MAXEY. Will the Senator from Maryland inform me whether in any case where an act of judgment is devolved upon an officer his view that the power is ministerial would apply?

Mr. WHYTE. No, sir. Where he has discretionary power a mandamus will not lie; but where he is in the discharge of a mere ministerial duty a mandamus will lie. Let us see why a mandamus will not lie against the President of the Senate.

Mr. MAXEY. If the Senator will permit me, the point I would like to make is that where two certificates come up, it is an act of judgment to determine which one of those certificates is the right one; and if it be an act of judgment it is not a mere ministerial act. The counting of a vote, the opening of a certificate, is a mere ministerial act unquestionably. The counting of the vote may be a mere ministerial act, but it may also involve an act of judgment. Where there are two certificates it necessarily does involve an act of judgment.

Mr. WHYTE. If my friend will read Cooley on the subject, he will find the whole thing explained and all the authorities cited. He will see that it is not an act judicial in its character, but that it is simply attached to the ministerial duty that the party may discharge it intelligently. Cooley cites the very case, according to my recollection, (for I cannot lay my hand upon the book,) of the clerk of a court who has to see that he complies with the law, who has to examine the paper that he is authorized to record, to see that it complies with the law before he records it. The President of the Senate is in no other position than the governor of a State who is authorized to issue a commission upon the returns made to him. If there are two returns, there must be a lawful return and an unlawful one. If there are two governors, there must be a lawful governor and an unlawful governor. Therefore there must be a right and a wrong. Neither the learned Senator from Indiana, nor the Senator from Ohio, need point out to me defects in the Constitution. I am not saying that there are no defects in the Constitution. I am not saying that it is the perfection of wisdom, because we know ourselves that at the election of Jefferson in 1801, the defect of this very clause in the Constitution about electors was discovered, and that it was amended; but our fathers had not got quite as far advanced in political ethics as we have. They did not anticipate two governors in one State. They thought the States were hardly big enough for more than one governor each, and therefore they looked to a return certified by one governor. I admit that you have to make some amendment to the Constitution, and all that I have argued against here is that by legislation you are seeking to take away from the President of the Senate his constitutional power. All that I have been attempting to say is to show that the power is with him, and that you are bound to amend the Constitution if you mean to take it away from him; and if you mean to give any person or any umpire authority to decide upon the returns, you had better go a step further and go behind the returns themselves. I have not much faith in election-returns after the exhibit of the manner in which they were concocted in Louisiana. I do not speak of any party. I have not much faith in the men who put them up, and therefore if you are going to

determine which of two returns you will take, go behind the returns and propose a constitutional amendment that will lodge the power to decide upon the *prima facie* case first, and then submit it to some court or some judicial tribunal to determine upon testimony who has been lawfully elected the President of the United States. That is the point I make. I am not quite sure that that power is not now lodged in the courts of the United States. I am not sure of the entire truth of the remark which fell from the Senator from Kentucky [Mr. Stevenson] the other day about the power of issuing a mandamus against the President of the Senate not being lodged either with the Supreme Court of the United States, exercising original jurisdiction, or with one of the courts of this District, and then the Supreme Court having appellate jurisdiction in the case. Why? Who votes for electors? Each State votes for electors. Each State can vote by its legislature. It can vote by general ticket, and let a majority of the people of each State choose the electors. It can vote by districts. It can vote in any way the legislature of the State shall determine. Therefore the State votes. The State is interested in having its vote counted. Suppose when the lawful State government sends its electoral vote here the President of the Senate refuses to count it. Why cannot that State, through its properly-authorized officer, apply to the Supreme Court of the United States for a mandamus to compel the President of the Senate to count its vote? I would like to see some authorities to the contrary. If the Supreme Court cannot exercise original jurisdiction where a State is a party, because there the State is a party in claiming its vote, then the people can, through the circuit court of the district and by appeal to the Supreme Court, test the question as to which is the lawful return upon which the President of the Senate is bound to base his decision.

I do not differ with gentlemen here that there is a defect in the Constitution in not providing for a case of contested election of President and Vice-President of the United States. I will vote to submit to the people of the States a constitutional amendment providing who shall count, who shall declare, in the first instance, the *prima facie* title to the office of President and Vice-President, and also designating a tribunal before which the contested election may be heard and decided in behalf of the person lawfully entitled to the office and lawfully chosen by a majority of the people in the several States; but I will vote for no bill that undertakes to assert upon the part of Congress the power of counting the electoral vote and deprive the President of the Senate of it, as I understand him to be entitled to it under the Constitution as it now is.

Mr. DAWES. Mr. President, after this protracted debate upon a subject-matter, the need of legislation in respect to which all of us admit, I should not think of engaging the attention of the Senate for a moment did either the discussion itself or the bill before the Senate meet certain difficulties which have for a long time existed in my mind in reference to this question. It was my lot for many years to be upon a committee in the other branch corresponding to the one which has reported this bill here, before which this subject was frequently brought, growing out of the apprehensions in the public mind arising from the danger which at this point the Government of the United States seemed exposed to in 1857, in 1861, and again in 1869. Although those dangers were of a different kind on each of those successive occasions, yet in attempting to find some remedy, some guard against the evil and the danger which those discussions gave rise to, I have listened patiently in this debate to see if the difficulties which I then encountered had found a solution either in this debate or in the bill before the Senate. I hope I may be permitted to express my disappointment that after so long a time and such a discussion, under circumstances so favorable, in which all parties seem to have addressed themselves to the question without the bias or passion of party, when no measure can become a law unless it receives the sanction of both parties, no measure is agitated that can have any possible bearing upon any future contingency so far as we can foresee it now.

This bill, in so far as it follows the outlines of the Constitution, is without difficulty; but the moment it attempts to approach and grapple with the questions that may arise, with the actual difficulties, with those dangers to which I have alluded, if they ever shall exist, it seems to me it utterly fails. My disappointment is that there is going upon the statute-book a delusion, an appearance of provision against danger under which, when that danger shall arise, it will be found to be utterly unprovided for; and so we shall be carried along in fancied security until we are upon the danger itself, and when provision for it will be in the nature of things utterly impossible.

Those difficulties I wish briefly to state, to see whether there is any relief from them either in this bill or in any possibility of legislation, and whether we had not better have addressed ourselves to some amendment of the Constitution rather than to have attempted to tide over a danger with what is, in my mind, utterly insufficient and will prove rather a snare than a protection. Take the electoral college from the moment its action comes under the provisions of the United States Government, either the Constitution or any legislation; follow step by step all the proceedings; and the moment you undertake to provide for the question which this bill and this earnest effort of this committee and this discussion is seeking to provide for, you run at once counter to the very provisions of the Constitution itself, and why? Because

the danger is something else than that which we have discussed. It does not arise upon the papers. It does not arise upon any question that can be decided, whether by the President of the Senate or the two houses of Congress, or any umpire that it is possible to provide for, upon the papers themselves. A discussion or deliberation of two hours' duration is provided in this bill. The Constitution provided that the States should appoint the electors. It was not anybody else but the States, the States as States, and in just such manner as each individual State should deem best. One State might appoint them by a popular vote; another by its legislature; a third might clothe its governor with power to appoint them; but however appointed, it was the act of the State. It was the State, and not the nation, that was to appoint them; and the State was to take good care, in the opinion of the framers of the Constitution, that its act, whatever it was, was to be verified by the State and not by the nation. The State was to verify its act and certify it in such way as each State might determine so to certify its act.

"Each State shall appoint"—

Is the language of the Constitution—

"in such manner as the legislature thereof may direct, a number of electors equal to the whole number of Senators and Representatives to which the State may be entitled in the Congress."

In point of fact one State did provide that it should be by popular vote. To-day in my State—and I doubt not that is an illustration of all the States—there are three methods: First, the popular method, and if that fails, the legislative method; and, when the college meets on the first Wednesday in December, if there is a failure of a sufficient number to meet, the college itself fills up the number. But, however they were to be chosen, it was the act of the State, and it was the business of the State to verify and certify its own act and furnish each elector with the evidence of his appointment. Then the United States takes up the matter, and from that point provides by law just what is to be done. These electors bearing the certificate of their State are by the provisions of the Constitution and of the statute to meet at such place as the legislature of the State has determined, and there in the manner prescribed by the Constitution these men bearing the certificate of the State, and these alone, are to cast their votes in a manner so particularly, so carefully guarded, that the idea that it is possible for these particular men ever to make a mistake, or for anybody to ever make any mistake about the action of these particular men, seemed to be considered a phantom, a far-fetched idea. They are, after they have voted and each man subscribed his name to the vote and sealed it up, by a special messenger to send that particular action, and no other, to the President of the Senate. The President of the Senate is the sole constitutional custodian of these certificates from the several States. He is to bring them upon a particular day into the presence of the two houses, of the Senate and the House of Representatives, and he is to open them. He is not to open anything else but these certificates. Nobody can clothe him with power to open anything else but the genuine certificate of each State; but that carries along with it the incidental power of determining whether the paper in his hand is that certificate or not. Right there at the outset, before he breaks its seal, he is to determine whether he does break the seal of this certificate or whether he has a false certificate in his hand. So far, incidental to the duty with which the Constitution clothes him of receiving and keeping this certificate and in the presence of the two houses opening it—incidental to that and without which he cannot determine that he has performed this act—he must decide whether the paper coming into his hands is the genuine certificate. Then the several certificates, all opened by him and before him, are to be counted. When? When he is with them there in the presence of the two houses, and nowhere else. That, it seems to me, disposes of every one of these amendments that propose to take these certificates out of the presence of the two houses and submit them to another tribunal to be created for the purpose of determining what these men shall count, and then for us to say that a tribunal created by us determining what shall be counted does not count!

I am not going into the argument that has been so elaborately made by the Senator from Maryland [Mr. Whyte] as to whether these votes shall be counted by the President of the Senate or by the two houses, because so far as my difficulties are concerned it does not matter. I have heard no one say that they were to be counted by anybody else, and therefore after he has brought them into a constitutional presence, if I may use that word, namely, the presence of the Senate and the House of Representatives, they are "then" to be counted. That is, when they are there; and therefore they cannot be counted in any other presence and before any other tribunal or by any other tribunal. I think that the Constitution means that they shall be counted by the two houses. I cannot quite agree with the Senator from Maryland, that they are to be counted by the President of the Senate, for the reason that the framers of the Constitution kept in their mind, when they prepared for the election of President, the States. They provided, as I have said, that the States should appoint the electors, that the col-

lege of electors should in the first instance choose the President and the Vice-President; they provided that, if the college of electors shall fail to do their duty, then the States in the House of Representatives, as States, shall elect the President, and the States as represented in the Senate shall elect the Vice President. They have kept up the idea of the States all through, until, as they supposed, they had secured beyond peradventure the election of a President.

I am not dissuaging the question whether we can now in this day afford to stand upon the ground of the States as against the people in the popular branch. I am one of those who believe in State rights, and I am one of these who, so far as State rights are defined in the Constitution, are for preserving them with sacred care, and I shall stand up for them. More than any other feature of this whole Constitution this idea is prominent, running from the time when the States reserved to themselves the power in such manner as they pleased of appointing the electoral college to the time when, if the electoral college fail to make that choice, they devolved it upon the States in the House of Representatives to choose the President, and upon the States in the Senate to choose the Vice-President. I infer, therefore, that, if these two bodies are there for any purpose whatever, they are first there to aid in the counting of the votes; and the question is whether they are there as one body or as two. The Constitution says this shall be done, not in the presence of the Senate and House of Representatives, but in the presence of the Senate and of the House of Representatives. Therefore the only question that can possibly arise at that point, namely, whether the paper that the Vice-President opens is the real, genuine paper coming from the electors of a State, must be decided either by the two as one body or by the two in their separate capacity as Senate and House of Representatives. You depart at once from the whole theory and tenor of the provision the moment you say it is to be done by them in convention in one body. If you follow it out and in harmony with all its provisions, as it seems to me—I am only suggesting how it strikes my own mind—you must say that this incidental question necessary for the counting of the votes is to be determined by the two houses as houses; and so far as this bill recognizes that principle, so far this bill is but carrying out what seems to me to be the plain provision of the Constitution. But then from that point I find no comfort in this bill. The second section is:

“That if more than one return shall be received by the President of the Senate from a State, purporting to be the certificates of electoral votes given at the last preceding election for President and Vice-President in such State, all such returns shall be opened by him in the presence of the two houses when assembled to count the votes; and that return from such State shall be counted which the two houses acting separately shall decide to be the true and valid return.”

Does that mean two returns purporting to come from the same electoral college? If you reflect how the electoral college acts, you will see that that is a contingency so remote, so impossible to happen, that for us to spend any time in providing for it seems to me to be entirely idle. They are to act on a particular day, and they cannot act on any other day. Each one of them is to vote and to sign his name to his vote, and the sign-manual of every one of them is attached to the certificate stating how they vote. That is to be sealed up on that day, and a special messenger is to take that to the President of the Senate. Now the idea that on that day these same men could do two different acts in that way, vote for one man, and then, before the day closed, falsify that vote by voting for another, supposes a contingency which, I am free to confess, I do not think the framers of the Constitution ever contemplated; and if that is what is meant by deciding between two returns from the same college, it is not worth while for us to spend a great deal of time on so remote and almost impossible a contingency.

It, however, it means to meet the case of two returns coming from a State, purporting to be the action of two sets of electors appointed by the State, what is to be done under this bill? That is a question of fact which set is appointed; and, considering the general manner in which they are appointed, by election by the people, it is a question of fact lying deep down, surrounded by difficulties, and to be determined, not upon inspection of the papers, but upon evidence to be taken outside of the papers, if such a contingency shall ever arise. On those two sets of papers it is proposed here to determine this question of fact, without any hearing of the question of fact whatever, for the papers are to be submitted to the two houses of Congress and to be decided on a ten-minute debate in two hours. Well, that only puts one's hand on the mouth of a crater in the vain idea that you have closed it up. That is a poor cobweb attempt to smother a volcano. It is a delusion to the people if it means that; and, if it means the other thing, it is an impossibility almost in the nature of the case that there can be two certificates from the same set of men on the same day, under their own seal and under their own hand.

Mr. MERRIMON. Suppose, in a State where the electors are elected by the people, those who are in the minority insist that they really got a majority of the votes?

Mr. DAWES. That is what I am discussing. I say, if it means that, if it means that those electors declared to be chosen are to meet on the proper day and send up a vote,

and those who are defeated but who believed that they were really and actually elected are to do the same thing, so that we have two sets of certificates, I can understand that that is a danger upon which we are drifting, a danger which we have had warning time and again to provide for; and that was what I hoped from this able committee there would come out some remedy for. But what is it? It is to take these two certificates, and on the face of the certificates, and by a law of Congress limiting the deliberation to two hours, without testimony from any quarter whatever, to reach a result that the people of that State or of the United States in certain contingencies everybody will see it is impossible to expect will acquiesce in.

Mr. MITCHELL. Allow me to ask a question. Suppose a case of that kind just stated by the Senator, where two returns come up—

Mr. DAWES. From two different bodies?

Mr. MITCHELL. From the same body, in the case stated, where one part of the electoral college claim that they were elected and the other part claim that they were elected, and two returns come up.

Mr. DAWES. That would be from two different delegations.

Mr. MITCHELL. Yes. In that case do I understand the Senator to contend that, under the Constitution as it now stands, it is the duty of the President of the Senate to determine, before he breaks the seal, which of the two is the correct return?

Mr. DAWES. No, I did not say so. If I do not make it clear what I do mean before I get through—

Mr. MITCHELL. I understood the Senator to contend that there could be but one correct return from a State, and that under the Constitution it is the duty of the President of the Senate to determine, before he breaks any seal at all, which is that return.

Mr. DAWES. The Senator will allow me. I do think the Senator will admit that there can be but one correct return in point of fact.

Mr. MITCHELL. I admit that; but what I want to know is whether the Senator contends that, under the Constitution as it now is, it is the duty of the President of the Senate to determine, before he breaks the seal, which is the correct return?

Mr. DAWES. If the Senator will excuse me from answering just at this point, I will proceed. Let me go through with my statement again. It is impossible for there to be more than one correct return; and in the nature of the case it is next to impossible that there can be two returns from the same body of men. Inasmuch as they have to act on one particular day, in broad daylight, and sign their names to what they do, in the nature of the case, I do not say it is impossible, but it is next to impossible, that there can be two returns from the same body of men in the State of Massachusetts or the State of Oregon claiming to be the electors. Then I say this provision can in practice have no possible application to any other case except where two sets of men in Massachusetts claim to be each one of them appointed electors, and those two sets meet together at the capital of the State, and each one of them goes through with precisely the same form, voting for different men, and send up their votes; so that when they come to the President of the Senate, on the papers themselves there is nothing to guide him to determine which of them is correct and which is not.

Mr. MITCHELL. Now in that case, do I understand the Senator to say that it is the duty of the President of the Senate under the Constitution to determine which is the correct one?

Mr. DAWES. I did say a moment ago that that was a case for which no provision has been made, and that was a danger upon which we were drifting, and that I had hoped that, warned as we had been that such a contingency not only was possible but was almost probable, some provision would come from this committee. I said I had been disappointed in that hope. I said so because I stated that all the provision for such a case which they have made in this bill is that these two sets of certificates (the right or the wrong of which lies in a question of fact deep down among the complications and passions and frauds that exist in the State itself, which the Constitution has clothed with the power, and which alone it has clothed with the power of making the appointment) shall be opened and laid before the two houses, and that the decision upon them shall be made by a vote of the two houses, and it provides by law that it shall be done in two hours, and decided without any evidence of the question of fact. I regretted to be compelled to say that that was an attempt to stifle with the palm of a man's hand the crater of a volcano.

Mr. MITCHELL. I do not like to interrupt my friend, but I wish to ask him one other question. I am a member of the Committee on Privileges and Elections, and trying to assist in this matter. What I want to know is whether the Senator means to be understood now as contending that there is no power in Congress under the Constitution to provide a means of determining as to which is the right certificate in a case of that kind, or whether the President of the Senate is compelled, under the plain provision of the Constitution, to determine it for himself.

Mr. DAWES. I am sorry, Mr. President, to be compelled to agree with the Senator from Wisconsin [Mr. Howe] on that point. I do not think the framers of the Constitution foresaw that when they clothed the State with the power itself to appoint the

electors a contingency would ever arise where the State would fail to see to it that its appointment was so certain and so verified that no question could ever arise about it. Inasmuch as the State appoints, the State must determine whether the State has appointed or not; the State must determine whether it has performed its duty in the absence of any constitutional provision.

MR. MORRIS. Will my friend allow me to call his attention to the questions that I think are involved in his argument?

MR. DAWES. I am after light, nothing more.

MR. MORRIS. In a case where there are two sets of electors—take the case of Rhode Island during the Dorr trouble there; suppose a presidential election had occurred at that precise time and there were two sets of electors, one certified by the governor under the old charter government and the other certified by Governor Dorr under the Dorr government, and those two certificates or packages came here sealed. In order to settle which set of electors is to be counted in the vote it must be determined which is the government of Rhode Island, the Dorr government or the charter government. I suggest to the Senator whether that question under the Constitution of the United States must not be decided by Congress in such a case as that.

One other question in regard to what must be done in such a case. Where there are two sets of electors and there are two packages, of course the President of the Senate cannot, without some outside information, determine which is the proper certificate until he opens them. I understand the Senator to say that to determine on the face of these papers is simply to put the hand on the crater of a volcano; but the question goes back to which set of electors was chosen by the people or by the State. I want to call my friend's attention to this proposition, that the Constitution admits of no time for that investigation.

"The President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates, and the votes shall then be counted."

There is no period of time in which you can go back into a State and inquire who was actually elected. And then further on it provides that when these votes are thus counted, if no one person has a majority of all the electors appointed, the House of Representatives shall immediately proceed to the election; so that there shall be no interregnum, there is no pause in the proceedings until a President is chosen either by the votes of the electors or the vote of the House of Representatives.

MR. DAWES. The remarks of the Senator from Indiana are but in corroboration of the reply that I made to the Senator from Oregon, that the provisions of the Constitution fail to meet the case of a contest upon a question of fact. Those points that the Senator from Indiana has called my attention to are but anticipating what I was going to say in a few moments.

The very fact that they are "then" to be counted, and as they appear then in that constitutional presence and nowhere else, shows that you have no more power to take them out of that presence before they are counted and submit them to the Supreme Court or to a court of arbitration than you have to submit them to a synod of Presbyterian ministers. The presence in which they are to be counted is fixed by the Constitution itself; and whether they are to be counted by the President of the Senate or to be counted by the Senate and House of Representatives, they are to be counted "then," in that presence, and "then" means at that time; and "immediately" thereafter, if the electors shall have failed to make a choice, the House of Representatives, by States, is to make the choice. Thus it appears that the Constitution has provided no method, has left no opportunity, if I may use that phrase, for a contest upon a question of fact; and the committee, recognizing that fact, has provided for a method of determining it by smothering the fact. When two distinct certificates come up here to the President of the Senate, from two distinct and separate sets of electors in the State of Massachusetts, each one of them claiming to be the true board appointed by the State, there is no provision, no opportunity, no method pointed out by the Constitution to determine that question of fact, and the Senator proposes, instead thereof, to take these two certificates, and on their face submit them to a two hours' deliberation in the two branches of Congress, and smother the voice of the State by the decision of those two branches.

MR. McMILLAN. Will the Senator allow me to ask him a question? In the present state of the Constitution can we make any further provision than that?

MR. DAWES. I was going to say, and had almost said it before the Senator interrupted me, that the fact that there is no other provision in the Constitution to meet this question does not relieve us from the necessity, when there is a provision for amending the Constitution, of meeting the question.

MR. McMILLAN. Will the Senator then allow me to suggest to him that the joint rule of the two houses which has existed up to this session has been repealed, and that before any provision for an amendment to the Constitution can transpire, a presidential election must intervene; so that, if this bill is not passed, there will be the mere naked provision of the Constitution of the United States, and that would certainly leave us in a most unfortunate condition.

MR. DAWES. If the Senator from Minnesota will indulge me, I will endeavor to state

just what I think will be the result when we get through and pass this bill; and I propose to vote for it. My objection to the bill is that, as I said in the beginning, it is a delusion; it purports to accomplish what it does not accomplish; it leads the people of this country into a snare, because it leads them to think Congress has provided —

Mr. MORRIS. If my friend will permit me a moment, as I am also in pursuit of light, I want to ask him a question. The twenty-second joint rule has been abolished. We have no rule. Suppose we fail to pass any law, and when we count the presidential vote less than a year hence there are from the State of Louisiana, if you please, two packages of electoral votes, each purporting to be certified to by a governor of that State, and each bearing the *fac-simile* of the seal of the State, so that you cannot tell by inspection which is the genuine and which is the false. I ask my friend, if we do not pass this bill and we have no rule, who is to determine the question between those two sets of votes? How is the question to be settled? Are you to cast aside both, or are you to count one? And if you are to count one, who is to select the one to be counted?

I would further add that the one is to be counted which is certified to by the governor of the State of Louisiana; and is not the question who is the governor or which is the government of Louisiana a proper question for the Congress of the United States to determine? Wherever there is a dispute in regard to electoral votes or in regard to a Senator, is it not the proper thing for the Congress to say which is the government of a State, and, that being decided, then the votes of the electors who are certified by that governor are to be counted?

Mr. DAWES. I agree with the Senator that every disputed question which can possibly arise upon the papers themselves had better be decided by the two houses as houses than to be decided by the President of the Senate. But I was commenting upon the utter impossibility of deciding the question under the form or, without meaning any offense, under the pretext of deciding it by deciding upon the face of the paper where the question lies deeper than all that, and I was showing that that question, from the very provisions that I have discussed, there is as yet no provision of the Constitution to settle; and an act of Congress only deludes the people by giving them the idea that it is settled when in point of fact it is not.

But the third section, the Senator will allow me to say, is the most curious section that ever I saw in a statute. It proposes to determine the rule of deliberation in the two houses of Congress by an act of Congress.

Mr. MORRIS. Before my friend passes to the other point, will he allow me —

Mr. DAWES. I wish to say but a few words more. The third section declares:

"That when the two houses separate to decide upon an objection that may have been made to the counting of any electoral vote or votes from any State, or for the decision of any other question pertinent thereto, each Senator and Representative may speak to such objection or question ten minutes and not oftener than once: *Provided*, That after such debate has lasted two hours, it shall be in the power of a majority of each house to direct that the main question shall be put without further debate."

Mr. MORRIS. Before my friend passes to the third section—and I shall be glad to hear him on that question—I ask him, if the two houses are not to settle the question between the two sets of electors in the case supposed, who is to settle it, and how is it to be settled? What would my friend do in that case? If we do not pass the bill and authorize the two houses to settle the question, how is the question to be settled between two sets of electors?

Mr. DAWES. I never would content myself with doing what is in this bill, and I never would fancy that I had done my duty as a legislator if I stopped with the provisions of this bill. That this bill is better than none I have said, and that is why I shall vote for it. That it is all that can be done without an amendment to the Constitution, I have no disposition to deny. I have not found fault with it, and I have not criticised this measure in any such spirit as that. I have listened with entire sincerity to see if it were possible by an act of Congress to meet the exigency; and having deliberated in another committee a good deal upon that question, I did hope that this committee would solve that question; but they have not done it, and that was the burden of my talk. That they could do anything better than this, I am not prepared to say.

Now the Senator will permit me to ask him what binding force as a rule upon the Senate or the House of Representatives this act of Congress can possibly have, if either desires to change it, when the Constitution itself says in so many words that each house may determine the rules of its proceedings itself, without the consent of the other house and of the Executive? That this may be treated as a rule of the Senate or of the House just so long as the Senate or the House is willing so to do, I will admit. It may be said that by passing this bill the Senate consents itself and the House consents itself to this law as its rule. That may be true; but the moment either wants to change it, it will have the power to change it without regard to this law. If, when the houses are deliberating upon a question of this sort they choose to deliberate three hours, there is nothing in this law in the way, and it would not be a

violation of this law, because this law is an attempt to exercise an authority over which the Constitution says the body itself is supreme; and therefore this section, in the interest of dispatch, in the interest of necessity, as the Constitution now exists, is a mere rope of sand, and the Senate can do away with it or the House do away with it at its pleasure. It is as idle to enact what shall be the rule of this body and of the House of Representatives by a statute as it is to enact what shall be the constitutional prerogative of the Executive himself.

The Senator has pressed upon me the question, what shall we do? I say, meet it fairly and squarely; bring forward some measure for an amendment of the Constitution upon a subject which the framers of the Constitution did not think there was any necessity for amending, but which subsequent experience has shown is vital and essential. But while such an amendment is pending and until it becomes a part of the organic law I shall vote for this bill; but I shall vote for it believing that, just so far as it follows the rules that existed before the twenty-second joint rule, it is but providing the uniform usage, and that the moment it goes beyond that it is only advisory and has no sort of binding force; and it is in vain for us to tell the people that we have met the peril, for the peril exists precisely under this bill as it existed before the twenty-second joint rule and when nothing but the usage under the Constitution was the guide of the two houses.

MARCH 21, 1876.

The Senate, as in Committee of the Whole, resumed the consideration of the bill (S. No. 1) to provide for and regulate the counting of votes for President and Vice-President, and the decision of questions arising thereon.

MR. MAXEY. Mr. President, no question of so much importance as the one now under consideration has been considered by the Senate during the present session.

The bill proposes to provide for and regulate the counting of votes for President and Vice-President, and the decision of questions arising thereon. We are warned by the past to provide for the future. With the majority in the two houses representing opposing parties, the time is propitious for passing a wholesome law which all the people will recognize as honest and free from party bias. We should take advantage of the favoring circumstances.

The Constitution reads:

"The President of the Senate shall, in the presence of the Senate and House of Representatives, *open all the certificates*, and the votes shall then be counted." (Part of the twelfth amendment.)

Here are two distinct duties to be performed. First, the President of the Senate shall, in the presence of the Senate and House of Representatives, *open all the certificates*. That is mandatory, not directory: it is unmistakable. The President of the Senate, and none other, shall open all the certificates; not part, but all. He cannot perform this duty except in the presence of the Senate and House of Representatives; not Senators and Representatives; not a mass convention of Senators and Representatives; but in the presence of the Senate organized and appearing in its organized capacity, and the House of Representatives there present, organized as such. So far, then, as opening all the certificates by the President of the Senate in the presence of the Senate and House of Representatives is concerned, there is no dispute; but it is insisted by the Senator from Maryland that the President of the Senate must not only open all the certificates, but must likewise count the votes; that the act of counting the votes is a mere ministerial act, and that the sole office of the two houses, who are required to be present, is to witness the performance of these two ministerial acts, namely, the opening all the certificates and the counting of the votes by the President of the Senate. If he is correct in this construction, then there is no need of any law. It would be a work of supererogation. The Constitution in this regard executes itself. The two houses are figure-heads and part of an imposing pageant.

I dissent from this construction. The duty of counting the votes devolves in the first instance, in my judgment, on the Senate and House of Representatives. Why the necessity of requiring the Senate to appear organized and ready for business, unless it has business? Why require the House of Representatives to be present organized, unless for business? The very fact that the two houses are required to appear in their organized capacities strengthens the construction which I place on the clause in question.

Had the framers of the Constitution designed to confer on the President of the Senate the duty as well as power of counting the votes, then why does it not say so? Why not read, The President of the Senate shall * * * open all the certificates and count the votes? As the power is, in express terms, conferred upon the President of the Senate to open all the certificates, and is not conferred upon him in express terms or by implication to count the votes, we naturally conclude that the power of counting the votes was not lodged in the President of the Senate, but was lodged in the Senate and House of Representatives, then present by the mandate of the Constitution and organized for business, and none other being required to be present. This

view is supported by the well-known rules of construction and is consonant with right reason.

The second officer of the United States in rank opens all the certificates in the presence of the two houses of Congress, and they, in his presence, count the votes. I say in his presence, because the Constitution says the votes shall then be counted.

If this view of the Constitution be correct, as I think it undoubtedly is, then it logically follows that Congress has the power to pass any law within the limits of its express or implied grants necessary and proper to carry out the foregoing provision of the Constitution.

Mr. EATON. Will my friend allow me to ask him a question?

Mr. MAXEY. Certainly.

Mr. EATON. He speaks of the two houses being organized for business. Do I understand him to mean by that, that, when these two houses meet together for the purpose of having the votes opened and counted, there are two organizations in the same room, one of the Senate and one of the House of Representatives?

Mr. MAXEY. That is precisely what I mean, sir. The Constitution says:

"The President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates, and the votes shall then be counted."

The word "Senate" means an organized body; the words "House of Representatives" mean an organized body. If it was designed simply to open the votes in the presence of Senators and Representatives, it would have said so; but it says "Senate," which is an organized body; it says "House of Representatives," which is an organized body; and I hold that these two bodies as organized bodies are present, and I have argued that they are present for business, and I think there is force in that view.

The question then is, What law will most effectually secure a fair count of the electoral vote and to each State its undisputed and inestimable right of having its true and valid return of the vote of the people through the electors counted beyond peradventure?

Now, I hold that the grant of power to and consequent duty upon the Senate and House of Representatives is a sacred trust of the very highest character devolved upon these two bodies for the soundest of reasons.

The Senators are the direct representatives of the States, or, if you please, the people of the States in their organized capacity under State governments, and the House of Representatives represent the people directly in their primary capacity, and the highest incentives that can impel man to honest action lie before them. These distinguished bodies organized for business, in order to proceed in an orderly manner without confusion, are presided over by the second officer of the Government. His incentive to honest action is of the highest character. Could there be a more enlightened court organized?

Now, as I have said, this duty of opening all the certificates and counting the votes is a trust reposed by the Constitution, the first in the President of the Senate, the second in the two houses of Congress, and in no other body or persons whatever. It is in its nature like a personal trust, and can be delegated to no power on earth, and necessarily demands sound judgment and discretion. Would any one say that, when the Constitution says in terms "the President of the Senate shall open all the certificates," we, or any other power on this earth, can say "the President of the Senate shall not do this, but some other party we name shall do it?" Now, if the argument is sound, as I believe it is, that the two houses are intrusted with counting the votes, we have no more right or power to take the authority out of the body of Congress to count the votes than we have to take away from the President of the Senate the power of opening all the certificates. It makes no difference that one is by express grant and the other by fair implication; the implied grant once established is just as binding, valid, effectual, and constitutional as the express grant. Therefore, as in the case of the President of the Senate it is clearly and in express terms a personal trust, so by fair implication the grant to the two houses to count the vote is a personal trust, and cannot therefore be transferred to arbitrators, court, or commission not of the body, however exalted be the personages. If I am correct in my reasoning, it follows necessarily that the amendment of the Senator from New Jersey [Mr. Frelinghuysen] falls. The amendment is as follows:

"The difference shall be immediately referred to the Chief-Justice of the Supreme Court, the Presiding Officer of the Senate, and the Speaker of the House, whose decision shall be final. If the Chief-Justice is absent or unable to attend, the senior associate justice of the Supreme Court present in the Capitol or other place of meeting shall act in his place."

And the same is true of the plan suggested by the Senator from Indiana [Mr. Morton] on Thursday last, and which is:

"That the judges of the Supreme Court of the United States shall be assembled in the chamber of the Supreme Court at the same time that the two houses of Congress are counting the electoral votes for President and Vice-President; and, in case the two

houses shall fail to agree as to which is the true and valid return as provided for in this section, the returns shall be immediately submitted to the said judges, who shall summarily decide which is the true and valid return, which return shall be counted."

The amendment of the Senator from New Jersey [Mr. Randolph] I do not say would be unconstitutional. It reads thus:

"SEC. —. Should the two houses of Congress, acting separately, fail to agree as to which is the true and valid return of a State, then, and in that event only, the President of the Senate shall render a decision of the question, and such rendition shall be in favor of that return of a State which shall have received a majority of all the votes cast in both houses of Congress, considered as if both houses had cast their votes in joint meeting assembled."

I will say, however, that it does not address itself to my mind as sound. The theory of the legislative department of our Government is that Senators represent States in their organized capacities as bodies-politic, while Representatives represent the people directly in their primary capacity. The books tell us that "State" and "people of a State" are interchangeable terms. The whole people of a State in their aggregate capacity as a body-politic are represented in the Senate by two men: Senators; and this without regard to whether the aggregate is great or small, so it is a State. But the House of Representatives, representing the people, is very differently constituted. The State of New York has two Senators and thirty-three Representatives; the State of Delaware has two Senators and one Representative. Now, manifestly, the vote of the Delaware Senators counted along with her one Representative would weigh more than the votes of the New York Senators counted along with her thirty-three Representatives. Such a plan follows no analogy of the Constitution, is not in accordance with the theory of the Constitution, and is, I believe, not the safest or best plan; and this applies also to the amendment of the Senator from Virginia, [Mr. Johnston,] which reads as follows:

"If the Senate should vote for counting one certificate and the House of Representatives another, the joint meeting of the two houses shall finally determine which shall be counted, by States, the representation from each State, including the Senators therefrom, having one vote; but if the representation of any State shall be equally divided, its vote shall not be counted."

The amendment of the Senator from Tennessee [Mr. Cooper] is plausible and would seem to rest upon the supposed analogy between a total failure of the electoral college to elect and the case under consideration, which is a partial failure, in ascertaining by the concurrent vote of the two houses how one or more of the States voted, whereby they would be thrown out and thus make a partial failure in the electoral college unless a plan is devised to save the vote, and his plan is presented, based, I think, on this supposed analogy. His amendment is:

"And if the two houses do not agree as to which return shall be counted, then that vote shall be counted which the House of Representatives, voting by States in the manner provided by the Constitution when the election devolves upon the House, shall decide to be the true and valid return."

Now the States as bodies-politic are directly interested in having true and valid returns of the people's votes through their electors. So are the people directly interested in their primary capacity. The question is not the same as that which arises in the House of Representatives when the election of President devolves on that body. The election in the House takes place from the persons having the highest numbers, not exceeding three, on the list voted for as President. There may have been more than three voted for. In that case the Representatives of the State or States whose people voted for one of the dropped candidates cast about for a second choice, and when the third man is dropped his supporters go to a next choice. But in the case in hand it is not at all a question of choice. It is a question of justice and common honesty. The question, and the only question is, which is the true and valid return? Which represents truly the will of the people as expressed through the electors? In the one case politics have all to do. In the other case, if we are honest, politics have nothing to do. But as I believe Congress (always confining the settlement of this question within itself) can constitutionally adopt this plan, my opposition to it is that I do not think it the wisest and best. Then can the question be constitutionally settled and the rights of the people and of the States saved by a plan alike just to all? The first section of the bill under consideration is, in my judgment, substantially correct. It looks to only one certificate from a State. If the two houses agree, there is an end of it. If they disagree, the vote shall nevertheless be counted. This is according to well-known principles of law, and I have heretofore said all in regard to that section I care to say.

The second section, so far as it goes, is to me unobjectionable. The trouble is it does not go far enough to provide a remedy to meet an unfortunate case that has arisen in our history, and may again: that is to say, where two certificates come up from the same State, both seemingly of equal dignity and validity. What are you going to do about it? That section reads:

"That if more than one return shall be received by the President of the Senate from a State purporting to be the certificates of electoral votes given at the last preceding election for President and Vice-President in such State, all such returns shall be opened by him in the presence of the two houses when assembled to count the votes; and that return from such State shall be counted which the two houses, acting separately, shall decide to be the true and valid return."

This section rightly requires the President of the Senate to open all the certificates. If the two houses agree that one is the right certificate, then there is no contest, and that certificate ought to be counted. But suppose one house votes that one certificate is true and valid, and the other house votes the other certificate true and valid, then what do you propose to do about that? I asked that question of the Senator from Indiana the other day, and he replied that in that case the vote of the State would fall. He deplored this result, but saw no way then of avoiding it. That cannot be. We must give force and effect to every part of this constitutional provision, if this be possible. Justice to the States, to the people, to the whole Union, a sacred regard for the peace and stability of the Union, demand that this problem should be solved.

The clause of the Constitution under consideration reads:

"The President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates, and the votes shall then be counted."

Clearly all the votes embraced in the true and valid returns or certificates are to be then counted; not part, but all; not at some future time, but then. Now, it follows that, of those presented, one from each State is the right return; but one house says one is valid; the other says the other is valid. It is no uncommon thing in legislatures and courts that opinions divide; still, in a judiciously-organized court, or in a legislature, we get a binding decision of the question. So I think we can here.

Clause 4, section 3, article 1, of the Constitution reads:

"The Vice-President of the United States shall be President of the Senate, but shall have no vote, unless they be equally divided."

Clause 5, same section, reads:

"The Senate shall choose their other officers, and also a President *pro tempore* in the absence of the Vice-President, or when he shall exercise the office of President of the United States"

Now, here we have two organized bodies—the Senate and House of Representatives—required by the Constitution to be present when the certificates are opened and the votes counted, and the President of the Senate is also required to be present, and to open all the certificates. None others are required to be present. In an orderly proceeding, such as this great occasion demands, a presiding officer over these two organized bodies, assembled for a common purpose—the two bodies that comprise the legislature of this Union—is necessary in the due order and eternal fitness of things. When these two bodies thus act, the senior presiding officer should preside, to wit, the President of the Senate, and this bill recognizes this fact and so provides.

Section 1, after providing for the assembling of the two houses, goes on, in lines 7 and 8, * * * "and the President of the Senate shall be their presiding officer."

Now, here we have an organization, and a presiding officer over that organization. A Senate, separately organized, representing States, which, as an organization, can withdraw in an orderly manner, and the House, representing the people, which can in like manner withdraw. Their deliberations concluded, they return and report to the common presiding officer, who is the second officer of the Government, and ordinarily elected by the people, filling the double capacity of Vice-President of the United States and President of the Senate. Suppose the House decides in favor of one certificate, the result is announced, and that is the vote of the House. Suppose the Senate decides in favor of the other certificate, the result is announced, and that is the vote of the Senate. Now, these two votes are of precisely equal weight and equal dignity. In all like cases the vote of the presiding officer decides the question, and so it should be here, and, in my judgment, this is the true solution. The Senator from Maryland read the opinion of Chancellor Kent in support of his position. The opinion read by him, I think, precisely accords with the opinions I have expressed. Chancellor Kent presumes that, in the absence of all legislation, the President of the Senate should count the votes as well as open all the certificates. It follows that, in the presence of legislation devolving the counting of the votes in the first instance upon the two houses, the President of the Senate would not have such authority. But another valuable lesson is learned from this same opinion of Judge Kent. If, in the absence of legislation, the President of the Senate could count the vote, then, *a fortiori*, in the presence of legislation devolving this duty upon him, (he being part of the Senate, and thereby of Congress,) most assuredly, in a certain contingency, he could count the vote.

Now where the two houses fail to agree it is the same in result as if no law had ever passed authorizing them to count the vote, in which case, applying the views of the distinguished chancellor, the count would fall upon the President of the Senate. The precedent relied on by the Senator was not a precedent under the Constitution, but a

plan adopted to put the machinery of the new Government in motion under the Constitution.

I will recall to the minds of Senators a few facts of history at this point which perhaps throw some light on the precedent from which the Senator from Maryland has read. The Congress of the Confederation was in session at the city of Philadelphia in 1787, at the same time that the convention was in session. The convention, having closed its labors, through its president, General George Washington, made report thereof to the Congress of the Confederation. In that report you will find, over the signature of General Washington, this recommendation, (and I will read only so much as pertains to the question before us):

"That the Senators should appoint a President of the Senate for the sole purpose of receiving, opening, and counting the votes for President; and that after he shall be chosen, the Congress, together with the President, should, without delay, proceed to execute this Constitution."

Thus it will be observed that the purpose and design of this was to pass without a shock from the old Government under the Articles of Confederation to the new Government under the new Constitution; and as Congress had never yet sat, as the Constitution had not been set in action, as the machinery of government had not been put in motion, the convention which framed the Constitution recommended to the Congress of the Confederation this mode. The Congress of the Confederation submitted by a resolution the work of the convention to the States for their ratification or rejection. At the first session of the First Congress succeeding the ratification of the Constitution by more than nine States, this resolution was introduced, that a President *pro tempore* of the Senate should be appointed for the sole purpose of receiving and counting the electoral votes. It was not a precedent under the Constitution, but, a precedent adopted for the very purpose of setting the machinery of the Constitution in operation. Therefore I think that precedent is not applicable to the case at bar.

Where the presiding officer is President of the Senate *pro tempore*, then I think his State cannot be deprived of its equal vote in the Senate; still, while in this exceptional case the President of the Senate *pro tempore* acts in a double capacity, I do not think it at all changes the conclusions to which I have arrived.

An objection has been urged that the Vice-President may be a candidate for re-election or for the Presidency. So may any man or men you select, if they possess the constitutional qualifications; so that if this proves anything it proves too much. In the argument I have made I have not in the slightest degree taken into the account what may be the effect on parties. I have tried to arrive at a plan constitutional, simple, and most likely to prove satisfactory to the whole people. In conclusion, permit me to say that I rejoice that so great a question has been all the way through calmly, deliberately, and intelligently discussed in a spirit of fairness and freedom from partisan spirit, and I trust the wisdom of the Senate will devise some plan to meet every phase of this great question with which both houses of Congress and the country will be satisfied.

In view of what I have said, Mr. President, I would suggest though it is not in order now, at the end of the second section to add:

"But if the two houses fail to agree as to which of the returns shall be counted then the President of the Senate, as presiding officer of the two houses, shall decide which is the true and valid return, and the same shall then be counted."

Mr. JONES, of Florida. Mr. President, I do not come before the Senate to-day with any plan to remedy this great difficulty. Much has been said here which meets my approval, and many plans have been proposed for adoption; but I propose to discuss the question as a constitutional question, and I intend to present to the Senate the reasons why I cannot support the present bill, or any of the amendments that are now proposed.

The bill before the Senate implies so much that we ought all be loath to admit that nothing but the strongest reasons should induce us to pass it even if we had the power. It presupposes contingencies and dangers that can never arise under a healthy administration of the governments of the States of this Union.

I believe that this bill involves a plain departure from the Constitution, and provides machinery for determining the will of the people in elections for President and Vice-President not warranted by that instrument.

In principle it does not differ at all from the twenty-second joint rule, so much condemned by Senators on this floor. That rule authorized either house of Congress to throw out the electoral vote of a State or of ten States, when objection was made to them. This bill gives jurisdiction to the two houses of Congress to do the same thing in a less offensive manner; for it provides that, if objection be made to the certificate from any State, the vote of such State may be excluded altogether by the two houses of Congress.

The second section goes much further than this, and provides that, if more than one return shall be received purporting to be electoral certificates, all such returns shall be

opened by the President of the Senate; and it is left to the two houses, acting separately, to say whether any returns from such State shall be received or not.

Let us analyze these sections, and see what cases they provide for. The first section provides for the case of a single electoral return from a State to which objection of any kind is made by anybody and stated by the President of the Senate. The moment objection is made this law gives to the two houses of Congress authority to settle the disputed question by rejecting the vote of one State, or of ten States, if the two houses should concur in such rejection.

The law does not inform us what must be the character of the objection or whence it must come, in order to justify the exercise of such an extraordinary power or jurisdiction. Shall the objection be technical or substantial? Shall it relate to the form of the certificate, the authority of the electors who signed it, or of the governor who certifies to their identity? Shall the objection prevail for the want of a seal to the certificate, or other formal requirements, or must it go to the very right and title of the persons claiming to be the legally-elected electors?

This part of the bill vests an absolute power of rejection in the two houses, for it makes the vote of each State depend upon the will and pleasure of these bodies. I cannot imagine a case where there is but a single certificate of election in which either house of Congress, or both houses, would be justified in rejecting it.

The second section of the bill provides for the case of two returns, a contingency that is hardly supposable except in a case of revolution. The Constitution vests in the several States the power to select in their own way the electors for a President and Vice-President. Those officers, although vested with a duty which concerns the whole Union, are not officers of the United States. They are elected in conformity with the State laws, the same which govern the election of members of the legislature, governor, and other local officials. They may be appointed by the legislatures or they may be elected by the people of the several States.

The view entertained of their duties by the framers of the Constitution, as we know, was very different from that which now prevails regarding them. It was expected that they would exercise an independent judgment in voting for President and Vice-President. But we know that under the present practice they meet only to record the will of those who elected them. But the mode and manner of their election was left to the laws of the States. This of necessity involves the right to determine all cases of contest arising out of the claims of rival candidates.

The Constitution of the Union was created by people living under organized governments, and it was intended to operate over them only in that state. In construing the Constitution we must look to the view which was entertained by its framers of the powers of the electors. They are to be selected by the States in such manner as their legislatures shall determine. It was intended that they should vote for whomsoever they pleased for the two first offices in this Government.

No person holding any office of honor and profit under the United States can become an elector. No Senator or Representative in Congress can become such. The selection of those officers was left exclusively to the States, and every question arising out of their election or appointment was left of necessity with the same authority. The laws of the States provide the manner in which these persons shall be chosen, and they may provide also who shall determine in cases of contest and difficulty the persons who have been duly elected. Whatever may be the decision of the State authorities, or by whom made, it is binding on the United States. This bill proposes to take this power from the States and vest it in Congress, because I contend that the right of ultimate decision between two persons claiming a single office is a right which flows from the authority, and the authority alone, that orders and controls the election. Will any one deny that the States cannot provide by law for determining cases of contest between opposing candidates for the office of elector? If they can, and the tribunal fixed by the local law is vested, as it must be, with the right of exclusive judgment, how can the same power of decision be exercised by another authority under a distinct government?

This power belongs either to the States or to the Union. If to the latter, it cannot be reconciled with the express authority vested in the States by the Constitution.

But it may be said, Mr. President, that the object of the present law is to provide for the case of two rival governments, and that it is intended to give to Congress the power to decide between them when determining the electoral vote of the State. Sir, I protest against this dangerous doctrine. There is no such power vested in Congress or in either house of Congress. If this or the other house has authority to decide the question at all, it must be an exclusive authority, an authority from which there can be no appeal.

The Constitution contemplates that all the States of this Union shall always be connected with this Government by certain constitutional ties. In the very nature of things, there never can be but one government in a State with which this Government can have constitutional relations, or that can claim recognition from the authorities of the United States.

The governments of the original States, differing as they did in many respects, were all recognized as legal governments, and so were all the governments of the States admitted into the Union afterward. But the framers of the Constitution were far-seeing men, and they foresaw that it was possible that the State governments, having legal relations with that of the United States, might be overthrown by usurpation or domestic violence too powerful for the local authorities to resist. And what did they do? Did they leave the matter to be decided by one or both houses of Congress when the electoral vote of the State was counted? No, sir. They *made* it the duty of the United States to guarantee to each State a republican form of government, and to protect them against invasion, and, upon application of the legislature or the executive, against domestic violence.

It is impossible in the very nature of things that the lawful and rightful government of a State can be destroyed, or a rival power established or put in operation, if this authority vested by the Constitution in the United States is faithfully and honestly exercised. It will be apparent that the Constitution contemplates that there will always be in existence in each State either an executive or a legislature which will be entitled to make the application provided for in case of threatened danger to the local government.

It is true that it is not every case of local disturbance that will call for the exercise of Federal power; but I do say that this is the remedy provided by the Constitution for maintaining intact the lawful governments of the States, and to enable them to fulfill the duties which they owe to the people and to the United States.

What right have we to suppose that there will be two certificates from two sets of electors and two governors? The electors must all be elected under the State laws and certified by the governors of the States. These laws all provide for the canvassing of the votes by State officers, who are sworn to perform their duties. The governors are all sworn likewise to do their duty and are liable to impeachment if they willfully fail to perform it.

This bill looks only to the certificates of the electors; but it is manifest that under an authority to look into the certificate of the elector the right will be claimed, and may be exercised, to inquire into the election of the electors themselves.

Now, I wish to know if gentlemen are willing that either house of Congress, in any event that can be supposed or imagined, shall go into an investigation of an election in a State held for electors of President and Vice-President. And that is what this bill proposes to authorize.

Now, I say that it would be as just, as proper, it would be as constitutional to give to Congress the power to investigate State elections held for governor and other local officers as it would be to authorize the same body to investigate elections held for electors. This is a proposition which I defy any one to dispute.

The right of the States to elect or appoint electors, although derived from the Federal Constitution, is just as complete and perfect and independent as the right to elect a governor. The act provides that, if more than one return shall be received by the President of the Senate purporting to be certificates of electoral votes, that return shall be counted which the two houses, acting separately, shall decide to be the true return.

The houses are to withdraw to discuss and decide this question, and although debate is limited to two hours there is no limitation as to the time the investigation shall last or the range it shall take. On the contrary, the houses, instead of being confined to the objection raised to the returns, may also decide any question pertinent thereto, and Congress is the sole judge of what is pertinent. And then the law, instead of providing that the main question shall be put after debate, simply gives the power to the majority to direct that it shall be put. Is it not known to Senators that elections take place in all States for legislatures and State officers on the same day that the election is held for President; that both elections are held under the same law, by the same officers?

Now by giving authority to Congress, as is proposed by this bill, to decide upon the validity of an election held for electors, you open up the whole subject of State elections to the review of Congress. You give to this body and the other house the power to strike down the most essential rights of the States, and make the right to vote by ballot at a State election an empty privilege to be exercised subject to the control and censorship of Congress.

Why, sir, under the second section of this bill, either house of Congress can bring the whole returns of a State election here or can send a committee to the State and investigate anything and everything they please in connection with a local election. Yes, sir, and, in defiance of State laws and constitutions, Congress can disregard the sanctity of the State ballot, and can force the citizen under oath to disclose how and for whom he voted.

This is a power which never was intended to be lodged in either house of Congress. But it may be said that the bill only gives to the Congress the right to decide which is the true return, and that in the absence of some provision of law the same right

will devolve upon the President of the Senate. I deny that this is so. The right to decide which is the true return in the case provided for by the bill, if it means anything, means a right of determining whether or not the electors who made them were legally elected.

How is this question to be settled? Certainly not by looking at the face of the returns. It can only be decided by investigating the primary election. The case contemplated by this law is not the case of double returns coming from the same body of electors—that is a case which is not supposed—but it is the case of two returns coming from two rival bodies of electors.

In the first case the only question would be, who received the majority of the electoral body? But in the other case, and the only case which the second section of this bill provides for, the question always must be which of the rival bodies whose returns are before us was legally elected; and a mere statement of the proposition is enough to show to any mind what is involved in such an inquiry.

The President of the Senate is invested with no such power by the Constitution. It is true that it was expected that such a thing as two rival powers in a State might exist, but the Constitution did not intend to leave the decision of the claims of such powers to recognition to the judgment of either house of Congress. The President of the Senate was assigned a simply ministerial duty, to count the electoral votes in the presence of the two houses of Congress, and, in view of the safeguards provided against usurpations and illegal governments in the States, it was not thought possible for any returns to find their way here except such as came from the local authorities of the States having recognized constitutional relations with this Government.

The United States had pledged all their power to the executives or legislatures of the States in order to protect them against illegal authority. The simple recognition by President Tyler of the charter government in Rhode Island had the effect of ending the contest in that State between the rival powers. Suppose in that case the Dorr party had elected presidential electors and they came here with certificates, would there have been any trouble in deciding whether or not they should be received? The duty of the President of this body was the same at that time as it is now. Yet I imagine no one will say that he would have had any discretion to exercise in counting the vote of Rhode Island.

Mr. President, this Government was founded in a great part upon the virtue of the people. It was not expected, sir, that our rulers would require penal statutes to compel them to discharge their duty. When Mr. Webster was reminded that the States by refusing to elect Senators could stop the operations of this Government, his reply was, that it could not be done except by blackening the souls of State officers with perjury. If we have arrived at that point when we cannot trust our highest officers in the discharge of their plainest duties because of their party feelings and prejudices, we may rest assured that all the legal ingenuity of this body will not be able to devise laws that will preserve the principles of our Constitution.

The first section of this bill, as has been said by some of the Senators who have spoken, is comparatively harmless. It provides for the case of a single electoral certificate to which somebody may make an objection, and thus devolve upon the two houses of Congress the unpleasant duty of deciding the question. It is the second section that is so full of danger, in my opinion. It attempts to provide a remedy for the case of two electoral returns sent here from a State.

Now I submit to the Senate whether it would not be better to try and prevent two returns from coming here than to undertake to constitute a tribunal to decide between them after they are received.

We know that it was never contemplated that more than one electoral return would come from a State. In the nature of things there can be but one legal return. It never was intended that the President of the Senate should receive more than a single certificate of the electoral vote of any State, and his duty under the Constitution is purely ministerial to count the vote.

It never was the purpose of the Constitution that any contest whatever should be carried on here respecting the vote of a State for President and Vice-President. The danger in such a case depends not so much upon the fact of two returns, as upon the body which undertakes to decide between them. If the decision of the question is remitted to the State in which the contest arises it is impossible that any trouble can flow from it.

Senators have spoken with great force and emphasis of the propriety of following as near as possible the spirit of the Constitution in framing a law upon this delicate subject. Now does it not occur to every one that the great source of danger in this case lies in the jealousy between the State and Federal authorities?

If a State should fail to vote or should voluntarily refuse to send here her electoral returns, such contumacy could lead to no serious trouble. But if this body were to disregard the vote of a State, such action would excite at once a spirit of indignation, if not resistance, unless the very clearest grounds and reasons could be given for such a proceeding. But, sir, the assumptions of this bill amount to the assertion on the

part of each house of Congress of an arbitrary right of rejecting the electoral vote of a State. In the event of two returns coming here, that one shall be received which both houses, acting separately, shall decide to be the legal return.

This language is calculated, I think, to create a misconception as to its true meaning. It may seem to imply a duty on the part of each house to canvass the vote and count in the return of the State. This is not the case. The sense of the section may be stated thus: When two returns are received by the President of the Senate from any State, the vote of such State shall not be counted unless each house of Congress, acting separately, shall so decide. I say that this amounts to an arbitrary right of rejection on the part of the two houses of Congress.

There is no cause stated in the bill which must be found to exist before the State is disfranchised. There is no mode of trial pointed out which shall precede the judgment of the House upon this momentous issue. No provision is made for securing to the State interested an opportunity to be heard before a judgment is rendered against her. The Senate or the House may resolve to do this business in secret, and exclude the world from all knowledge of the grounds of their decision.

The Constitution contemplates that the counting of the electoral vote and all decisions affecting it shall be made under circumstances which place it beyond the power of either house of Congress to withdraw their proceedings from the public gaze. We know that when they meet together in the hall of the House of Representatives to witness the counting of the electoral vote, they are beyond the operation of those rules and principles which were intended to control them in their legislative character. The two houses can do no legislative business together, and the whole legislative power of the Union is vested in them in their separate character as Senate and House of Representatives.

As I said a while ago, it is insisted that the power of decision proposed to be given by this bill is the same that may now be exercised by the President of the Senate in the emergency stated; that this right flows as an incident from the duty devolved upon that officer to count the votes. This proposition is to me very illogical; for, if the President of the Senate has a right under the Constitution to decide all questions incident to the counting of the votes, how can Congress take it from him and vest it in another body? Upon the other hand, if no power of rejection is vested in the President of the Senate by the Constitution, such as this bill gives to the two houses, on what principle of constitutional law can it be claimed that an omission in the Constitution to vest this power in any body or officer can furnish authority for the two houses of Congress to confer it upon themselves?

The Constitution has provided the mode and manner of returning and counting the electoral votes. It took jurisdiction of the whole subject. Its sense and meaning are to be collected as well from what it has omitted as from what it contains.

When the great case of *Gibbons vs. Ogden* was before the Supreme Court of the United States, Chief-Justice Marshall, for a time, was very greatly embarrassed in his judgment by the powerful arguments that were made at the bar.

Mr. Emmett, one of the distinguished counsel, maintained that, while the Constitution vested Congress with the power to regulate commerce, so long as Congress did not exercise the whole power, it was competent for the States to legislate in respect to any branch of the subject not provided for by some positive legislation of the General Government.

Mr. Webster replied (and this was the argument that impressed itself most upon the mind of the great judge) that, while there were some powers in the Constitution that were not in their nature exclusive and were not inconsistent altogether with legislation on the part of the States, still the commercial power was exclusive, and when this was conceded it was possible that Congress intended, by omitting to legislate touching a particular subject, to exercise the very power of regulation which was conferred upon Congress by the Constitution.

▲Now, sir, there are some parts of the Constitution to which this argument can fairly be applied when the question is whether a particular power is vested in Congress by the Constitution. I know that Congress is invested with the power to pass all laws which may be necessary and proper for carrying out the powers vested in the Government or any officer or department thereof.

The authority proposed to be given to the Senate and House of Representatives by this bill cannot surely be derived from any of the express powers of the Constitution. There is not a word said in the article which contains the delegated powers on this subject of counting the electoral votes. All that the Constitution says in regard to the electoral vote is to be found embodied in the second article. That article provides the mode and manner of returning and counting that vote. If it was intended that Congress should exercise authority over this subject by general legislation, why is it that the Constitution, instead of giving as in other cases a general power to Congress, has anticipated such legislation by a lengthy provision specifying particularly the manner in which the voice of the electors shall be ascertained? It was not the intention of the Constitution to leave to Congress the power to determine how the Presi-

dent and Vice-President should be elected. This is clearly indicated by the express words of the first section of the second article. After vesting the executive authority in these officers, it provides that they shall be elected as follows:

"Each State shall appoint, in such manner as the legislature thereof may direct, a number of electors equal to the whole number of Senators and Representatives to which the State may be entitled in the Congress; but no Senator or Representative, or person holding an office of trust or profit under the United States, shall be appointed an elector."

After having stated in detail how the election shall be held and the returns made, the very same section specifies the part which Congress may take in this important business. It says:

"The Congress may determine the time of choosing the electors, and the day on which they shall give their votes; which day shall be the same throughout the United States."

If the framers of the Constitution had supposed that Congress, under the general power to pass all laws necessary and proper to execute the powers of the Union, could determine the time of choosing the electors and the day on which they should vote, they were certainly at fault for having encumbered the Constitution with this unnecessary provision.

This clause shows that they weighed this subject with great care, and that they thought it necessary not to leave to Congress any implied power over the election of President.

Now, sir, the power to decide whether the votes of two or ten States shall or shall not be counted is a far more important and delicate power than that given to Congress in express terms to fix the time of choosing the electors. And am I not warranted in saying that, if the Constitution intended that Congress should have any more extended power than is conferred by this clause, it would have said so in plain language?

The right of Congress to exercise implied powers cannot be doubted. But it cannot be denied that, in exercising implied powers, we are limited by the purposes for which they were granted for carrying into execution the expressly delegated authority of the Constitution.

We may pass laws which are necessary and proper for carrying into execution the foregoing powers and all other powers vested by the Constitution in the Government of the United States, or any officer or department thereof. This is the language of the Constitution.

We have seen that all the power vested by the Constitution over the election of President is to be found in the articles of the Constitution which I have cited. This limits the authority of the two houses over such election to the right of being present at the counting of the votes and to fix the time of choosing electors and the places where they shall vote. Can we derive the authority to decide in the last resort between two electoral returns from a State from the power conferred upon us to witness the counting of the votes?

But, sir, I am free to admit that the evils apprehended by this bill and the several amendments proposed call for some remedy. And while I am well satisfied that we have no authority to give to either house of Congress, or to any other body or tribunal, the power to determine whether or not the electoral vote of a State shall be counted, I still believe that we have authority under the Constitution to so guard the rights of the lawful governments in the States as to render the difficulty which must flow from two returns impossible.

Now, sir, the guarantee clause in the Constitution was intended, first, to protect each State against invasion; secondly, against a usurpation of its government by preventing the overthrow of a republican form of government; and, thirdly, the protection of their governments against domestic violence. The guarantees against invasion and to secure a republican form of government were intended for the benefit of the people of each State, independent entirely of their State organizations. It was apprehended that the ambition of their local rulers, yielding to the influence or seductions of foreign enemies, might, as in the ancient confederacies, induce them to place the people under a foreign yoke and subvert their local governments. Hence the right to interfere in case of invasion or to enforce the guarantee of a republican form of government is not made to depend upon the application of either the legislature or the executive of the State; but the guarantee against domestic violence, which was intended to protect the local government, can only be made effectual when application is made in due form by the organs of such government—the legislature or the executive.

The object of the last guarantee was to secure to each State a single lawful government, and the whole power of the Union is pledged to secure that end. I am sure that I need not argue here that so long as there exists in a State but one legal government, with fixed relations toward this Government, such a difficulty as that provided for by this bill cannot arise.

Congress, as the representative of the sovereignty and power of the United States, is charged with the high duty of carrying out these guarantees. It is beyond doubt

its duty to secure the rightful government of each State against such violence as may prevent its authorities fulfilling their duties toward the United States by electing Senators and electors.

When there are two legislatures and two governors, Congress must decide which of them is legal. This is what Chief-Justice Taney called "political recognition." And when this is done, the acts and proceedings of the authorities so recognized, in the language of the Supreme Court, bind all the departments and the officers of this Government.

The Supreme Court in the case of *Luther vs. Borden* decided that it was competent for Congress to designate a court and give to it power to decide when the exigency had arisen when the power of the United States should be interposed to protect the lawful government of a State. Why may not such a tribunal be designated now; one which is placed by the character of its judges above all suspicion of party bias or prejudice, and to which the whole country can look up with confidence when difficulties come upon us? If such a tribunal can be designated, or if Congress itself will exercise with fairness and justness this high power conferred upon it by the Constitution, you need have no fear, sir, that two electoral returns from a single State will ever find their way here.

It has been argued by Senators on this floor since this debate began that this is a judicial function; that the duty proposed to be given to the Senate and the House is judicial in its character. Some say that it is ministerial. The Senator from Indiana [Mr. Morton] says it is judicial. I have but this to say, in concluding my remarks, that if this be a judicial duty, I want Senators to answer me where this body gets power to delegate a judicial function to either house of Congress.

The Constitution provides that all judicial power "shall be vested in one supreme court, and in such inferior courts as the Congress may from time to time ordain and establish." All legislative power by the same instrument is vested in the Senate and in the House of Representatives; and all executive power is vested in the President. If this be, as some claim it is, a judicial duty, I ask, Where is the power to give it to either house of Congress?

MR. MERRIMON. Does not the Senate very often exercise judicial functions?

MR. JONES, of Florida. I do not think so. If it does, it is without the warrant of the Constitution. No judicial function belongs to this body except in the single case where the Constitution invests it with such power.

MR. MERRIMON. The very question is whether the Constitution itself has not imposed the duty upon Congress to count the votes and decide all questions in connection with the count.

MR. JONES, of Florida. I admit that the case of deciding whether a person is entitled to a seat on this floor or in the other House is an exception, because the Constitution has made it an exception, and we may, in determining upon the right of a Senator to a seat on this floor, exercise judicial functions; but when it comes to the delegating of judicial power generally, I do not believe that this or the other House has any right to delegate it except to some court in accordance with the Constitution.

THE PRESIDING OFFICER. (Mr. Mitchell in the chair.) The question is on the amendment of the Senator from New Jersey [Mr. Frelinghuysen] to the amendment of the Senator from Tennessee, [Mr. Cooper.]

MR. EATON. Let the amendment be read.

THE PRESIDING OFFICER. The amendment will be reported.

THE CHIEF CLERK. The first amendment was offered by Mr. Cooper, to add to the second section these words:

"And if the two houses do not agree as to which return shall be counted, then that vote shall be counted which the House of Representatives, voting by States in the manner provided by the Constitution when the election devolves upon the House, shall decide to be the true and valid return."

The pending amendment of Mr. Frelinghuysen is to strike out all after the word "agree," in the first line of that amendment, and insert:

"The difference shall be immediately referred to the Chief-Justice of the Supreme Court, the Presiding Officer of the Senate, and the Speaker of the House, whose decision shall be final. If the Chief-Justice is absent or unable to attend, the senior associate justice of the Supreme Court present in the Capitol or other place of meeting shall act in his place."

THE PRESIDING OFFICER. The pending amendment is the one offered by the Senator from New Jersey.

MR. STEVENSON. I ask for the yeas and nays on that amendment.

The yeas and nays were ordered.

MR. JOHNSTON. I thought the amendment of the Senator from New Jersey was the one pending before the Senate.

THE PRESIDING OFFICER. It is the pending amendment, being an amendment to the amendment offered by the Senator from Tennessee.

MR. RANDOLPH. I think the Senator, and perhaps the Senate, is under some misap-

prehesion as to which amendment is pending. The question is not on the amendment offered by the Senator from New Jersey now on the floor. The question is on the amendment of my colleague.

Mr. JOHNSTON. I so understood.

The question being taken by yeas and nays, resulted—yeas 20, nays 29; as follows:

YEAS—Messrs. Allison, Anthony, Bruce, Burnside, Cameron of Pennsylvania, Conkling, Dawes, Ferry, Frelinghuysen, Hamlin, Howe, Logan, McMillan, Morrill of Vermont, Morton, Paddock, Robertson, Sharon, West, and Windom—20.

NAYS—Messrs. Bayard, Boggy, Booth, Boutwell, Christiancy, Cooper, Davis, Eaton, Goldthwaite, Gordon, Ingalls, Johnston, Jones of Florida, Kelly, Kernan, Key, McCreery, McDonald, Maxey, Merrimon, Mitchell, Norwood, Randolph, Ransom, Saulsbury, Stevenson, Thurman, Whyte, and Withers—29.

ABSENT—Messrs. Alcorn, Cameron of Wisconsin, Caperton, Clayton, Cockrell, Conover, Cragin, Dennis, Dorsey, Edmunds, English, Hamilton, Harvey, Hitchcock, Jones of Nevada, Morrill of Maine, Oglesby, Patterson, Sargent, Sherman, Spencer, Wadleigh, Wallace, and Wright—24.

So the amendment to the amendment was rejected.

The PRESIDING OFFICER. The question now recurs on the amendment offered by the Senator from Virginia [Mr. Johnston] to the amendment offered by the Senator from Tennessee, [Mr. Cooper.]

Mr. JOHNSTON. I ask for the yeas and nays on that amendment.

The yeas and nays were ordered.

Mr. RANDOLPH. I suggest that the amendment had better be read.

The PRESIDING OFFICER. The Clerk will report the amendment.

The CHIEF CLERK. The amendment offered by Mr. Cooper is in the following words:

"And if the two houses do not agree as to which return shall be counted, then that vote shall be counted which the House of Representatives, voting by States in the manner provided by the Constitution when the election devolves upon the House, shall decide to be the true and valid return."

The amendment to the amendment, offered by Mr. Johnston, is to strike out all after the word "and," in the first line of the amendment just read, and insert:

"If the Senate should vote for counting one certificate and the House of Representatives another, the joint meeting of the two houses shall finally determine which shall be counted by States, the representation from each State, including the Senators therefrom, having one vote; but if the representation of any State shall be equally divided, its vote shall not be counted."

Mr. MORTON. I voted for the amendment offered by the Senator from New Jersey [Mr. Frelinghuysen] because, if we are to establish an umpire to decide between the two houses, I believe his amendment much preferable to that offered by the Senator from Tennessee, [Mr. Cooper.] I believe, however, the proposition to vote by States, whether the vote is to be cast entirely by the members of the House of Representatives or cast by them in conjunction with the Senators, to be the most objectionable plan that could be adopted.

Mr. STEVENSON. I am aware, Mr. President, of the difficulty involved in the solution of this question, nor do I undervalue its magnitude. I have given to its consideration the time and reflection which its importance demands. I have sought light in the ways of our fathers in the early Congresses. I have listened with great interest to the very able discussion which the subject has evoked in the Senate; and I frankly confess, sir, I have been unable to reach the conclusion that any of the legislation proposed by the pending amendments is sanctioned by the Constitution.

I concur in the able argument of the Senator from Maryland, [Mr. Whyte.] I agree with him that the President of the Senate of the United States is the only agency selected by the framers of the Constitution and named in that instrument as invested with the sole power of receiving, opening, and counting the votes for President as returned by the electoral colleges and of declaring the result of that election. The Constitution declares that—

"The President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates, and the votes shall then be counted. The person having the greatest number of votes shall be the President, if such number be a majority of the whole number of electors appointed; and if there be more than one who have such majority, and have an equal number of votes, then the House of Representatives shall immediately choose by ballot one of them for President; and if no person have a majority, then from the five highest on the list the said House shall in like manner choose the President. But in choosing the President, the votes shall be taken by States, the representation from each State having one vote; a quorum for this purpose shall consist of a member or members from two-thirds of the States, and a majority of all the States shall be necessary to a choice."

Such I take to be the meaning, if not the very letter of the Constitution. Let us look to it as I have quoted it, words touching the duty of the Vice-President. The provision on this subject must be looked to as a whole and so construed as to make all

its parts harmonize. The Constitution provides for the election of President of the United States. It was not by a direct vote of the people, but by a number of electors equal to the whole number of Senators and Representatives to which the State may be entitled, but with this important exclusion that no Senator or Representative or person holding an office of trust or profit under the United States shall be appointed an elector. Mark that, sir. The Constitution further requires that these electors shall meet in their respective States and vote by ballot for two persons—one for President and the other for Vice-President.

These electors are required to make a list of all the persons voted for and of the number of votes for each; which list they shall sign and certify and transmit sealed to the seat of Government, directed to the President of the Senate. This was a singular and somewhat curious innovation upon popular suffrage. It was a well-guarded instrumentality of an electoral college through which the popular voice was to select the President and Vice-President instead of by a direct vote. It seems to have been especially guarded from congressional interference in forbidding any Federal officer to become an elector. When these electors had been elected by the people and cast their votes in such manner as the legislatures of the respective States might by law declare, then the results of the respective ballots by these electors in each State for President and Vice-President were transmitted to the seat of Government, directed to the President of the Senate.

Then come the provisions of the Constitution already quoted by me above, prescribing the duties of the President of the Senate touching these returns. No one doubts that the President of the Senate is to break the seals of the certificates from the electoral colleges as to the votes for President and Vice-President. No one doubts that this duty is to be done in the presence of the Senate and House of Representatives. And the votes shall then be counted. That is, the tellers are to put down the whole number of votes cast by the electors for President and Vice-President as shown by these certificates opened by the President of the Senate, and the result is then announced by him. This opening and counting by the President of the Senate is to be done without interference and without restriction, as I think, from any quarter. This is what I think is the true language and intentment of the Constitution.

The President of the Senate shall, in the presence of the two houses, open all the certificates, and the votes shall then be counted. By whom? Clearly by him to whom they were directed; by whom they were opened; counted in the presence of the two houses of Congress, as chosen witnesses selected by the Constitution to see that the certificates of the electors were all counted, and the results of such certificates to be recorded by the tellers; and the result was then to be announced by the President of the Senate whether any one had received a majority of the whole number of electors appointed, for President and for Vice-President. If so, then the persons receiving such majority for President and such majority for Vice-President were to be declared by the President of the Senate duly elected President and Vice-President of the United States. But it is insisted that because the Constitution does not use the words "by the President of the Senate" after the words "shall then be counted," that the two houses of Congress and not the President of the Senate are to count the votes for President and Vice-President.

I cannot concur in this construction. I do not believe that the two houses of Congress are invested by the Constitution with any such power. I do not believe that the framers of that instrument ever intended that Congress should have any power or jurisdiction whatever over the certificates of the electoral colleges. Neither the spirit nor letter of the Constitution clothes them with any such power. No provision seems to have been made for a contested election of President or Vice-President by the framers of the Constitution. To reach and provide for such a *casus omissus*, the Constitution must be amended.

Had our fathers provided for such a contested election, I do not believe that they would have intrusted it to Congress. They were careful to guard all members of Congress and all Federal officers from being eligible as electors.

The very vice of the legislation proposed by these amendments is to give to Congress a power and control over the certificates of the electoral colleges that I wish to guard against.

The President of the Senate was the chosen instrumentality provided in the Constitution to open and break the seals of these certificates, in the presence of the Senate and House of Representatives, count the votes evidenced by these certificates, and have them recorded by the tellers.

Nobody doubts the power of the President to announce the result of the ballotings of the electoral colleges when ascertained by an examination of these certificates. And yet there is no express words in this clause of the Constitution which declares he must announce this result. It is but a direct legal implication of precedent words. So I insist that the words "shall then be counted," following the words empowering the President of the Senate to break the seals and "open all the certificates," evidently mean that the counting shall be by him. Why, Mr. President, the whole counting

amounts to nothing more or less than the enumerating of the action of the electors. It is merely ministerial. The President of the Senate cannot alter, suppress, modify, or change one iota of the results shown by these certificates from the electoral colleges. He merely ascertains the action of these electors and announces it. If no one has received a majority of all the electors appointed in the several States, then the House of Representatives is to elect the President, giving each State one vote.

If two candidates have received an equal number of votes for President and there is a tie, then Congress does not decide, but the House of Representatives is to choose one of them by ballot.

All these amendments assume a power in Congress over the presidential election which I utterly deny is conferred by either the letter or spirit of that great charter of liberty. At least as I read it—I beg Senators to pause—and as we have gotten rid of that odious joint rule which threatened such danger to popular government, let us stand by the action of our fathers until some amendment to the Constitution providing for a contested presidential election is proposed and adopted. I may be blindly in error in despite of my efforts to obtain light, but I see nothing but mischief in these amendments. I see no warrant in the Constitution for their enactment.

I voted against the amendment of the Senator from New Jersey, [Mr. Frelinghuysen,] not only because we, in my judgment, have no constitutional power to select an arbiter to decide a presidential election, but for reasons of obvious impropriety if the power existed.

It might so happen that the power of the Supreme Court might in some extreme case be invoked to settle judicially the title of an incumbent elected by the people to the Presidency; but, the certificates of the electoral colleges suppressed or their results not properly reported, I do not say that the Supreme Court are invested with such power. I see, however, that in the debate in 1857 on the counting of the electoral vote it was stated that the Supreme Court might be called on judicially to settle the title of a claimant under the popular vote to the Presidency.

I can without any stretch of fancy imagine a case—not very probable—where the people had clearly elected a President of the United States and the certificates showed a clear majority of votes of the electors as having been cast for him—if the President of the Senate should refuse in such case to announce the result of the vote of the electoral colleges, and in presence of the Senate and House of Representatives attempted, for any cause whatever, grossly to violate his trust by fraudulently withholding the certificates with a view of defeating the popular voice, that there might be relief afforded by the Supreme Court of the United States. I will not undertake to specify the mode. I will not say that the Supreme Court would possess such power. The very fact that such jurisdiction is barely possible is enough to defeat the amendment of the Senator from New Jersey.

Mr. HOWE. I want to ask the Senator to what debate he alludes.

Mr. STEVENSON. I think it was the debate in February, 1857, on the election of Buchanan and Breckinridge, when the vote of Wisconsin was counted by the President of the Senate although Wisconsin had voted on a day different from that prescribed by the act of Congress throughout the United States for the presidential election.

My recollection in that discussion is that at least one Senator stated that the power of the judiciary might be invoked in a case of wrong to pass on the election of President by the people in case of wrong or fraud. I do not remember that the statement was denied, although it may have been.

Mr. President, I deny that the power of Congress to witness the counting of the votes confers any power whatever upon that body to control the election of President, to correct any errors of the electors by exclusion, or to regulate a contested presidential contest. Still less can I consent to infer such a power from the clause relied on by the advocates of these amendments empowering the President of the Senate to open the certificates and count the votes in the presence of the Senate and House of Representatives.

Let us stick to the precedents of the early and better days of our fathers. John Langdon was elected President of the Senate especially to open and count the votes for President and Vice-President. For fifty years we went along under that practice, without mischief or bad results. Let us adhere to it. Let us not exercise doubtful power.

Mr. President, I will never believe, I cannot consent to believe, that any Vice-President or any President of the Senate will ever degrade himself, dishonor his country, and falsify his official vow by any improper tampering with returns and imposing on the people of the United States by fraudulently defeating the election of any one legally elected President of the United States. If he did, he would promptly be impeached and hurled from office.

Mr. MAXEY. I would ask the Senator from Kentucky this question: In view of the Blount case, suppose the President of the Senate should be a President *pro tempore*, and therefore not liable to impeachment?

Mr. STEVENSON. I suppose if he was President *pro tempore* he would discharge all

the duties of Vice-President. The language of the Constitution is, the President of the Senate.

Mr. MAXEY. But I ask if he would be liable to impeachment under that decision.

Mr. STEVENSON. I do not understand the Senator.

Mr. MAXEY. In the Blount case it was decided that a Senator is not liable to impeachment. Suppose the President of the Senate is a President *pro tempore*; as a matter of course he is a Senator, and under that decision he would not be liable to the penalty.

Mr. STEVENSON. I cannot undertake to prescribe punishment in every extreme possible case. If not liable to impeachment, he would be subject to punishment civilly and to popular degradation. What offenses of the President of the Senate are impeachable is a question which I decline to pass upon without due consideration; but the Vice-President of the United State, who is usually the President of the Senate, is subject to impeachment, and he is the official to whom we look and to whom I have referred. If Congress possesses the power to legislate on the returns of a presidential election, why may not Congress determine who has been elected President of the United States? Why may not Congress then exclude States on some alleged irregularity? Where, if this power be legislative, is it to end? The Constitution makes the House of Representatives, voting by States, the electors of President if no candidate has received in the electoral college a majority of all the electors appointed. But if Congress can count the votes of the electoral college—count returns and exclude certificates of electors under its constitutional power—then I have no faith in the permanency of our free institutions. Never have I heard before of the existence of such a power. I look back for fifty or sixty years and see how harmoniously and beautifully the action and construction claimed by me have worked. I am unwilling to change it. I will not anticipate danger. We must trust somebody. It occurs to me that the safest and wisest course to pursue is to adhere to the precedents which for sixty years guided our fathers in the selection of Chief Magistrate. Let us guard the States from encroachments of arbitrary Federal power upon their suffrage. I am an old-school democrat; and I shall vote with the Senator from Maryland, [Mr. Whyte,] whose speech I listened to with so much interest and whose enunciations I so heartily endorse.

Mr. THURMAN. I did not think I should trouble the Senate with another remark on this subject; but the respect that I sincerely feel for the Senators from Maryland and Kentucky, who differ so widely from the opinion that I have expressed, compels me to say something more than I have already said.

How it could come into the head of any man looking at the Constitution alone and not looking at any usage under the Constitution to suppose that the power of counting the votes is conferred upon the President of the Senate, is almost past my comprehension. It has often been said that the framers of the Constitution, and especially that most distinguished man in letters, Gouverneur Morris, to whom the revision of the language of the Constitution was given, were masters of the English tongue; and that the Constitution itself is the most remarkable instrument to be found in the world for the clearness and terseness of its provisions. Let us turn to this provision and see what it is, and see what it would have been if the framers of the Constitution had intended what my learned friends suppose. The language is:

"The President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates, and the votes shall then be counted."

If it were the intention that the President of the Senate should count the votes, would it not have been plainly said: "The President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates and count the votes?" That would have been a briefer expression than is used. That would have been an expression free from all ambiguity. That would have been an expression in good, plain Anglo-Saxon. That would have been an expression as clear as the intellect of Gouverneur Morris, the reviser of the language of the Constitution. But there is nothing of the sort. It is simply said:

"The President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates"—

And then it is said—

"and the votes shall then be counted."

Who is there who can say that the Constitution declares in express terms who shall count the votes? When it simply says, "and the votes shall then be counted," and says nothing more, who is there who can say that the Constitution in express terms declares that the President of the Senate shall count the votes, or that it declares by whom the votes shall be counted? Manifestly there is no declaration on that subject. Manifestly it is not declared by whom the votes shall be counted. What is the consequence? These votes are to be counted, for they concern the election of the Chief Magistrate and the Vice-President of the Republic. The power to count them is a power conferred upon the Government, or some department or officer of the Republic. If, then, there is no declaration by whom they shall be counted, I ask any lawyer in the

Senate is there any alternative but to say that the law-making power shall declare by whom they shall be counted? I ask any lawyer to say if it does not come within the express words of the last clause of section 8 of article I, defining the powers of the Congress—

"To make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the Government of the United States, or in any department or officer thereof?"

And, without that clause in the Constitution, does not every one know that of necessity where a power is conferred upon a government or any department of a government by a written constitution and the mode of exercising that power is not prescribed, that mode is to be prescribed by the law-making power? Without that express provision in the Constitution, how could it be doubted that the law-making power is to supply the mode of ascertaining the popular will?

But the Senator from Maryland seems to think that this might deprive a State of its vote for President. He seems to think that if the President of the Senate had the power, no State could be deprived of its vote. With great respect for him, how can that be? Suppose the President of the Senate has the whole power to decide that a given return, where there is but one return, is not a valid return, has not this man decided that that State shall be deprived of her vote? Take the case of Wisconsin in 1857. If the President of the Senate alone had the power to decide that question, and he had decided it against Wisconsin, would not Wisconsin have been deprived of her voice in the presidential election? Take any other case that you can suppose, and if you give this one man this power, may you not deprive a State by this fiat, and even when he is a candidate, too, of her voice in the presidential election? Take the case of Louisiana at the last election, when she had two returns sent here. If you give the power to decide that question to one man, the President of the Senate, may he not decide it wrongly and deprive the people of their just choice; or may he not do what we did, reject both returns and disfranchise the State?

How, then, do you get rid of the difficulty by conferring the power upon one man? How does that secure to the people their voice in the choice of the Chief Magistrate? No, sir; give this power to whom you please, to one man or a thousand, it may be that the people of the State will unjustly lose their right. You cannot help that, because there is no human tribunal that is free from imperfection. Until men shall be gods, pure and omniscient, there will be error in decision, and you cannot avoid it.

But, sir, this is not all in this matter—

MR. MORTON. Will the Senator allow me to call his attention to the fact that if this matter is to be left entirely to the President of the Senate, it includes the power to disfranchise a State where there is only one return because of an imperfection in the return? He may say that the return does not show that the electors voted by ballot, and in his judgment that should reject the return from a State; but that return would not be rejected under this bill unless both houses concurred in saying that it should be rejected; or, where there were two returns, he might decide which was the proper one.

MR. THURMAN. But, Mr. President, there is something more, for this goes deeper. We have no Vice-President of the United States now; but we have a President of the Senate. This Senate by a large majority has declared that a majority on this floor can displace that President *pro tempore* whenever it pleases. It may change him from day to day. Now suppose the presidential election was so close that everything depended upon the rejection of the vote of a single State, it may be the smallest in the Republic. Sir, what have you done? You have placed it in the power of a bare majority of the Senate to displace the President of the Senate if they fear that his virtue or his knowledge will decide that question against their party wishes. I make no accusation against the majority of the Senate or against any Senator. I do not believe that all men in public life are villains, and I never did believe; but I repeat what I said the other day, that the greatest prayer our race has inherited is "lead us not into temptation." Besides, sir, what inducements would you have to change your presiding officer with a view to a count of the votes at the presidential election?

But again, it is said that the judiciary can interfere. How can the judiciary interfere? It is said that if the President of the Senate does not count the right vote, a mandamus may issue to him. Well, Mr. President, I am an old lawyer, and it is a long time since I began the practice of the law; and the idea that the President of the Senate, exercising a power quasi-judicial, as he must do if he is to decide between two returns, and which it is simply idle to call ministerial, can be controlled in the exercise of that quasi-judicial power, or that power not quasi-judicial, but really judicial in its nature, by a mandamus of any court, is to me the most astonishing proposition. And how would it work in practice, pray? Certainly the Supreme Court of the United States has no original jurisdiction to issue any such mandamus, unless, indeed, it is given under that clause conferring original jurisdiction upon it, which says that it shall have original jurisdiction of controversies in which a State is a party. Now assume for a moment that a State could be a party asking for a mandamus to compel what? To

compel the President of the Senate to count the vote of the State of Louisiana for A. B. What is the answer to that mandamus? The President of the Senate answers, "I have counted it for C. D.; the thing is done; my function has ceased; I am *functus officio* in the business." That is the first answer to it. But suppose that the ruling power in that State coincides with the President of the Senate in the count that he has made; suppose, for instance, that Kellogg is governor *de facto* of Louisiana and the President of the Senate counts Louisiana for the republican candidate, although a majority of the votes of Louisiana have been given for the democratic candidate, how are you going to get your mandamus, how are you going to get the State of Louisiana to apply for a mandamus?

And, sir, when is that question to be decided? Certainly the Constitution requires the count of the votes of the presidential electors to be concluded without delay; and the President is inaugurated, and how then are you to proceed? Are you to proceed through one year, two years, three years, in some circuit court of the United States or in the Supreme Court of the United States, in order to find whether the President of the Senate correctly counted the vote, and then to have a decree of the court that he did not correctly count it, and then when you have got that decree, how are you going to turn the incumbent out? Suppose that the incumbent has a majority of both houses on the side of his party, of what value would be your decision of the Supreme Court?

Sir, does not every one see that this gets us into inextricable difficulty? The man who is declared to be elected must be inaugurated. You propose, then, a litigation after he is inaugurated, for there cannot be an interregnum, and that litigation may last for years, and when that litigation is determined and the decision is against the man who is inaugurated, where is the power of the Supreme Court to enforce it? Where is its army? Where is its treasure? How can it enforce it, and especially how can it enforce it if Congress is of the same political party with the President in possession? Is it possible that our forefathers, those whom we have been accustomed to venerate as men the wisest in the history of nations, as the fountain of government, as men before whom the Solons and Lycurguses of the world must hide their diminished heads—is it possible that they have framed such a government? I do not believe it. I believe that the Constitution is perfectly framed. I believe that our forefathers did not foresee the contingency that has happened. I believe, however, that the Constitution is a much more perfect instrument than it is supposed; for, though they did not foresee the particular case which has since arisen, it does so happen that you can scarcely find a case that the language of the Constitution does not cover. That is the wonderful merit of our Constitution. It was well expressed by Chief-Justice Marshall when, in answer to an argument that the framers of the Constitution never contemplated a particular case, he said, "It is not sufficient to negative a power that the framers of the Constitution did not contemplate that particular power or the exercise of that particular power; the question is, does the language of the Constitution cover the power?" Now, I say the language of the Constitution covers the power in this case: it makes it a legislative power to decide by whom and in what mode these votes shall be counted.

Now, sir, I want to stick to the Constitution as closely as I can. Inasmuch as the Senate and House of Representatives are called upon to attend the counting of these votes, I think for that and for other reasons that it was intended that this matter should be decided by the members of both houses. I find that first in the fact that they are required to attend; I find it again in the fact that the Constitution requires that "the votes shall then be counted;" it admits of no delay. I find it in the further fact that if there is no choice by the people, "the House of Representatives shall immediately proceed" to the choice. I find in all the facts an utter opposition to the idea of the delay incident to judicial proceedings, or any other delay. I think, therefore, that it was contemplated that this matter should be decided by the Congress or the members of Congress, and therefore I have been in favor and am in favor yet of so deciding it either by the adoption of the proposition of my friend from Virginia, [Mr. Johnston,] or by that of my friend from New Jersey, [Mr. Randolph.] Either by treating the two houses as a joint convention, and counting the vote of each member for one as in a joint convention, or by the mode proposed by the Senator from Virginia. I am in favor of deciding this vexed question.

I know very well that the decision can only be for a time. I feel as strongly as any Senator on this floor can feel that the Constitution needs amendment in regard to the choice of President. I feel that the idea of electors of President entertained by our forefathers has in practice wholly failed. Their idea was that these electors were to make the choice of President according to their own good judgment and will. That idea has wholly failed. I believe that that cumbrous machinery ought to be dispensed with. I believe that it can be dispensed with, and yet preserve to the smaller States their relative weight in the presidential election which they now enjoy, and I believe it ought to be done. I believe that some mode, clear and specific, free from doubt, ought to be constitutionally adopted for the counting and verification of the votes for

President and Vice-President. But, sir, we cannot make a constitution in a day; we cannot amend the Constitution in a day. The necessity for action is a present necessity; it is upon us now, and the question is, shall we exercise that power which the Constitution does confer upon us, to provide for ascertaining the voice of the people according to the Constitution as it is?

These considerations, and the firm belief that there is danger unless we settle this matter, induce me to hope that this Congress will adopt some measure which shall solve this problem. Certainly it is a difficult question; but that is no reason why we should not attempt to solve it.

One word more, sir, and I have done. The Senator from Maryland read a passage from Kent. With great deference to him, it seems to me that Kent's opinion is directly opposed to his argument. What is it that Kent says?

"The Constitution does not expressly declare by whom the votes are to be counted and the result declared."

Every one must admit that. Then Kent goes on to say:

"In the case of questionable votes and a closely-contested election, this power may be all-important; and I presume—"

It is a mere presumption—

"in the absence of all legislative provision on the subject, that the President of the Senate counts the votes and determines the result, and that the two houses are present only as spectators, to witness the fairness and accuracy of the transaction, and to act only if no choice be made by the electors."

"In the absence of legislative provision on the subject," which implies that if there is legislative provision on the subject the President of the Senate does not then count the vote and determine the result. That is what he means.

Mr. WHYTE. May I ask the Senator from Ohio whether Chancellor Kent refers to legislation in regard to organic or statute law?

Mr. THURMAN. Statute law, plainly.

Mr. WHYTE. I do not think so.

Mr. THURMAN. My friend, I think, will see that it must be so when he considers for a moment. If the Constitution gives to the President of the Senate the right to count the votes, no legislation can take it away from him; that is clear. Why, then, should Kent talk of the absence of legislative provision? Kent was a man remarkable for the clearness of his diction. His commentaries have won the hearts of all the law-students of the country, not so much for their great grasp and breadth as for the wonderful clearness that marks them. Would he have talked in ambiguous language on this subject? If the Constitution had said that the President of the Senate was authorized to count the votes, if the Constitution had conferred on him alone the authority to count them, would not Kent have said so? On the contrary, he says exactly the opposite. He says:

"The Constitution does not expressly declare by whom the votes are to be counted and the result declared."

What, then, was in his mind? That which is in the mind of a lawyer, and a great lawyer, too, that the Constitution not having declared by whom the votes should be counted and the result declared, it necessarily followed that the law-making power had authority to act; and therefore he says that, in the absence of legislation, he presumes the President of the Senate declares the result, clearly recognizing that the law-making power had control over the subject.

Mr. President, I beg pardon for having occupied the time of the Senate again on this subject. I believe I promised the other day that I should say no more about it. I once more affirm, and I affirm it in all sincerity, that if it were not for the real respect I entertain for the legal and statesmanlike opinions of my friends from Maryland and Kentucky, I should not have said one word to-day.

Mr. STEVENSON. I desire to add a solitary additional word. I had no purpose whatever of entering into the debate. I was not prepared to do so. I rose briefly to state before the vote was taken the ground upon which my opposition to these amendments would rest. The able arguments in their favor by political friends with whom I usually agree seemed to demand that much from me. The Senator from Ohio, [Mr. Thurman,] for whose opinions I have the highest possible respect and in whose judicial construction of any legal or constitutional question I have the greatest confidence, has replied to my few desultory observations at some length and with some animation. He seems to think it profoundly strange that any human intellect should seriously persuade itself that the President of the United States was the constitutional instrumentality through which the votes of the electoral colleges in the several States for President and Vice-President were to be counted.

I am somewhat surprised—perhaps as much so as my friend from Ohio—at this broad expression of wonder on his part for opposing views on any part of the Federal Constitution. It is an instrument whose opposite constructions have arrayed in fierce opposition parties and men from the moment it was ratified by the States. The fathers who framed it have differed widely and warmly as to the true construction of many of

its provisions. That antagonism of construction still continues. It seems to me somewhat strange that when the views entertained by the Senator from Maryland and myself of the precise clause of the Constitution which we are discussing was sustained by the usage and practice of our fathers for fifty years, the Senator from Ohio ought not to wonder that we still adhere to them. I think the language of the Constitution not less than the early precedents fully sustain us.

John Langdon was one who framed and signed the Constitution of the United States. He was, as the record shows, elected President of the Senate of the United States in the First Congress for the sole purpose of counting the votes of the electoral colleges in the States for President and Vice-President. He did open and count them; a power which the Senator from Ohio [Mr. Thurman] wonders that any human intellect should conceive was conferred by the Constitution on the President of the Senate. The message sent from the Senate of the United States to the House of Representatives by Mr. Ellsworth was that John Langdon had been elected President for the express purpose of opening the certificates and counting the votes of the electors of the several States in the choice of President and Vice-President of the United States. Oliver Ellsworth, who bore the message, and John Langdon, whom the Senate made its President, and who did open and count the vote for President and Vice-President in the First Congress of the United States, were both members of the convention which framed the Constitution, and they took the same view of this question entertained by the Senator from Maryland and myself; and yet in their time no wonder was expressed in any quarter as to their construction of this clause of the Constitution. So far from it, that construction which clothed the President of the Senate with the sole power of opening and counting the certificates of the electoral colleges of the vote for President and Vice-President of the United States was sanctioned by the uniform and unbroken usage of Congress for fifty years continuously from the beginning of the Government.

The claim of power by Congress over these certificates of the electoral colleges certifying the votes for President and Vice-President, and which is asserted in the pending bill, was, so far as history and precedent go, absolutely unknown to the framers of the Constitution and to the members of the early Congresses. This is a most astounding fact if any such power existed. If there is any fact patent in the Constitution it is that Congress was expressly excluded by the letter and spirit of the Constitution from any power to interfere with or control the certificates of the electors certifying the votes for President and Vice-President of the United States. The Senate and House of Representatives were the chosen witnesses of the Constitution to see that the President of the Senate received, opened, and counted all the certificates of the electoral colleges; that the tellers duly recorded the same, and that the President then faithfully announced the result of the election as evidenced by these certificates of the electors. What is there then to astound or surprise the Senator from Ohio that any Senator now on this floor should feel disposed to follow the framers of the Constitution in the construction and practice under this clause of the Constitution? The wonder, it seems to me, should be how so acute a lawyer and orthodox a constructionist as the Senator from Ohio [Mr. Thurman] undoubtedly is should abandon the old landmarks of the fathers, ignore their usage of construction of the Constitution for one doubtful and dangerous. The Constitution declares that—

“The President of the Senate shall, in the presence of the Senate and House of Representatives”—

In their presence, do what?

“open all the certificates, and the votes shall *then* be counted.”

MR. THURMAN. Allow me to interrupt my friend.

MR. STEVENSON. Certainly.

MR. THURMAN. I ought to have mentioned, perhaps, that the reason of those proceedings in the First Congress is very plain. The Constitution provides that the Vice-President shall be the President of the Senate. Until it was declared who was elected Vice-President, there was no such presiding officer of the Senate as the Constitution provided for; and it was necessary to have somebody for the simple and sole function of having the votes counted, and that Senate could do not one single act except count those votes, until it had a Vice-President to preside over it. Hence, in order to show that the Senate was not to do any legislative act or any other act whatsoever, and in accordance with the recommendation of the convention, which was read by the Senator from Maryland, John Langdon was selected President of Senate for the sole purpose of opening and counting the votes for President and Vice-President. The language is not so clear at all that it would purport that he should count them, though I grant that he did it. But the reason why that limitation was put on the resolution that it was for that sole purpose, was simply to disclaim any power in that Senate to do any act until it had the presiding officer provided for by the Constitution.

MR. STEVENSON. Why, Mr. President, the reason given by the Senator from Ohio is no reply to the argument which I present. Why? Because the language of the Constitution is, the President of the Senate shall open, &c.; and the office of President of

the Senate is an office created by the Constitution as much as the office of Vice-President. It was the President of the Senate—whether Vice-President or President *pro tempore*—who is empowered and designated to open and count the votes. He did it in a ministerial capacity. He had no discretion. He was the instrument of the Constitution of making known, after opening and ascertaining from the certificates of the electoral colleges in the several States, the result of the ballots of their electors for President and Vice-President. He had no power to exclude, alter, or withhold one solitary certificate sent to him by the electoral colleges. The Senate and House of Representatives were to witness the discharge of this constitutional duty by the President of the Senate. The tellers were to record the votes for President and Vice-President evidenced by these certificates, and the President was then to announce the result. If the certificates showed that a majority of all the electors of all the States had voted for one man as President, he was then to be declared elected by the President. If not, then the House was to elect.

All the dangers of double returns, &c., that the Senator from Ohio speaks of now, existed then; and yet the wise and patriotic men who framed the Constitution, and who were then members of the Senate of the United States, elected John Langdon President of the Senate to open and count these certificates of the electoral colleges. The Senator from Ohio admits that he discharged that duty of opening, counting, and proclaiming the result. And that usage continued for years and years. The tellers were and are mere clerks, as I think, to record the result of the votes of the electors for President and Vice-President, as opened, counted, and announced by the President of the Senate. That result, the fact disclosed by those certificates, untouched, uninterfered with, was beyond the power of either house of Congress, or of both combined. Our fathers intended to guard the votes of electors from all congressional interference of any and every sort. They were wise and far-seeing men. They made no provision in the Constitution for contested presidential elections. I was amazed to hear the Senator from Ohio [Mr. Thurman] say that this power of Congress to count the votes and regulate the same by law, was a legislative power. I deny it. Congress has no legislative power whatever over the result of the electoral colleges in the States in electing President and Vice-President.

The Senator from Ohio attempted to deduce the power from that clause of the Constitution conferring on Congress all authority, legislative authority, to effectuate certain granted powers. That clause has no application whatever to the subject of the election of President and Vice-President by the people of the States. Congress cannot interfere with that subject. If there is a tie in the electoral college or no candidate has received a majority of all the electors, then the House of Representatives is to elect, each State having one vote. I rejoice that Congress has no legislative power in counting the votes of the electors for President and Vice-President. Whenever such a power is usurped and exercised then our constitutional liberty becomes extinct. Neither house of Congress can reject the vote of a State, singly or combined. The only constitutional function assigned to Congress is to witness the opening of the votes of electors as certified to the President of the Senate and counted by him. Their duty is to witness and see that every return is opened and counted and the result as shown by the certificates of the electoral colleges is correctly reported and correctly announced.

Had Congress the power to count and regulate these returns, then Congress can regulate the election of President and Vice-President.

If Congress can count the vote of one State and exclude another within the discretion of a majority, who shall measure the danger in high party times, or in times of great venality and corruption, the grant and exercise of such a power?

When I look to the language of the Constitution, or to the contemporaneous action of the early Congresses, when the President of the Senate alone exercised this power of opening and counting the votes, I am surprised, I confess, to find that this bill should, without some amendment to the Constitution, find among its supporters my distinguished friend from Ohio. I have listened with attention and interest to all his speeches, hoping that he would show the grant of constitutional power which sanctions this amendment. I confess I have never seen nor heard it. The language and precedents of the early Congresses are all against the existence or the exercise of so dangerous a power.

Is that circumstance entitled to no weight? Are we to overturn all the rules of construction which look to the opinions and contemporaneous action of those who framed the Constitution and put the Government in operation as evidence of its true intent and meaning? Is action of Congresses for fifty years in allowing the President of the Senate to count the votes to be utterly disregarded?

What says Chancellor Kent on this subject? I beg the attention of the Senator from Ohio to a word or two from him. He says "that the two houses are present"—to count the votes? No, sir. The two houses are present for another purpose. What is it? "As spectators, to witness the fairness and accuracy of the transaction." What transaction? Opening the seals; counting the vote of the electors in every State as

certified by their colleges to the President of the Senate, as the sole instrumentality which the Constitution designates for the discharge of that duty. If this power be possessed by the two houses of Congress as a legislative power, it must follow that the power to correct and to revise, to set aside and to add to, can likewise be exercised by them. Yield the legislative power to Congress, as claimed in the pending bill and amendments, and all the rest follow.

Our fathers would not allow a Federal officer or a member of Congress to be an elector; but their children propose to allow Congress the power to count and control the returns of the electoral colleges.

MR. WHYTE. Will the Senator from Kentucky allow me to make a suggestion?

MR. STEVENSON. With the greatest pleasure.

MR. WHYTE. It is a remarkable fact that in the convention the proposition originally agreed upon was that the President of the Senate should, in the presence of the Senate, open the certificates, and the votes should then and there be counted. That was the original report; but on motion the House of Representatives were included as spectators; and the words "in the presence of the Senate and House of Representatives" were put in after the word "counted." In the redraft of the Constitution those words are before the word "counted," but by the vote of the convention it was provided that the certificates should be opened and counted in the presence of the Senate and House of Representatives.

MR. STEVENSON. The fact stated greatly fortifies our construction which so surprises the Senator from Ohio. I thank my friend from Maryland for his pertinent suggestion. It is another fact going to show that the framers of the Constitution looked to the President of the Senate as constitutionally empowered not only to open but to count the vote certified by the electors to him. Chancellor Kent tells us the House and Senate were to be spectators of the accuracy and fidelity with which he discharged that duty, and further, that the tellers were to record what the certificates evidenced had been done by the electoral colleges in voting for President and Vice-President. The President of the Senate opened and read the returns. The tellers recorded the votes.

It is with extreme deference that I find myself differing on a question of constitutional construction with lawyers so eminent as the Senator from Ohio and others who coincide with him. But, tested by the language of the Constitution or the usages under it, I am constrained to believe the bill wholly unconstitutional.

I agree with my friend from Ohio that human nature is not perfect. There may be dangers and difficulties that await us whatever construction shall prevail. I can see more from my stand-point as likely to flow from his construction than from mine. Nothing so appalls me as to hear the honorable Senator from Ohio say that Congress possesses the constitutional power to count and regulate the election of President and Vice-President; to prescribe when the vote of a State may be counted and when it may be rejected. The possession of such power is the tocsin of danger to free elections.

MR. THURMAN. I beg my friend to allow me to ask him how he will avoid that by allowing one man to analyze the vote.

MR. STEVENSON. I reply that if he is the sole instrumentality named in the Constitution to receive, open, and count the certificates of the electoral colleges showing the votes for President and Vice-President in the States and certified to him, we have no power to disregard that mandate of the Constitution. It has operated well in the past; let us adhere to it. If we desire a change let us amend the Constitution. If a Vice-President ever sought to degrade himself by improper conduct in withholding returns or counting false ones, we would soon reach him. The Senator says that he never heard of the Supreme Court of the United States in exercise of its original jurisdiction issuing a mandamus.

MR. THURMAN. No, I did not say that.

MR. STEVENSON. I will state directly what the Senator did say. He said he had never heard of a case where the Supreme Court granted a mandamus in the exercise of its original jurisdiction. The Senator said he would like to hear of it. I will cite a memorable case to the Senator of the exercise of such original jurisdiction by the Supreme Court against a governor of a sovereign State, and that governor a governor of Ohio! I refer to the case of the State of Kentucky *vs.* Dennison, reported in one of the Howard Supreme Court Reports. The governor stands to the State in a position somewhat analogous to that occupied by the President to the United States. When William Dennison, the governor of Ohio, some years ago, refused to deliver up to the governor of Kentucky a fugitive from justice escaping from the latter State, on a requisition made by the governor of Kentucky, which by the mandate of the Constitution of the United States he was directed to do, the State of Kentucky applied to the Supreme Court of the United States—an exercise of its original jurisdiction—for a mandamus against him to compel him to do his duty. The jurisdiction to issue the writ by the Supreme Court of the United States was denied by the attorney-general of Ohio, but the plea was overruled. The court held that they possessed the power to

issue the writ against Dennison as governor of the State of Ohio, who they held was in default in not surrendering the fugitive to the governor of Kentucky. They decided, however, that they had no power to coerce a State or its governor.

I will not say that the Supreme Court of the United States would or would not undertake to require the performance of a clear ministerial duty by an officer whom the Constitution of the United States has named and designated for receiving, opening, and counting the votes of the electoral colleges for President and Vice-President. I will never allow myself to believe that the President of the Senate, elected of any political party, will be so far recraent to his duty as to require the exercise of such a judicial power. I will never believe it. If such an instance should ever occur, I have no doubt a remedy will be found. Therefore I say "sufficient unto the day is the evil thereof." No such instance has occurred in the past. None such is likely to occur in the future. If it does, I neither assert nor deny the power of the judiciary to afford relief by a proper correction. The danger of abuse is more likely to occur by allowing Congress to interfere with the returns of the electors of the States. We have had a dark experience of what Congress has done and may do again with some of the States. Let us beware!

My friend from Ohio need not be amazed that any human intellect should undertake to construe the Constitution as the Senator from Maryland and myself propose to do. Abler and more distinguished Senators than either of us have reached the same conclusion. Jacob Collamer in his time was regarded as a pretty good lawyer; he was *primus inter primos* before any judicial forum, and as a leading and prominent Senator from Vermont for many years in this chamber he was regarded *primus inter pares*. He construed this clause, in 1857, as I do. He thought the President of the Senate could alone count the votes of the electoral colleges. I repeat, Jacob Collamer believed in no power of Congress to count votes or to exclude votes as certified by the electors. This statesman saw none of the dangers now pictured as likely to occur if we do not pass this bill.

Mr. President, I have been drawn unexpectedly and reluctantly into this debate. Now I have spoken hurriedly and without preparation. I have no feeling on the subject whatever. I have tried to gain light from my distinguished friend from Ohio [Mr. Thurman] to guide me in my vote on the pending bill. I have listened to him attentively. His learning, his clear, discriminating intellect entitle his utterances to respect, not only in the Senate but everywhere else. He has, however, failed to persuade me that the Constitution authorizes Congress to pass this bill. We have gotten rid of that hateful joint rule whose pernicious operation was acknowledged, a rule which should never have been adopted and was always pregnant with danger.

Let us come back to old landmarks, and let us stand where our fathers stood so safely and so long. Let us not exercise doubtful powers or seek to clothe Congress with unlimited discretion to interfere with the certificates of the electoral college, and thereby control indirectly the election of President and Vice-President. Let us continue to trust the President of the Senate with the power confided to him by the Constitution of the United States, exercised in the presence of both houses of Congress as chosen witnesses of that solemn and august ceremony in which he only announces to the Senate and to the House of Representatives the action of the electoral college in selecting the President and Vice-President of the United States.

What a solemn scene it is, occurring, as it does, once in every four years of our political calendar! No man lives with the true spirit of American liberty in his heart who does not feel that heart beat quicker when we, as we do in every quiet and peaceable election of President and Vice-President of the United States, give to the despotisms of the Old World new and enduring evidence of man's capacity for self-government.

I think, Mr. President, we had better stand where we are. I see possible difficulties, no matter what Congress shall do. It is impossible to guard against possible danger. Let us adhere to the limitations of the Constitution and seek to restrict, not to enlarge, congressional power.

Mr. WITHERS. Mr. President, at the risk of being very presumptuous, I propose to say a word or two in the discussion of this question. I am no lawyer, and consequently do not propose to quote any legal authorities for or against any proposition which I may advocate; but I am inclined to take what we call in our country a plain, common-sense, plantation view of this question. I am the more disposed to do this from the fact that I find gentlemen of the highest legal attainments and reputation who rely upon precisely the same authority and the same paragraph and the same sentence to prove identically opposite propositions.

I have listened with great attention to the whole of this discussion. When I first suggested the difficulty which presented itself to my mind upon reading the bill as it was proposed by the committee who reported it here, I thought that it was a manifest defect; that the bill provided no agency by which the decision of the vexed question of double returns coming up from a State could be settled, thereby risking the loss of the electoral vote of that State. I think that the progress of this discussion has demonstrated that the objection was well taken; because it is admitted by a large propor-

tion of those who have discussed the question that some agency or other should be provided, if indeed it does not already exist, for the contingency which the second section proposes to meet.

Now, the discussion has drifted off into two great channels, if I may so express myself. One is upon whom the constitutional right devolves to count the vote of ordinary elections. The other is the proposition for which the amendment of my colleague was designed to furnish a remedy; and that is, what course shall be taken in the case where two returns come up from a State, each claiming to be the proper return of that State? With regard to the first, I shall have very little to say beyond this, that the argument of the Senator from Maryland [Mr. Whyte] was, to my mind, almost conclusive on the subject that the framers of the Constitution designed that the duty of counting the votes should devolve upon the Vice-President of the United States. That the Constitution does not explicitly thus provide is true; but the argument of those who have urged that, because of the absence of that specific provision, we were therefore to assume that the power did not exist there, but that it existed to a much greater degree with the law-making branch of the Government, I think is defective in this, that while the ministerial agency of the Vice-President is invoked by the Constitution to a certain degree in the ceremonial of deciding this question, to wit, in opening the vote, and while it is true that it says that vote shall then be counted, without specifying that the Vice-President shall count it, there is not one word of the agency provided by the Constitution which shall be played by the legislative branch of the Government further than that they shall be then and there present. No ministerial function under the Constitution devolves upon them at all. They have no right, so far as the Constitution shows us, of touching the returns in any manner, shape, or form. When I take this fact into consideration, coupled with the additional circumstance that clearly at the first meeting of the Senate and House of Representatives after the adoption of the Constitution the President of the Senate did not only open the vote but count it, and the additional fact that at the next presidential election the same duty was performed by the same officer, I think the objection of the distinguished Senator from Ohio [Mr. Thurman] can scarcely hold good when he asserts that it is a most remarkable exhibition of the wonderful obliquity of intellect on the part of any person to suppose that under the Constitution the Vice-President was intrusted with this power.

The Senator with his usual ability brought to his aid the force of the argument based on the primary action under this Constitution by asserting that the then President of the Senate, Mr. Langdon, was elected for the sole purpose of opening and counting the vote, for the reason only that the Senate had not been organized under the Constitution and that there had been no organization of Congress under the Constitution. It seems to me, taking another branch of his argument and considering it in this connection, that if the legislation necessary by Congress under the Constitution to designate the officer or power that should have the right to count the vote had never been had previously, it was then had. The very resolution which empowered Mr. Langdon to preside for the sole purpose of opening and counting the vote was legislation, defining on whom this trust should be imposed. Therefore we have the additional precedent established by the election of Mr. Langdon for this purpose to show that it was the intention of the Constitution that the power should rest in the hands of the President of the Senate.

We have had arguments *pro* and *con* on the question upon whom the counting of the votes should devolve. One is sustained by the implication which I have mentioned, the only legislation which has ever been enacted by Congress upon the subject, pointing to the President of the Senate as the person by whom this duty should be performed, in the absence of a contrary or a specific provision in the Constitution that the Vice-President should perform it. There is not one word in the Constitution, there is not a letter or a syllable in it, to indicate by indirection or by implication that the duty should devolve upon any one else.

Assuming, however, that this duty under the Constitution could be properly exercised by the Vice-President or President of the Senate, I cannot go beyond that point and declare that, because of this legislative provision and because of the action under it, the Vice-President or the President of the Senate should also be intrusted with the power of deciding as to the validity of returns when two conflicting returns present themselves. That is a different question. The first action, the counting of the vote, is clearly ministerial. The last action is by no means clearly ministerial. When two conflicting returns come up, whoever decides as to which is the valid return exercises certainly a judicial function. It seems to me that that point is irrefutable. It cannot be urged that it is ministerial, or that it is executive, or legislative. He has to exercise the power of judgment in the matter.

Just here I will say that while I favor the proposition of my colleague, [Mr. Johnston,] for reasons which I will state more at length hereafter, no difficulty is presented to my mind by a proposition to vest this power in the House of Representatives, in a joint session of the two bodies, or in a vote by States; because, while it is true that the Constitution clearly separates the powers which are wielded by the Government

into three great branches, executive, legislative, and judicial, yet there are certain great functions which must devolve, and do devolve, by the Constitution upon these legislative bodies. These functions are not only discretionary, but judicial, for the Constitution specifies that this body "shall be the judge of the elections, returns, and qualifications of its own members;" and so with the lower house. In cases of impeachment, the Senate constitutes the highest judicial tribunal known, and must of necessity exercise judicial powers. I, therefore, see no constitutional difficulty in providing by legislation that this judicial power shall be exercised either by the Vice-President, or by the House of Representatives, or by the Senate and House of Representatives. I think it is clearly competent for the law-making power to delegate this judicial duty to any or all of these.

The principal proposition, after the amendment offered by my colleague, is the one which proposes to substitute the judges of the Supreme Court as the umpire to decide in cases of doubt. It does seem to me that there does exist a constitutional difficulty in that case. The argument of the distinguished Senator from Indiana [Mr. Morton] the first day this question came up for discussion was to my mind perfectly conclusive and satisfactory, that we could not, under the Constitution, and with a due regard to its provisions, delegate this duty to the judges of the Supreme Court; whether they acted as a Supreme Court, or whether they acted merely in their individual capacity, which the amendment suggested by the Senator from Indiana contemplates, for two reasons: First, the Constitution requires that the decision shall be then made; and it contemplates the presence of no person other than the Vice-President and the two houses at the time the decision is made. If the Constitution had contemplated the possibility of any power other than those mentioned discharging any duty which might, directly or indirectly, spring out of the performance of the function of counting the vote and declaring the result, it would have provided some means by which we should have a right to know that this additional tribunal was authorized by the Constitution; but no other person, so far as the provisions of that instrument go, is contemplated to be present or anywhere near; and in addition the Constitution requires that the question shall be then decided. More than that, the judges of the Supreme Court may possibly themselves be called upon in their judicial capacity to decide upon questions which may arise under the action which is taken in Congress at the time the vote is counted. I do not pretend to designate the *quo modo* in which the case may come up for their adjudication; but that such an event is possible I think can scarcely be denied. That being the case, it would be manifestly improper to require the Supreme Court to act as umpire in the decision of a question which they might subsequently be called upon to decide as the highest judicial tribunal of the land. Although it may be asserted that in the one case they would act in their individual capacity and in the other as an organized legal tribunal, it seems to me that the difficulty is merely evaded and not met by the suggestion, because it would be impossible for a judge to divest himself of the opinions and conclusions which he reached as an individual when acting as an umpire. Therefore I think that the proposition to refer the decision of this question to the judges of the Supreme Court, as provided for in the amendment suggested by the Senator from Indiana, would be improper.

My primary purpose and desire in this whole matter is to secure some tribunal by which this question shall be decided. I am unwilling to leave it undecided, because it may possibly be a fruitful source of the greatest dangers to our institutions. If no legislation is had, if this act is not passed here, or if it fails to be agreed upon by the other house, if from any cause whatever we should not consummate any legislation providing for the contingency which we all so much deprecate, I think no Senator present will deny that in the not distant future we may be confronted with a condition of things which will test, in a degree beyond any to which this Constitution has ever heretofore been subjected, its vitality and its strength. I think it is the part of the Congress of the United States, as wise legislators, to provide a remedy, to avoid and prevent this contingency, if it be possible to do so. Therefore I am prepared now, if I cannot get the legislation which I desire, to take what I regard as next best, and having the primary purpose of securing some proper tribunal for the decision of such a question as will probably arise in the count of the next presidential vote.

In providing these agencies, among all the conflicting propositions which have been submitted by different Senators, it does strike me, after due deliberation and consideration, that that presented by my colleague is more in accordance with the principles of the Constitution, more in accordance with the usages which have prevailed in other departments of the Government, and that the spirit of our Constitution is carried out more fully thereby than by any of the propositions which have been offered in competition. If it were a question to decide simply upon the election of a President, we all know that the Constitution provides that that shall be done by the House of Representatives, who come forward and stand here as the representatives of the popular vote. But the same Constitution requires that the Senate in such a contingency shall have the privilege of deciding who shall be the Vice-President of the United States. It is therefore clear that in a case like the one under consideration, when two conflict-

ing returns come up claiming to be the return of a State, we have to decide not only who is President but who is Vice President as well. That decision should accordingly be had by the joint voice of the House of Representatives, who stand as the exponents of the popular will, and of the Senate, who represent the will of the States.

The objection urged by the distinguished Senator from Indiana that the vote by States would be repugnant to the very spirit of our institutions, because it would stifle the voice of the people in certain cases, cannot be regarded as valid if you compare it with the provisions of the Constitution and with the ideas which animated the framers of that instrument in the construction of the theory and machinery of our Government. This Government is not a democracy purely; is not a government of the people *per se*; but it is a representative government. It is a federal government. All the provisions of the Constitution, and especially and *a fortiori* this one providing for the election of a President when there should be no choice by the people, indicate a purpose and intent on the part of the framers of the Constitution to provide a tribunal other than that of the popular vote to decide who should perform the functions of President in the contingency therein contemplated. They provided that this vote should be taken by States. Therefore I say it is no violation of the spirit of the Constitution, but on the contrary it is in strict accordance with the provisions of that instrument, that in such a case as the one now under discussion, where two conflicting returns come up here, and when the question is as to who shall be elected both President and Vice-President, both these bodies should exercise a voice in the matter, and the vote should be taken by States, inasmuch as it is provided that the vote for President shall be taken by States in the House of Representatives in the event of no election being had by the people. The proposition of my colleague is, therefore, I assert, strictly in accordance with the spirit and letter of our Constitution, and, for that reason, to my mind it is preferable.

I do not hesitate to say, however, that if I cannot get my first choice, if I cannot secure the adoption of this amendment, I will take some other amendment, my primary purpose being, as I designated in my opening remarks, to secure by legislation some tribunal, some authority, to have the right to decide this question when the difficulty presents itself, rather than to leave it open to be decided and become the subject of future squabble, and perhaps much greater difficulty than squabble; because we all recognize, not only the possibility but the certainty that if no legislation is had to provide for the difficulty that may arise, if, in the event it shall arise, we are left with nothing but the constitutional provision, there will be no concert of action, no unity of opinion, as to the power in whom the right of decision shall then be vested.

Mr. MORRIS. It seems that the purpose of these several amendments is to provide some way by which the vote of a State shall not in any contingency be lost. The second section of the bill provides that where there are two returns that return shall be counted which receives the vote of both houses as the valid return. If the two houses do not agree as to which is the valid return, then no vote from that State shall be counted. The amendment we are about to vote upon provides that in such a contingency, where the houses disagree, the two houses shall be together as one body, Senators and Representatives, each having one vote, and the vote shall then be taken by States. For example, the State of Delaware would have one Representative and two Senators, and they would cast the vote of that State, which would count one. New York would have thirty-three Representatives and two Senators, making thirty-five, and they, or a majority of them, would cast the vote of New York, counting one. Aside from the inequality and the anti-republican character of such an election, the gross injustice to the people, the absolute stifling of the public voice, there are other objections to it in the very line which this amendment is intended to meet. If the vote is to be taken by States, and there should be thirty-eight States, as there will be next fall, and the States should be equally divided, then the question is lost. In that case the contingency would happen under which the vote of a State would be lost, because the last tribunal provided for deciding the question would have failed to agree. When you come to take the vote by States there would be very great danger that the votes of particular States would be lost in taking that vote, because if the delegation is equally divided, then the vote of that State is not cast, according to this very amendment:

"But if the representation of any State shall be equally divided, its vote shall not be counted."

This very amendment provides for not counting the vote of a State in deciding the question where the delegation is equally divided; and that is a contingency very likely to happen. It will not happen very often, I trust; it has only occurred once in the history of this nation that there were two returns of electors from the same State. We may hope that that contingency will never occur again; but it may. Then, if there should be such a contingency, it is not very reasonable to suppose that the two houses will not be able to agree upon which is the true and valid return. Still, that contingency may happen. But where the vote is to be taken by States, the contingency of the delegation being equally divided, and the vote of the State being

lost in that way, in determining the question either in the election of a President by the vote of the States, or in the decision of this question by the vote of the States, is likely to happen.

MR. MAXEY. Will the Senator from Indiana allow me to suggest an amendment which I have prepared, in order that I may get his views upon it?

MR. MORTON. I will give way to my friend in a moment, when I get through with the point I am now making. I want to call the attention of the Senator proposing this amendment to a fact in our history, in the first election of a President by the House of Representatives in 1801. When that election took place there were sixteen States in the Union. The delegations from two States were equally divided, and the votes of those States were not counted. From the very first ballot the delegations from Vermont and Maryland were equally divided, and so those States were not counted; and that remained the case from the 11th of February until the 17th of February, and after thirty-five ballots had been taken the dead-lock in those two States was broken in this way: When they took the last ballot, after an hour's interval, on the thirty-sixth ballot, Mr. Morris, of Vermont, was absent, and the two Maryland Federalists, Craig and Baer, put in blank ballots, thus giving two more States to Jefferson, which, added to the eight which had always voted for him, made a majority. There were two States divided in the very first election by the House, a contingency likely to happen. So that, in endeavoring to meet this contingency of the two houses being divided, the very plans resorted to are exceedingly liable to the same difficulty, causing the loss of the vote of a State.

While I agree in the main with the Senator from Ohio, [Mr. Thurman,] it seems to me that he has not been entirely logical. My friend from Texas [Mr. Maxey] made a very able and a very clear argument this morning, but I think the final conclusion was not in harmony with the premises with which he started out. He took the ground that the two houses would be present in their separate capacity, the Senate there as a Senate, the House as a House: not merely the members of the two bodies. In that I think he was entirely right; and he took the ground that these two houses were to count the vote. It is a duty, then, devolving upon the two houses, and I understood the Senator to argue that it was not competent for these two houses to cast the duty of counting the votes or determining any question upon the Supreme Court of the United States, because it belonged to the two houses in their legislative capacity; but, if I understood my friend at the close of his remarks, he came to the conclusion that we could authorize the President of the Senate to count the vote in case of disagreement between the two houses. If we can authorize the President of the Senate to do it by virtue of this law, if we can depute to him the power, we can depute it to any other specific tribunal that we may create.

MR. MAXEY. If the Senator will permit me, I will state the position I took. The position which I assumed, as is very correctly stated by the Senator from Indiana, was that the two houses appeared organized in their separate capacities as a Senate and as a House, and over these organized bodies the President of the Senate presided; that under the Constitution you could not go outside of Congress to devolve the duty on anybody; that it was a personal trust. I further took the position that where these two houses divided the vote of the Senate counted one, the vote of the House counted one, and the Presiding Officer being a part of Congress the duty of deciding the question where there was a divided vote between the two houses could be devolved legitimately upon the President of the Senate, the Presiding Officer, and you could not go outside of the body to decide it.

MR. MORTON. I understood that to be the argument of the Senator; but still I think the difficulty is not obviated. When the two houses come together and the President of the Senate presides over both bodies for the time being, he has no casting vote under the Constitution. The Vice-President has the casting vote in the Senate on an equal division of that body, by virtue of the Constitution. The President of the Senate *pro tempore* has no casting vote under the Constitution, but he simply votes as a Senator. If you give the President *pro tempore* a casting vote where the two houses fail to agree in determining which is the true vote of a State, that right thus conferred upon the President of the Senate is given to him by virtue of a law, and does not belong to him under the Constitution; so that after all we are deputing to an umpire or to a third party the exercise of a duty which according to the argument of the Senator from Texas, and I think very clearly, too, belongs to the two houses as a part of the legislative power of the country.

MR. MAXEY. That umpire is a part of our own body. He is not an outside body, but is a part of Congress.

MR. MORTON. That may be true. He is a member of this body either as Vice-President or as a Senator; but the power conferred upon him is not given by the Constitution; it is a new power which we are conferring upon him. Our right to confer it does not depend upon the fact that he is a member of this body. If we have the power to confer this extraordinary function upon anybody, that power does not depend upon

the fact that the person upon whom we confer it belongs to this body. We may confer it as well upon the Supreme Court as upon the President of the Senate.

The same argument applies in regard to my friend from Ohio, who was led into the same difficulty. He started out on the presumption that the two houses must count the vote as a part of their legislative powers, but he ended by agreeing to the amendment of the Senator from Virginia [Mr. Johnston] that we might refer it to a joint convention of Senators and Representatives all voting together, the vote to be taken by States. If we can thus depute a legislative power to be exercised by a joint convention, a body unknown to the Constitution of the United States, and voting by States, a matter which the Constitution never contemplated, we can depute that power to the Supreme Court of the United States or to anybody else; so that I think my friend's conclusion was wrong. I deny the power to create an umpire to decide between the two houses in a matter which is devolved upon the two houses by the Constitution; but I said this, and I call the attention of my friend from Texas to it. He misapprehended my position a little. I say that, if we have the power to create an umpire or to call in a new tribunal, then I think the safest umpire, the one most satisfactory to the people of this nation, would be the Supreme Court of the United States, simply requiring that body to be in session when we come to count the votes; and in case of disagreement requiring it to decide it somewhere.

Mr. MAXEY. I think I understood the Senator's position, but, that he may understand mine, I referred to the page of the Record in which his view was given, and he will find by reference to it that this power was only to be exercised in a certain contingency, if tolerated at all.

Mr. MORTON. I failed to hear that part of my friend's remarks.

Mr. MAXEY. I do not know but that I elaborated it. I referred to the page of the Record of Thursday last, which shows for itself, page 13.

Mr. MERRIMON. How would you give the Supreme Court jurisdiction?

Mr. MORTON. If we have power to give any outside tribunal jurisdiction, we have power to give it to the Supreme Court, and that would be the most satisfactory tribunal to which we could refer so great a question. The people of this country would submit with more satisfaction to the decision of that body than they would to the decision of any one man, I care not how wise or how great he might be, or to any special tribunal that we might create.

In answer to the question put by my friend from North Carolina, I say we cannot confer the jurisdiction upon the Supreme Court as a Supreme Court. Still, if we have the power to create a special tribunal, we can confer it upon the judges of the Supreme Court because they are judges of that court.

Mr. MERRIMON. I ask the Senator where we get the power to confer it upon any tribunal.

Mr. MORTON. I have been trying to argue that we have not that power. I do not believe we have that power. I have said that if the unfortunate contingency should happen that the two houses cannot agree which return shall be counted, the vote of the State is lost; if it is left to the President of the Senate, and he is not able to make up his mind which vote shall be counted, the vote is lost; or if you refer the whole matter to him and he comes to the conclusion that the certificate is defective where there is only one, the vote of the State is lost. The vote of the State may be lost in any contingency. In any way that you may dispose of this question, that is possible. You cannot devise any scheme under which the vote of a State may not possibly be lost. Under the very plan proposed by my friend from Virginia it is probable that the vote of a State would be lost. I have just shown that in the very first election made by the House two States were evenly divided and so remained for seven days, until the thirty-sixth ballot was taken, and then the dead-lock was broken by one member dodging and two members from other States casting blank ballots.

Mr. RANDOLPH. May I interrupt the Senator from Indiana for a moment?

Mr. MORTON. Yes, sir.

Mr. RANDOLPH. The Senator from Indiana says that, under any tribunal that may be adopted, or that has been suggested, it is possible to lose the vote of a State. I think if he will refer to the plan I suggested yesterday he will find that it would be impossible to lose the vote of any State. I made the argument yesterday; I do not know whether the Senator was present at the time or not. My proposition was this: That the two houses should vote separately; that in the event of their not being able to agree as to which the true returns of a State were, and in that event only, the President of the Senate should declare which the true returns were; but that declaration should be based upon aggregating the votes of the two houses, and a majority in that aggregation should determine the result. I would like to know from the Senator from Indiana whether that does not preclude the possibility of rejecting the vote of a State.

Mr. CAMERON, of Pennsylvania. I rise for the purpose of making a motion to go into executive session. We cannot get through with this subject to-day, and it may as well be disposed of hereafter.

The PRESIDENT *pro tempore*. Does the Senator from Indiana yield for that purpose?

Mr. MORTON. I yield for that purpose.

The PRESIDENT *pro tempore*. Pending the motion, the Senator from Texas [Mr. Maxey] desires to present an amendment.

Mr. MORTON. Let it be read for information. I desire to hear it.

Mr. MAXEY. I move to insert at the end of section 2 the following:

"But if the two houses fail to agree as to which of the returns shall be counted, then the President of the Senate, as Presiding Officer of the two houses, shall decide which is the true and valid return; and the same shall then be counted."

Mr. MERRIMON. I ask leave to submit an amendment which I send to the Clerk's desk, and which I ask to have read for information.

The PRESIDENT *pro tempore*. The amendment will be reported.

The CHIEF CLERK. It is proposed to insert after the word "which" in section 2, line 7, the words:

"Shall be duly authenticated by the State authorities, recognized by and in harmony with the United States, as provided by the Constitution."

So that, if amended, that portion of the section will read:

"And that return from such State shall be counted which shall be duly authenticated by the State authorities, recognized by and in harmony with the United States, as provided by the Constitution."

The PRESIDENT *pro tempore*. The Senator from North Carolina proposes to offer this amendment when it shall be in order.

Mr. MERRIMON. As I wish to submit some remarks upon it, I ask that the amendment be printed.

The PRESIDENT *pro tempore*. The amendment will be printed.

MARCH 22, 1876.

Mr. WHYTE. I call for the regular order of business. The Senator from Indiana is in his seat. The regular order was only postponed temporarily until he should come in.

The PRESIDENT *pro tempore*. The Senator from Maryland calls for the regular order, which is the unfinished business of yesterday, being Senate bill No. 1.

The Senate, as in Committee of the Whole, resumed the consideration of the bill (S. No. 1) to provide for and regulate the counting of votes for President and Vice-President and the decision of questions arising thereon.

Mr. MORTON. I desire to ask Senators to remain here to-day until this bill is disposed of. It has been before the Senate for some time; it is a very important measure, and I hope Senators on this side of the chamber at least will find it convenient to remain here and dispose of it to-day.

Mr. EDMUNDS. I suggest that the Senator ought to say "to-morrow," because there is some other business that ought to be done to-day on another subject. I would suggest to the Senator to fix to-morrow for disposing of this bill.

Mr. MORTON. I should prefer to have it disposed of to-day, if possible.

Mr. SARGENT. I wish to give notice to the Senate that at the earliest moment I shall call up the diplomatic and consular appropriation bill. I propose to do so as soon as this bill is finished.

Mr. WHYTE. Mr. President, I hope the Senate will not be frightened out of its propriety by the supposition that I am about to make another speech on this important subject. Nothing is further from my thoughts. But after the judicial broadside fired into the Senator from Kentucky [Mr. Stevenson] and myself yesterday by the Senator from Ohio, [Mr. Thurman,] when, with uplifted hands, in wondering astonishment, he declared that it was past his comprehension how the idea could enter the brain of any man, upon reading the Constitution as it is, that the duty of counting the presidential vote was lodged with the President of the Senate, I am quite sure the Senate will pardon me if, by one or two quotations, I show them that that idea entered into a brain larger than that of the Senator from Maryland and into heads which have worn the crown of laurel with as much grace and almost as much modesty as the Senator from Ohio wears his.

I referred, Mr. President, to the views of Chancellor Kent, and for the purpose to which I referred to these views they sustain my position, which was that, as the Constitution now reads, the President of the Senate is presumed to be the proper party to count the electoral vote; and so in confirmation of that I ask permission to read what was said in 1857 by Mr. Israel Washburn on the floor of the House of Representatives in regard to these views of Chancellor Kent:

"I received a letter but a few days ago from a gentleman, eminent for his wisdom and ability, who stated therein that the late Chancellor Kent, of New York, had told him that there was clearly a *casus omissus*; that there was no power either in the House or Senate, or in a joint convention, to interfere and participate authoritatively in counting and declaring the votes and deciding upon their validity; and he said that the chancellor added that he feared the time might come when the country would be

shaken to its center on this point.”—*Congressional Globe, Thirty-fourth Congress, third session, page 657.*

That was the sole purpose for which I referred to the opinion of Chancellor Kent, and he does most positively say that, looking at the Constitution as it is, the authority is lodged with the President of the Senate. So, then, when the Senator from Ohio said that, reading the Constitution as it is, it passed his comprehension how it could enter into the brain of any man so to construe it, he failed to remember that it entered into the brain of Chancellor Kent so to construe it.

Nor is that all, Mr. President. Mr. Stuart, of Michigan, who was a prominent lawyer and a most honored member of this body, in this same discussion wherein I before referred to Judge Collamer's view, used these remarks:

“I think the law might be made more specific; but I cannot admit that the law can provide for any other counting of the votes, under the Constitution, than that they shall be counted by the President of the Senate.”—*Ibid.*, page 664.

And again:

“I disagree, therefore, with the honorable Senator from Kentucky [Mr. Thompson] when he supposes this is a count by the Senate. It is a count by the President of the Senate. To secure fairness and accuracy it is a public count before two responsible organized bodies under the Constitution.”

And Mr. Benjamin, than whom no better lawyer ever sat within these walls, did not think it was unworthy of consideration, for he laid it down expressly that there ought to be a law—that is, in regard to counting the vote not cast upon the day provided by law under the express grant of the Constitution—

“There ought to be a law directing that hereafter, when the vote of a State presented for count shall appear to have been given on a day different from that provided by law, it shall be the duty of the President of the Senate not to count that vote.”—*Ibid.*, page 665

Recognizing that the President of the Senate was the proper person to count the vote and no one else. And so Mr. Toucey, of Connecticut, a gentleman who had held the high and honorable position for fourteen or fifteen years of prosecuting officer of the State of Connecticut, called to the Cabinet of Mr. Polk as Attorney-General of the United States, an honored and respected Senator in this body for many years, said:

“The whole proceeding of counting is based on the idea merely of disclosing to the public in a safe, authentic way, the actual state of the vote, and when that is ascertained truly, the President who is chosen by that vote is President, let Congress do what it may. * * * And any law of Congress which undertakes by its operation to change the actual result as found upon an inspection of the facts would, so far as it changed or varied the result, be inoperative and of no effect; and hence I say to-day, as I said yesterday, that in my judgment the course of the Presiding Officer”—

Mr. Mason, who had counted the vote upon the report of the tellers—

“was entirely correct in the House of Representatives.”—*Ibid.*, page 666.

But, Mr. President, to prove that it not only entered into the brains of abler and stronger men than the Senator from Maryland, but had strong argument to sustain the rightfulness of such a lodgment, the Senator from Ohio to the contrary notwithstanding, I wish to go a step further and show that not only was this count the mere disclosure in the presence of witnesses of the vote of the States, and that neither house had anything to do with it, but that it was purely ministerial in its character, and not judicial at all, I wish to cite to this Senate the authority of a man with whom I differed as widely in politics as the poles are far apart, but a man whose talent no fair-minded man could deny, whose legal learning no man truthfully could gainsay, a man who held his seat high in the estimation of our country, and whose memory to-day is as green as the shamrock in the hearts of the republican party of the United States—I refer to Hon. Henry Winter Davis. On page 658 of the volume of the Globe which I have cited will be found what he said in regard to this ministerial duty; and, more than that, while we are on the brink of this precipice which may involve us in trouble, let us listen to his warning note as to the difficulty which may arise by Congress tampering with this great question of counting the electoral vote.

“In my opinion”—

Said he—

“there is no judgment to be passed, either by the Senate or by the House of Representatives, or by the tellers, or by the Speaker of the House.”

Every one, except the President of the Senate, is enumerated here by Mr. Davis.

“I think that the Constitution of the United States has defined with perfect precision what we are here to do; and beyond that there is nothing to be done except on a motion which has not yet been made.

“The Constitution says that the President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates that are laid upon your table, as containing the votes of the various States, and the votes shall then be counted. They are to be counted in the presence, not of any joint convention, but of the Senate sitting separately, and of the House sitting separately, as separate houses. It does

not say that any result shall be announced. It does not require any judgment to be declared. It does not confer on either the Senate or the House the power to authorize the President of the Senate to declare who is the President of the United States.

"Mr. QUITMAN. Will the gentleman permit me to ask a question? Who is to count the votes, and to decide whether a vote is to be counted or not?"

"Mr. DAVIS, of Maryland. That is the precise point I rose to explain my views upon. The votes are to be 'counted,' and there the Constitution stops. What do gentlemen mean by the word 'counted?' Do gentlemen mean that counting a vote here has the effect of a judgment upon the vote that is counted and admitted, or upon a vote which is not counted and is rejected? Do they mean to say that if a vote were rejected here upon the count by the tellers, or were admitted, it would bind any authority known to the laws of the United States? It is that fertile source of all difficulty, this ambiguity in the phrase we are using. I apprehend that the only purpose of assembling here is to identify the things which are sent here as votes. The act is a ministerial and not a judicial one. Counting or refusing to count has no effect. Whether a vote shall or shall not have the effect of electing a President is, after the mere ministerial act of counting out the things sent here by the various States, referred by the Constitution of the United States to the body that is to elect in the event of a failure of election, and there is no motion that can be made here which can raise this question, unless some gentleman shall rise and move, in pursuance of the Constitution of the United States, that the House now proceed to the election of a President; and when that shall have been done, and the question shall have arisen whether the papers laid upon the Speaker's table, identified by their official certificates, counted by the gentlemen who are appointed to count, are legal or illegal, that question the House, and the House alone, have the power to decide; and until we are called upon to decide upon the question whether we shall or shall not elect a President, there is no practical question which can be raised in this House upon which our decision would be final. Although this House should go on and pass separate votes upon every vote before them, I apprehend they would be extra-judicial opinions upon facts which they have no right to pass upon separately, and they can only pass upon them upon the motion or upon the presumption that there is no election; and the only decision this House can come to is whether they will proceed or not now to elect a President. I presume that with reference to the Vice-President exactly the same question devolves upon the Senate, untrammelled by any count or refusal to count, accepting nothing as the basis of their decision except the papers identified here—identified before the Senate and the House as witnesses to the fact."

And now, Mr. President, fortified with these views of eminent statesmen, I invoke another fire from the battery of the distinguished Senator from Ohio.

Mr. THURMAN. Mr. President, I really did not suppose that what I said yesterday would excite the sensitiveness of either of my friends to the extent it has done. I certainly did not intend to wound anybody's sensibilities. I said, and perhaps I ought to apologize for having said, that it did seem strange to me how the idea ever could have entered into anybody's head, looking to the Constitution alone and not at any practice under it, that the President of the Senate was the judge in the case that is supposed by this bill.

Mr. WHYTE. The Senator must not suppose that I ever said he was the judge. Counting the vote, and judging of an election, are different things.

Mr. THURMAN. That is what I said, or at least what I intended to say. I do not know myself, except upon this new theory of the late Mr. Davis, how counting the votes and being a judge are not one and the same thing where any judicial question arises. When, for instance, the question is whether a return is in conformity with the statute, it seems to me the decision upon that is in its nature judicial, and not ministerial. When the question is between two returns from the same State, it does seem to my poor comprehension that the decision of that question is judicial in its nature, and not ministerial. That is the reason why I said that the power to count the votes does involve a power of judging what votes shall be counted and what votes shall be rejected. That being the case, I do not see for myself, as I said before, how upon the language of the Constitution the idea can be entertained that the President of the Senate is this judge.

The Senator reads a very able argument by the late Mr. Davis, which I never heard before, and to which I have listened with very great attention, at least all of it that he has read since I have come into the Senate, but if I apprehend what I heard, without knowing what preceded it, Mr. Davis did not entertain the opinion, but entertained directly the opposite opinion, that the President of the Senate was the judge in this matter. He supposes that when the returns are brought in they are to be counted. He says, however, that it does not matter whether they are counted or not, that the question whether or not those returns show an election of President is to be determined by the House of Representatives alone on a motion to go into the election of a President on the theory that the people have failed to elect, and in the same way that the Senate is to decide in respect to the Vice-President whether there has been an election

or not. That, I understand, is his theory. It seems to me that it is not a sound theory; but if it were a sound theory it would certainly show that the decision does rest with the President of the Senate. Certainly Mr. Davis's opinion is distinctly against the power of the President of the Senate to decide the question.

But I do not quite understand that reasoning. I must confess; and I think that if a case had been brought to the attention of Mr. Davis, who was a very able man indeed, the very case presented by the second section of this bill, he would have had to give a reconsideration to the argument he made. He says that the two houses are present at the opening of these votes to identify the returns, the Senate as a Senate and the House of Representatives as a House; that they are there to identify them.

Mr. MORTON. How?

Mr. THURMAN. How they are to identify them he does not say. He says they are there to identify them. Identify what? Identify certain pieces of paper which are laid upon the desk, or identify which is the true return? If it is meant simply to identify the papers which have been opened by the President of the Senate and laid upon the desk, then they are there simply as witnesses to testify that two papers from a single State, in the case of two returns being made from it, have been laid on the table, and there is no decision and no count; for according to Mr. Davis's argument that question then cannot be decided; the vote of the State cannot then be counted. The Constitution says the vote shall then be counted. His plan says the vote shall not be counted. That is what it comes to. If there are two returns, and if there is no power of decision in the President of the Senate, as he seems to admit, nor any power of decision in the Senate and House of Representatives there, then the plain provision of the Constitution that "the votes shall then be counted" becomes a nullity, for you do not count the votes then at all; but instead of then counting the votes, as the Constitution requires, you are simply to identify certain papers, and when the Senate has returned to its chamber without any count of the votes of the State from which two returns have come, and without any declaration who has been elected, after that has taken place the House of Representatives is to go into the inquiry whether the vote of that State shall be counted, or which one of the certificates for that State shall be counted. Is that the Constitution? Is that the Constitution which declares that the votes "shall then be counted," and if it appear that no one has received a majority of all the votes the House of Representatives shall "proceed immediately" to elect a President? Is that it? I must confess, with great respect for the ability of the late Mr. Davis, I cannot see it. And it does seem to me that all this wandering about, with this plan, that plan, and the other plan, this interpretation and that interpretation, comes from losing sight of the plain provision of the Constitution and the fundamental principle of government, that where a thing is directed to be done and the mode is not prescribed by the Constitution, it belongs to the law-making power to provide for it.

Mr. JOHNSTON said:

Mr. President, in considering this question we have to take the Constitution as it is, and not as we think it ought to be. It is agreed, I believe on all hands, that a better mode than the present for the election of President and Vice-President of the United States ought to be provided if possible; but until that is done by an amendment of the Constitution of the United States, we have to adapt our legislation and whatever we do in this regard to the existing provisions of that instrument.

The electoral college is just as much a constitutional body as the Senate and House of Representatives. It is equally established by the Constitution. We are bound to recognize it and to recognize the fact that it provides for an election of President and Vice-President partly by the States. The election of President and Vice-President is not merely the act of voting by the people, but it consists in everything necessary to elect the President and declare the result. The election consists, first, of the voting by the people; next, of the meeting of the electors in the several States and the casting of their votes; and then the certifying of those votes to the President of the Senate, and of the assembling of the two houses together and ascertaining the result in joint convention and declaring such result. All these things are necessary to make a complete election. If you stop at the vote of the people, the result is never ascertained. Altogether they constitute what we call the election of President and Vice-President; and in framing any law for the purpose of settling a disputed question connected with it, or to do anything necessary to carry out the constitutional provision relating to it, we must have regard to the provisions of the Constitution regulating the whole matter and what was intended by the instrument itself by the framers of the Constitution.

One thing that stands out prominently is that the States, as such, irrespective of their size or population, were to have a voice in the election of these two officers. When the Constitution was adopted the States were different in size, as they are now. It was known then that that inequality existed; it was known then that the time never would be when the States would be equal in size and population, but that that same inequality which existed then would go on as long as the United States lasted. Therefore the argument now that the States are so unequal in size is no reason why the original provision of the Constitution giving the States their due weight in the

election of these two officers should be disregarded. It was a provision intended for the protection of the smaller States. They were bodies politic; they had their rights; there was danger that they would be overlaughed by the larger States, and that their rights would be destroyed by the greater representation that other States had in the House of Representatives. In order to protect them against that, the States were given a representation without regard to size in this body and also in the electoral college. Then I insist that any law passed on this subject must be passed with respect to these particular features and purposes of the Constitution, which were to protect the smaller States against the dangers arising from the preponderance of the larger.

Now, Mr. President, how do the electoral colleges vote? They vote by States. Each State elects a number of electors equal to her representation in the House and in the Senate. The State of Delaware elects three, the State of Virginia eleven, the State of New York thirty-five. When these electors meet together, those representing the States and those representing the people, they constitute one body in each State, and cast their votes as one body. They cast the vote of their State, and a majority casts it, if that majority be only one.

Now, to keep up the analogies of the Constitution and the unities of the Constitution, I insist that whatever we do in this regard shall be done in the same meaning, and in the same sense, and for the same purpose that the electoral college acts. We must endeavor to preserve the symmetry of our system; we must strive, in every step we take toward electing a President and Vice-President and declaring the result, to preserve the same analogies that guided the convention in establishing the electoral college and the mode of electing the President and Vice-President. Any departure from that, anything going outside of that, is a violation of the purposes of the Constitution and the intentions of the framers of it, and should therefore not be adopted.

Hence, when it comes to the decision of any important question connected with the election of these officers, and to deciding which of two returns is the vote of a State, upon which decision the result of the election may turn, why is it not proper that that question should be decided upon the same principle, rule, and reasons that regulate the election of President in its other phases? If it was proper that the President should be elected by a joint vote of the people and the States; if it was proper that the electoral college should be constituted partly of the States and partly of the people, is it not equally proper that a question upon the decision of which the result may turn should be decided in the same way that the election itself was intended to be decided? Certainly when we do that we keep up what the framers of the Constitution intended, and we preserve the purpose of the instrument. If we go outside and adopt any plan different from or beyond that, we depart to that extent precisely from what was intended in the original framing of the Constitution; and, therefore, we do what was never intended and what is contrary to the instrument itself.

The Senator from Indiana proposes to let the judges of the Supreme Court, not sitting as a court but as individuals, decide this question in the last resort, and he does it upon the ground that letting the Senate and House of Representatives decide it is anti-republican, because the States would thus be represented in the decision. It seems to me that if the Constitution intended that the States should be represented in all these questions, it cannot be contended that it is anti-republican. It is the purpose of the Constitution itself that the States should be represented; and when an amendment is offered which declares that the States shall not be represented as to any particular thing arising in this election, to that extent we depart from the Constitution and from our republican institutions. The members of this body and the members of the House of Representatives were elected by the people partly to perform these very functions. They were chosen for the purpose, among others, of deciding who in a certain contingency should be President and who Vice-President. When the people voted for them, they delegated them to fulfill those duties; they elected them for that purpose as well as other purposes; and when we leave the question with the men thus elected by the people, we leave it where republican government ought to leave it, with the people or with the representatives of the people. But if we take it away from them and give it to nine other men never selected by the people, knowing little of the people, necessarily by the very nature of their functions and duties removed from the people and in no sense representing them, we get the decision of that great question away from a representative body of men to a body never elected by the people and having little connection with them. I can imagine no provision that would be further from the spirit of the Constitution and of our republican institutions, unless it would be to select six or eight of the ministers who represent foreign governments in this city and let them be constituted a court to decide upon this question. That would be just as far from my idea of what constitutes a republican government which is a representative government as the proposition submitted by the Senator from Indiana. I think, therefore, that his amendment is wholly inadmissible.

Then I think the proposition of the Senator from New Jersey, [Mr. Randolph,] to a certain extent incorporating my view, is yet defective in one very important particular, and that is in its practical working. Now observe in what that defect consists.

The two houses meet together in the hall of the House of Representatives to count the votes. If there is no objection made and the votes are simply counted throughout without any question arising, the two houses do not separate at all until all the votes are counted and the result announced; but whenever a question arises to be decided the two houses separate at once, and the Senate returns to its chamber and the House remains in its, and each proceeds to act for itself on the disputed point. Suppose there be two returns from a State, and it becomes necessary to decide which is the right one. The two houses separate, and each proceeds to act upon the question. After they have acted, the Senate is notified of the readiness of the House to receive them and returns to the hall of the House of Representatives, and there it is ascertained that the House has decided in favor of one return and the Senate in favor of the other. Now, the proposition of the Senator from New Jersey is that in that event the President of the Senate shall proceed to declare which return shall be counted, and shall base his decision upon a majority vote of the two bodies. But does not this practical difficulty arise: The vote of the House has been given in the absence of the Senate and of the President of the Senate; he does not know what it was; and the amendment provides no means of ascertaining what vote the House has given.

Mr. RANDOLPH. May I interrupt the Senator?

Mr. JOHNSTON. Certainly.

Mr. RANDOLPH. I should like to know whether the President of the Senate would not have the same means of ascertaining the vote of the House as he has of ascertaining that the House has disagreed at all? If he is competent to receive one message he is competent to receive both; and therefore the information is within his grasp, and within his official grasp, as it seems to me.

Mr. JOHNSTON. I think not, sir; because all that the Senate learns when it returns to the House is simply the result. How that has been attained there is no way of ascertaining. It is announced merely that the House has determined to accept one set of returns. By what vote the House has done that is not announced. The proposition of the Senator from New Jersey leaves that as a difficulty likely to impend, and does not undertake to remove it.

Mr. RANDOLPH. That is a mere matter of detail.

Mr. JOHNSTON. It may very well happen that the vote may not be taken by yeas and nays, and it might happen that that vote would be taken so that those who voted for the proposition and who voted against it could not be ascertained. Suppose it was a simple vote in the ordinary way: "All who are in favor of this proposition say ay, and the contrary, no." It would be out of the power of the Presiding Officer of the House or anybody there to say how the vote was. Nobody could tell who were the members who constituted the majority.

Mr. RANDOLPH. Does the Senator from Virginia mean to say that upon a question of that magnitude it is probable, or even possible, that the vote shall be taken in the manner indicated by him; that so undignified a proceeding as that would be likely to occur at all?

Mr. JOHNSTON. I cannot say that it is probable, but I do say that it is possible; and, while we are providing against these contingencies, let us provide against all. Let us have this law passed so that there can be no trouble in the execution of it, and have the mode so clearly defined that it meets every conceivable emergency.

Mr. RANDOLPH. Then I will answer the Senator by saying that in providing for the details the law may state that the vote shall be taken by roll-call, and the names entered.

Mr. JOHNSTON. That is possible. The law might be framed in such a way as to provide for that; but, as it stands now, that difficulty exists, and, to my mind, it is a serious one.

The Senator from North Carolina [Mr. Merrimon] has made a suggestion; and, as I am speaking on this subject, I may as well address myself to that as to the others. His proposition is to strike out all after the word "which," in section 2, line 7, and insert:

"Shall be duly authenticated by the State authorities, recognized by and in harmony with the United States, as provided by the Constitution."

It seems to me that that amendment of the Senator from North Carolina is open to very serious objection. What is meant by being in harmony with the United States? Suppose we adopt that amendment and declare that that vote shall be counted which is certified by the authorities of the State in harmony with the United States, what does that mean? Does not that leave a wide field open for investigation and construction? What is the United States? The United States is the whole Government. It is the executive, the judicial, and the legislative departments of the Government. All these combined constitute the United States, and no two of them do it. It takes them all; and when we say that the government of a State is in harmony with the United States, I do not exactly understand the phrase or know how it will be interpreted. Take the existing state of things. The President belongs to the republican party; the Senate is republican; the House of Representatives is democratic; the Supreme Court

and the judiciary are neither one nor the other, but are, as they ought to be, not politicians. Suppose the question should come up, whether or not a particular State government is in harmony with the United States, how is that fact to be ascertained? All the departments of the Government are not "in harmony" with each other just now. There is a difference of opinion between the two houses, the legislative branch; and a case might arise in which the government of a State could not be in harmony with the whole United States at the same time. A case might very well exist, too, where a State government had never been recognized by any department of the United States. The elections come on in November. Most of the governors qualify in January. These returns are to be counted in February. No act of anybody, neither the legislative, executive, nor judicial branch of the Government, may have recognized the government of a State from the time of its inauguration up to the time of counting the electoral vote. I understand a recognition to mean some act of the legislative body recognizing a particular governor and a particular legislature as the legal government of a State, or through some proclamation of the President or some communication between him and them recognizing that as the legal government of the State. But the President cannot by general proclamation declare that a certain man is the governor of a particular State; that is not part of his duties. Neither can the Congress of the United States by law declare that a certain man is the governor of a State; that is no part of their constitutional power. All that either can do is, when a man claims to be the governor of a State, to recognize him in such intercourse as may take place between him and the United States or between him and a particular department of the Government in such manner as the Constitution and laws authorize States to have intercourse with that department. That is all we can do. We can only recognize him as governor when the occasion arises for the recognition. We cannot make a solemn recognition as an independent act. The recognition is the result of some intercourse between the two which requires that some act shall be done to bring it about. Until that is done there can be no recognition. It may very well happen, therefore, that the State may not be in harmony with the United States. The State government may have never been recognized; and if the question of the returns comes up then, and it is to be tried by that standard, we have nothing to decide it by. That practical difficulty arises in regard to that proposition, and I think, therefore, that it is objectionable also.

I desire to say a few words in regard to the proposition of the Senator from Maryland, [Mr. Whyte.] I differ as widely from him as I can, both upon the construction of the authority he quotes from Kent's Commentaries and upon the construction he puts upon the Constitution and the report of the committee quoted by him. His idea is that Chancellor Kent, in his Commentaries, recognized the right and power of the President of the Senate to count the vote, that that was a duty under the Constitution, and that Congress had no right to legislate upon the subject. I think, with all due deference to the learned Senator, that he construed the authority wrongly. This is the law that he read:

"In the case of questionable votes and a closely-contested election, this power may be all-important"—

That is, the power to count the votes—

"and I presume, in the absence of all legislative provision on the subject, that the President of the Senate counts the votes, and determines the result, and that the two houses are present only as spectators, to witness the fairness and accuracy of the transaction, and to act only if no choice be made by the electors."

Now I read that to mean this. There is a wide difference between constitutional provisions and legislative provisions. A constitutional provision is an amendment to the Constitution, a change in the organic law of the land. A legislative provision is an act of Congress, some proceeding of the two houses in their legislative capacity. Chancellor Kent certainly knew the difference between a legislative and a constitutional proceeding; and when he used words intimating that there might be a legislative provision on this subject, he certainly could not be held to have meant that the Constitution might be amended, and thus the difficulty avoided. We all know it is in the power of the country to amend the Constitution whenever three-fourths of the States agree to do so. There can be no question upon the right of amendments to the Constitution. He could not, therefore, have referred to amendments to the Constitution, nor could he have referred to any question connected with the Constitution itself, because certainly so learned and so accurate a man as Chancellor Kent knew the difference between the words "constitutional" and "legislative," and he would not use the word "legislative" where he meant "constitutional." That any man, especially a learned law-writer, writing an elementary book for the regulation of the courts of the country and the instruction of the legal profession, should use words so loosely that he would not discriminate between the word "legislative" and the word "constitutional" is not to be supposed; and when he intimates, or says plainly, that there may be a legislative provision on the subject, we understand him to mean that he thinks Congress has the right to pass a law on the subject, and by it declare who shall count the votes. In that sense, if that view is true, he cannot be held to mean that the Con-

stitution gives the Vice-President the right to count the votes, because if the Constitution did give that right then it could not hold that Congress could legislate on the subject. Whenever the right of Congress to legislate on the subject is conceded the right of the Vice-President under the Constitution to count the votes is denied. That proposition it seems to me is very plain. If the Constitution vested in the Vice-President the right to count the votes then no power can take it away from him; it belongs to him; he must exercise it; nobody else can. When Chancellor Kent says this is a subject upon which Congress may legislate, that Congress may provide who shall count these votes, of course his opinion is that the Vice-President has not the constitutional right to do it, or that it is not vested exclusively in him.

I think that view is supported precisely by the report of the committee which was quoted by the learned and eloquent Senator from Maryland. It will be observed that the same body of men framed both the Constitution and the report. That was a report to the convention that framed the Constitution of the United States, and was adopted by that body. In construing the two instruments, therefore, if we find any difference in phraseology between them, what is the natural inference? It is not that the two mean the same thing, but that they mean different things. If the same body of men make two instruments, and if in making one they use particular language and in making the other they use other language in regard to the same subject, no rule of construction authorizes us to assume that the two instruments have the same meaning. The Constitution provided, as originally framed, in the second section of the second article, that the Vice-President should open the votes and they should then be counted; just as the twelfth article of the Constitution now provides. After the Constitution was constructed the report was made. The object of the report was merely to put in force the Constitution. We then had no President, no Vice-President. This report was in the nature of a schedule, such as accompanies all new State constitutions, specifying the means of putting it in operation, and nothing more. The Vice-President could not count the votes and determine who was regularly elected, because he did not then exist. Somebody had to do it. Therefore they had to provide some temporary expedient, and having provided first in the Constitution in general terms that the Vice-President should open the votes and that they should then be counted, they provide in this report for a special officer to be elected by the Senate, who should do what?

"That the electors should meet on the day fixed for the election of the President, and should transmit their votes, certified, signed, sealed, and directed, as the Constitution requires, to the Secretary of the United States in Congress assembled."

That provision was changed afterward by directing the votes to be sent to the President of the Senate.

"That the Senators and Representatives should convene at the time and place assigned; that the Senators should appoint a President of the Senate for the sole purpose of receiving, opening, and counting the votes for President; and that after he shall be chosen, the Congress, together with the President, should, without delay, proceed to execute this Constitution."

Now, then, that officer was elected for a single purpose. He was particularly deputed by this report to receive, to open, and to *count the votes*; but when you come to the Constitution itself it authorizes him to receive and open, and omits to direct that he shall count the votes. Then what is the rule of construction by our courts? When this report provides that the Vice-President or the Presiding Officer shall receive, shall open, and shall *count the votes*, and the Constitution says that he shall receive and open them, by what rule of construction, I ask, is it that anybody can say that he shall also count the votes? The instrument itself upon its face would seem to me to determine it. When we recollect that it was made at the same time that this report was made, by the same body of men, and that these words that are important and material in the report are omitted in the Constitution; when we recollect that the Constitution specially takes away from the Vice-President that particular power, I cannot understand how it is that any one can contend that the framers of the Constitution intended that it should give to that officer the right to count these votes. Every rule of construction and every court in the land would determine that the Constitution meant something different from the report because it omitted an important part of the report; that it meant something different because it used different language; that it could not mean the same thing when the two were so widely different in their terms. Therefore, I respectfully submit to the learned Senator that his argument is in default in that respect.

Upon reviewing all the propositions that have been made, I still insist that the amendment offered by myself, that, where there is a disputed question in regard to a return, the two houses together, voting by States, should decide it, is the one most in consonance with the Constitution and with the spirit of our institutions. It preserves the legitimate and constitutional weight of the States, and it is the only mode suggested that does. It presents the same features that the electoral college has, and it is the only provision that does it. It carries out just what the framers of the Constitution seemed to intend, and it is the only one that does it. It remits the decision of

an important question to the two houses acting in their capacity under the Constitution and acting in the way that the Constitution intended them.

It seems to me, therefore, with all due deference to the opinion of other Senators, that this proposition is the true solution of this question and should be adopted.

The PRESIDING OFFICER, (Mr. Mitchell in the chair.) The question is on the amendment offered by the Senator from Virginia [Mr. Johnston] to the amendment of the Senator from Tennessee, [Mr. Cooper.]

Mr. JOHNSTON. I ask for the yeas and nays.

The yeas and nays were ordered.

Mr. BOGY and Mr. HOWE. Let the amendment be reported.

The PRESIDING OFFICER. The amendment and the amendment to the amendment will be read.

The CHIEF CLERK. The amendment of Mr. Cooper is to add to section 2 the following words:

"And if the two houses do not agree as to which return shall be counted, then that vote shall be counted which the House of Representatives, voting by States in the manner provided by the Constitution when the election devolves upon the House, shall decide to be the true and valid one."

It is proposed to amend this amendment by striking out all after the first word, "and," and in lieu thereof inserting the following:

"If the Senate should vote for counting one certificate and the House of Representatives another, the joint meeting of the two houses shall finally determine which shall be counted, by States, the representation from each State, including the Senators therefrom, having one vote; but if the representation of any State shall be equally divided, its vote shall not be counted."

Mr. SARGENT. I should like to inquire whether if this amendment be adopted it so adopted becomes the text, so as to be capable of amendment.

The PRESIDING OFFICER. This is an amendment to the amendment of the Senator from Tennessee, and if adopted it will be still subject to amendment.

Mr. SARGENT. It can be superseded by another amendment?

The PRESIDING OFFICER. It will be open to amendment of course. The question is on the amendment to the amendment, upon which the yeas and nays have been ordered.

The question being taken by yeas and nays, resulted—yeas 11, nays 39; as follows: YEAS—Messrs. Allison, Bogy, Davis, Johnston, Kelly, McCreery, Ransom, Sargent, Sanlbury, Thurman, and Withers—11.

NAYS—Messrs. Booth, Boutwell, Burnside, Cameron of Pennsylvania, Cameron of Wisconsin, Christiancy, Cockrell, Conkling, Cooper, Dawes, Dennis, Eaton, Edmunds, Ferry, Frelinghuysen, Gordon, Hamilton, Hitchcock, Howe, Ingalls, Jones of Florida, Key, Logan, McDonald, McMillan, Maxey, Merrimon, Mitchell, Morton, Norwood, Oglesby, Paddock, Randolph, Robertson, Sharon, West, Whyte, Windom, and Wright—39.

ABSENT—Messrs. Alcorn, Anthony, Bayard, Bruce, Caperton, Clayton, Conover, Cragin, Dorsey, English, Goldthwaite, Hamlin, Harvey, Jones of Nevada, Kernan, Morrill of Maine, Morrill of Vermont, Patterson, Sherman, Spencer, Stevenson, Wadleigh, and Wallace—23.

So the amendment to the amendment was rejected.

The PRESIDENT *pro tempore*. The question recurs on the amendment proposed by the Senator from Tennessee, [Mr. Cooper;] which will be read.

The Secretary read the amendment, as follows:

"And if the two houses do not agree as to which return shall be counted, then that vote shall be counted which the House of Representatives, voting by States in the manner provided by the Constitution when the election devolves upon the House, shall decide to be the true and valid return."

Mr. EDMUNDS. I ask for the yeas and nays on that.

The yeas and nays were ordered; and being taken, resulted—yeas 13, nays 35; as follows:

YEAS—Messrs. Bogy, Caperton, Cooper, Davis, Gordon, Johnston, Kelly, McCreery, McDonald, Ransom, Sanlbury, Thurman, and Withers—13.

NAYS—Messrs. Allison, Booth, Boutwell, Burnside, Cameron of Pennsylvania, Cameron of Wisconsin, Christiancy, Cockrell, Conkling, Dawes, Dennis, Eaton, Edmunds, Ferry, Frelinghuysen, Hamilton, Hitchcock, Howe, Ingalls, Jones of Florida, Key, Logan, McMillan, Maxey, Merrimon, Mitchell, Morton, Oglesby, Paddock, Robertson, Sargent, West, Whyte, Windom, and Wright—35.

ABSENT—Messrs. Alcorn, Anthony, Bayard, Bruce, Clayton, Conover, Cragin, Dorsey, English, Goldthwaite, Hamlin, Harvey, Jones of Nevada, Kernan, Morrill of Maine, Morrill of Vermont, Norwood, Patterson, Randolph, Sharon, Sherman, Spencer, Stevenson, Wadleigh, and Wallace—25.

So the amendment was rejected.

Mr. MAXEY. I handed in yesterday an amendment which I propose to offer at the proper time. I believe this is the proper time.

The PRESIDENT *pro tempore*. There is no amendment pending; the bill is open to amendment.

Mr. MAXEY. I offer the amendment and ask that it be read.

The PRESIDENT *pro tempore*. The amendment will be reported.

The CHIEF CLERK. The amendment is to add to the second section the following:

"But if the two houses fail to agree as to which of the returns shall be counted, then the President of the Senate, as presiding officer of the two houses, shall decide which is the true and valid return, and the same shall then be counted."

Mr. EDMUNDS. I ask for the yeas and nays on that amendment.

The yeas and nays were ordered.

Mr. MAXEY. I ask that the whole section as it will stand if amended be reported.

The PRESIDENT *pro tempore*. The section will be read as it will stand if this amendment be agreed to.

The Chief Clerk read as follows:

"SEC. 2. That if more than one return shall be received by the President of the Senate from a State, purporting to be the certificates of electoral votes given at the last preceding election for President and Vice-President in such State, all such returns shall be opened by him in the presence of the two houses when assembled to count the votes; and that return from such State shall be counted which the two houses, acting separately, shall decide to be the true and valid return. But if the two houses fail to agree as to which of the returns shall be counted, then the President of the Senate, as presiding officer of the two houses, shall decide which is the true and valid return, and the same shall then be counted."

Mr. EDMUNDS. I have two objections to this amendment. The first is one perhaps of mere phraseology. It declares that "the President of the Senate, as presiding officer of the two houses, shall decide." I do not think myself, under the Constitution, that any duty of the President of the Senate imposed upon him by the Constitution in respect to counting the votes is in the character of a presiding officer of the two houses, which implies a strict joint assembly, and logically to my mind would imply that the two houses then and there assembled, as they frequently do in the States, as they do in my State, should act in a consolidated way and decide any question that might arise just as either house would alone. Therefore, phrased as the amendment is, I cannot vote for it for that reason, for I do not understand that the President of the Senate is the presiding officer of either House when he is performing that duty, in any legal and constitutional sense. That he sits in the chair, and that everybody keeps quiet, I agree; but in respect of it in a legal and constitutional sense I do not believe it at all. But of course it would be very easy to change that phraseology.

The objection that I have in substance to this amendment, and which to my mind is absolutely fatal, is that the President of the Senate may be, sometimes has been, and very likely often will be a candidate for President or for Vice-President himself, and this amendment proposes that that very person, selected by designation, shall, in a case of great doubt and dispute, when the two houses acting with a patriotic disposition to follow the law and the Constitution are unable to agree, decide himself whether he shall be President or not. It appears to me that that would be a very unsafe and dangerous proposition. It is wrong in principle, as I think; and that it would be dangerous in the last degree in practice, I have no doubt at all.

Mr. MERRIMON. Mr. President, I cannot support this amendment. In my judgment, after very considerable reflection, the duty of counting the electoral vote for President and Vice-President is devolved upon the Senate and House of Representatives as composing the Congress. My mind is not clear whether the two houses when sitting in joint session should vote as one body or vote separately. At the last session I ventured to say that they should vote as one body. The inclination of my mind now is the other way; but be that as it may, the exclusive jurisdiction is in Congress, and I think so for reasons which I will not now detain the Senate to express. Entertaining that view, we have no power to delegate to the President of the Senate, or to the Supreme Court, or to commissioners, or to any tribunal whatsoever the right to decide any controverted question arising upon the count of the votes. It must be done by the Congress; by the Senate and House of Representatives. As I said, I will not detain the Senate now by assigning the reasons why I think so. I merely wish to say that I cannot support this amendment upon that ground.

Mr. BURNSIDE. Mr. President, I shall detain the Senate but a moment. I approach this question with a great deal of diffidence. It has been discussed by the best legal minds of the Senate and the best legal minds of the land; but I am well convinced that, if a constitutional mode could be adopted for perfecting the electoral returns before they come before the joint convention of the two houses, it would be a desirable thing to do, and we should direct our efforts to bring that state of affairs about. There should be no bone of contention in the joint convention when it meets. The great danger is that there may be a difference of opinion there which might create

such great discord as to endanger the peace of the country. Now, it does seem to me that it is within the province of the law-making power of the Government to impose upon the Supreme Court any duty which is reasonable and proper, just as Congress imposed on that court duties with reference to the appointment of registers in bankruptcy and the organization of bankrupt courts. These duties were quite outside of the specific duties of the Supreme Court under the Constitution, and it seems to me that all agents of this Government, whether cabinet ministers, courts, or officers of any kind, can have reasonable extra duties imposed upon them by Congress, which they are bound to perform or give up the positions they occupy.

Taking that view of the matter, it is clear to my mind that such legislation should be had here as to remove all doubt as to the *prima facie* legality, if I may so say, of these returns before they come to the joint convention. If the electors were made to meet, say, on the last Wednesday of November, instead of early in December, as the law now provides, and if the joint convention of the two houses would meet, say, on the second Wednesday in February, instead of late in January, ample time would be given for an examination of these returns. I do not mean an examination of the matter inclosed in the envelopes, but an examination of the conditions under which the votes were cast. If the electors were obliged by law to subscribe their names on the envelopes inclosing the returns, together with the date and hour of meeting and mode of procedure, then the returns when they reach the President of the Senate would show on their faces all necessary information to determine their legality or illegality.

If these returns could be submitted by the President of the Senate to the Supreme Court, either as a court or as a board of examination organized under a law of Congress for the purpose of examining the returns, the fact would develop itself at once if there were irregularities of procedure, or if two or more sets of returns had been forwarded from any one State. In the latter event the court or board of examination could send for witnesses and issue all necessary processes to determine which were the legal returns. After the necessary examination the legal returns could be certified back to the President of the Senate by the board of examination, and he would then be able to present to the joint convention at their meeting returns which on their faces would show themselves valid. Thus the intrusion of this bone of contention would be avoided.

There may be grave constitutional objections to this plan, but I can see no reason why the duty cannot be imposed upon the Supreme Court in some form. It seems to me an equitable way of arranging the matter, and one that would be acceptable to the people. The President of the Senate, in my opinion, could be authorized by Congress to part with these returns, for the time being, for the purpose of this examination.

It is gratifying to me, and must be to every Senator, to witness the spirit with which this question has been approached. There seems to have been no display of partisan feeling, and we should endeavor before we leave the subject to have it in such condition as to leave no ground for such a display at the meeting of the joint convention.

I merely throw out these remarks for consideration. I have draughted an amendment to the bill covering these points which at the proper time I may offer.

Mr. SAULSBURY. Mr. President, I had not proposed to say anything upon this subject, but the amendment of the Senator from Texas is of a character that I think will be very dangerous in practice if it should be adopted. I only rise to say that I cannot vote for the amendment of the Senator from Texas. It proposes to confer in a certain contingency upon the Presiding Officer of this body the right to determine a question about which the two houses of Congress are at disagreement. I think that would be a very dangerous power to place in the hands of any one man, however exalted his position, however pure his life and character. I would be unwilling to confer such a power, involving such consequences as would then probably arise, upon any one individual. Especially would I oppose the vesting of such great power in the Vice-President after there had been a disagreement between the two houses of Congress upon the subject of which of two returns of the vote for President of the United States, certified from the same State, should be counted.

I fully realize the importance of the subject which has been brought to the attention of the Senate by the bill under consideration, and in the Committee on Privileges and Elections where it was under discussion I think the feeling very generally was that the question was one of vast importance and one which ought at least to be brought to the consideration and attention of Congress. The bill was reported from the committee for that purpose, with the distinct understanding that the respective members of that committee were not bound by the simple fact that the bill was reported to adhere to its provisions. I should have preferred the amendment offered by the Senator from Virginia, [Mr. Johnston,] and I voted for that most cordially as an amendment, but it has been voted down.

Now, there is no doubt but what there might possibly arise a contingency in the history of this country when, if we have nothing but the constitutional provision on this subject, great difficulty and embarrassment may result. I have listened to this debate; I have heard the views of Senators in reference to the true meaning of

the constitutional provision in regard to the counting and ascertaining of the result of a presidential election; and I must confess that I widely differ from my learned friend from Maryland [Mr. Whyte] in his view of that subject. The constitutional provision is simply that the Presiding Officer of the Senate shall receive and open the votes. It does not say nor does it imply, in my opinion, that he shall count the votes.

In fact, the argument of the Senator from Virginia this morning showed that if any implication arises from the language of the Constitution and the practice at the First Congress, it is adverse to the conclusions of the Senator from Maryland, and the implication is the other way, that he shall not count. Mr. Langdon, the first Presiding Officer of this body under the Constitution, before its adoption, was specially required and authorized to count the votes by resolution of the Senate when no such authority was conferred upon the Presiding Officer of this body under the language of the Constitution. The Presiding Officer at that time, Mr. Langdon, was appointed to receive, to open, and to count the votes; but under the constitutional provision, the President of the Senate was only to receive and to open the votes. There is no express grant of authority in the Constitution to the President of the Senate to count the votes; and I apprehend that it would have been perfectly competent at any previous period in the history of this country for the Congress of the United States to have determined for themselves, in the absence of an express provision on the subject, who should count the votes, whether the President of the Senate, or the Speaker of the House, or persons appointed by their respective houses. There is nothing in the Constitution to inhibit it, neither by express provision, nor, as I conceive, by implication.

I am fully aware that the precedents which have been cited are entitled to some weight as authority, indicating at least what may have been considered the meaning, but they are not constitutional provisions. The practice has been, and the precedents establish the practice, that the Presiding Officer of this body counts when there is but one return; but those precedents do not incorporate any provision into the Constitution, and in the absence of such a provision, I maintain that it would have been competent, on any occasion when the vote for President was to be counted, for the respective houses of Congress to have designated some other party than the President of the Senate to count the votes. I am not saying that the practice has not been a wise one. I am only saying that that practice has not the force and effect of constitutional provision, that it incorporates nothing into the Constitution that is not there, and that in the absence of any constitutional provision on the subject as to who shall count the votes, it was competent for Congress to provide some person other than the President of the Senate to have counted them, if in their wisdom they had seen proper so to do.

Now, the bill as reported from the Committee on Privileges and Elections fails to provide for one contingency that may happen. I do not know that I have any serious objection to the bill except upon that ground, that it fails to provide for one contingency that may happen in the future history of this country, and that is that when two returns have been sent up from any State, and the two houses of Congress are at disagreement in reference to which of those two returns are the true returns, then, if they cannot agree, but disagree, the vote of that State shall be thrown away. That such a contingency may arise is unquestionable, because it has arisen at one time, and at the very last presidential election such a contingency did arise, and the vote of Louisiana was cast aside.

Now, we ought not to leave this matter in that condition. The bill introduced by the Senator from Indiana does leave it in that condition, if there is no concord and agreement between the two houses. The bill is defective in not further providing some rule by which the true returns from a State in that condition shall be counted. The amendment of the Senator from Virginia met the case, in my judgment, upon the true and proper ground; that was, to give to the two houses of Congress, voting by States, the right and the power to determine that question, but that amendment has been voted down. And now an amendment is presented by the Senator from Texas that in that contingency—that is, upon the disagreement of the two houses of Congress—the power shall be conferred on the Presiding Officer of this body. That, I say, would be conferring on him a most fearful power; and the exercise of that power on his part, I apprehend, would not only create dissatisfaction, but might lead to results in themselves very embarrassing.

It is not to be presumed that, if the two houses of Congress disagree as to which of the returns in the case of double returns should be counted, there would be general acquiescence in the decision of the Presiding Officer of this body, and especially if his decision was cast in harmony with the views of his party on that subject. To avoid any such danger, to avoid the possibility of questioning the correctness of his action, I should be unwilling to see him placed in the possession of such authority. Nor do I believe that the Presiding Officer of this body has the right under the Constitution, as has been contended by some already, of judging when two returns are made which is the proper return. It is a case which was not contemplated by the Constitution, and

for which no provision has been made; and if I could admit (which I do not admit) that the Constitution confers upon him now the power of counting the votes, that being a mere ministerial act, it does not confer upon him the power of judging as to which of two returns is the correct return; it does not devolve upon him the fearful power of deciding a question of that magnitude. Certainly it will not be contended that when there are two returns presented to the Presiding Officer of this body where he must exercise judgment, where he must exercise discretion, the decision of that is the exercise of a ministerial act. It is a judicial act, to all intents and purposes.

The Senator from Maryland, if I understand him aright, contends that the power to count the votes is lodged in the President of the Senate, and is a ministerial act; but if he means to go so far as to say that any decision which he may render between different returns is a ministerial act, I differ entirely and essentially from his conclusion. Wherever there is the exercise of judgment required, wherever there is discretion involved, then the act ceases to be a ministerial act and becomes, not quasi-judicial, but judicial in fact. So then, if I were to admit that under the Constitution the President of the Senate is invested with authority and power, not only to receive and open the votes, but to count the votes, I do not admit that, when the question is presented of deciding between two sets of returns, he is invested with authority under the Constitution of deciding which shall be counted. That being the case, I was in favor of some amendment to the bill proposed by the Senator from Indiana which would meet that contingency. But nothing that I have seen yet fully meets with my approval except the amendment, which has been rejected, offered by the Senator from Virginia. It is true I voted for the amendment of the Senator from Tennessee [Mr. Cooper] as the next best proposition to meet the difficulty, but that likewise has been defeated. Now the proposition of the Senator from Texas [Mr. Maxey] is of such a character, investing the Presiding Officer of this body with such fearful power, that I am unwilling that that should become a part of this bill, preferring, if it is to pass, that it pass without any such amendment. I shall therefore vote against his amendment, and it was more for the purpose of announcing my determination to do so that I arose on this occasion than to enter into any general discussion upon the bill or the subject which it brings to the attention of the Senate.

MR. FRELINGHUYSEN. Mr. President, some days ago, in making some remarks on this subject, I expressed myself as favorable to such an amendment as that which has since been proposed by the Senator from Texas. On reflection, however, I became so impressed with the fact that our past history shows us that the President of the Senate, either on a re-election as Vice-President or as a candidate for President, is so likely to be interested in the result of the question which he may thus be called upon to decide, that I abandoned that proposition and introduced an amendment, which is not perfect, but which has hitherto commanded the most votes, that the Speaker of the House of Representatives representing the popular branch, the President of the Senate representing the States, and the Chief-Justice, the head of the judiciary, should be a tribunal to decide the question. That, I concluded, was the best tribunal we could have; a tribunal further removed from political influence than any other; and unless some other amendment is adopted, when this bill passes into the Senate I think I shall renew that proposition.

I simply rose to say that it seems to me the probability of the Presiding Officer of the Senate being interested in the question is a reason why I shall not vote for this amendment.

MR. SARGENT. Mr. President, I think it is a matter of regret that we cannot agree upon some plan for the decision of a question almost inevitable in the future, and where for the want of a decision the consequences are certain to be so grave. With what time and attention I have been able to give to studying the various amendments proposed, I have thought that the one proposed by the Senator from Texas was preferable to any other, although not entirely satisfactory. The Constitution contains in a single clause all power and all direction there is upon this matter:

"The President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates, and the votes shall then be counted."

It must either be done by the President of the Senate or by the two houses. Certainly it is as fair to presume that by this provision of the Constitution it is as much intended that the duty of deciding which are the correct returns shall be devolved upon the President of the Senate as upon the two houses. The proposition that the houses, acting either separately or together, shall decide, has been already rejected; and the only portion of the Constitution which has any operative effect left for us to act upon is the first portion of it, which says that this duty, so far as the opening at any rate is concerned, shall devolve on the President of the Senate.

I am aware that the contingency may arise, has arisen before in our history, when the President of the Senate would be a candidate for President or perhaps for Vice-President, and his act might have the effect to either elect or defeat him and his party in his aspirations to that office. But I had rather, even with any temptation which might arise under that condition of things, leave it to the fair judgment of any man

of sufficient character to be intrusted with the position of Presiding Officer of the Senate than to leave it to either house, or to both houses, or to any tribunal where it will be determined simply upon party considerations. I suppose there is no doubt that a decision by States in the House of Representatives would be influenced almost wholly by questions of party, and adding the Senate to them would not change those considerations at all. If the Senate and the House should decide this matter sitting in joint convention, each Senator and each member having one vote, it would still be determined by mere party considerations; and I doubt if we are to expect in a decision so made the highest equity; but to any man occupying the position of Presiding Officer of the Senate, who should wrongfully, and obviously wrongfully, decide, whereby he became a gainer and attained high office, the office of President or Vice-President, such contempt would follow him during his term and during his whole life that I believe any one would shrink from encountering it. In this day of the rapid propagation of public opinion, of the facility for making known all facts, of sifting things to the bottom, any man who should fraudulently decide in favor of his own claims by wrongfully declaring upon these returns, would place himself in a more unenviable position than that of Benedict Arnold, I might say even than that of Judas Iscariot; and it would be impossible for any man, under any temptation or for any office, even if he would hold it after such an act, to shield himself or to encounter contempt like that which would fall on his head from the whole American people and from the inhabitants of this globe. Therefore I believe that that in itself would be a safeguard for the purity of his act, and a very high one.

For this reason I am disposed, for one, to vote for this amendment and to lodge this power where it would seem that by some plausible interpretation of the Constitution the fathers intended that it should be lodged. There may be some difficulty in the wording of the amendment. Of course in the Senate, when this bill is reported, if the amendment shall be now adopted, the phraseology can be changed; but there is certainly the idea carried in the Constitution that the President of the Senate is the presiding officer of the body:

"The President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates, and the votes shall then be counted."

There certainly is a body assembled, a joint convention made up of the two houses, assembled for this limited purpose, and a person is designated who is to act in their presence, and act in the way that a presiding officer ordinarily acts. Of course he is not here called distinctly the presiding officer of the body, but the inference is certainly carried by the language that he is to act in a certain capacity, and to a very large extent in that manner; and therefore the phraseology itself does not trouble me much; but I believe it can be corrected in that respect, and may conform perhaps more nearly to the language of the Constitution by leaving out the words "as presiding officer of the two houses," and simply require this duty of him in the presence of the two houses.

I give thus briefly my reasons for voting for this amendment. I think it is the best we have had.

MR. EDMUNDS. Mr. President, I must confess my surprise at the ground upon which my learned friend from California has placed his support of this amendment, touching a man's judging in his own case. If I understand him, his reason for being in favor of this amendment, so far as it respects that particular feature of it, is that, if a man were to judge erroneously, wrongly, in his own case, in order to gain the election, if he were a candidate himself, he would be so followed by obloquy and moral perdition in this world that he would be restrained from doing it.

MR. SARGENT. I spoke of corruption; not of an error in judgment. Errors of judgment we are all liable to; and so is any human tribunal.

MR. EDMUNDS. So we are; but I have always been taught to suppose that those people were least liable to errors of judgment who had no interest in the question to be decided. That is the very principle upon which, as I understand it, we nowhere in our polity, and nowhere in the polity of any civilized country, allow a man to be a judge in his own cause. It is not because any man who may happen to have a cause and be a judge is corrupt, or would mean to be corrupt if he decided his own cause; but it is because we know, as human nature is, that no man in his own cause can generally be considered as impartial, that his mind is biased, and his intellect, therefore, is unable from the very nature of things to hold evenly and fairly the balance between opposing considerations or opposing facts. That I understand to be the principle upon which we do not allow people to act themselves where they themselves are concerned. That is the reason why we do not allow a Senator here to vote upon a measure in which he is directly and personally interested, peculiar to himself; not that if he did it we should expect that he was doing it from corrupt motives, if he decided in his own favor, but because we should expect that he was incapable, in the nature of things, of bringing to the consideration of that question a perfectly impartial mind. I think that is the principle.

Now, here you propose by a distinct affirmation of law that a person who may be, and who often is, and is likely often to be, the very person whose right to the office is

in question, shall in a case of the greatest doubt, when the two houses disagree, and when the direction in which that doubt may be solved is to turn the scale, be the judge himself. Mr. President, it does not appear to me that that is sound in principle or safe in practice; quite the reverse. If there is any man who ought not to be authorized to exercise any judgment to determine a disputed question it is that man who is interested in it; and yet this amendment selects the very person who in our past history has sometimes been, and in our future history often will be, the person voted for as either President or Vice-President of the United States. I do not think, therefore, that the reasoning of my learned friend from California is well founded.

Mr. SARGENT. I might add another suggestion. This case, of course, is encompassed with difficulties. I presume that any one who addresses himself to it does it with some doubt, with some fear of the correctness of his own conclusions. I have endeavored to inform myself by the progress of this debate of the difficulties that were to be encountered, and to exercise such judgment as I could in arriving at a conclusion. At the same time I am aware that it is difficult for me, in the absence of light in the Constitution, and in view of such differences of opinion among those around me, to arrive at a conclusion in which I can have entire confidence; but I can suppose a case where if the Presiding Officer of the Senate was a candidate for the Presidency of the United States, nominated by any party or receiving any electoral votes, and it became his duty under a law like this to open and decide upon the returns, he would retire from the office; he would resign; and then it would be in the power of the Senate to choose some person who would not have this disability.

I am not sure that if it was decided that the responsibility had better be concentrated upon a single individual of high character rather than be diffused through a body where responsibility is entirely lost, so many partaking of it, and it becomes merely conventional and party, the law might not require that the presiding officer of the Senate should vacate his office if he became a candidate for President of the United States, or rather in case any electoral votes should be cast for him. That certainly would remove the difficulty. Then the Presiding Officer of the Senate does not pass upon a question the result of which is to give him either the Presidency or Vice-Presidency of the United States. I would suggest that to my friend from Vermont as entirely obviating the objection which he makes to the amendment. That is to say, the amendment might be so framed that in case the Presiding Officer shall receive electoral votes from any State in the Union he shall retire from his office, and the Senate shall select a presiding officer whose duty it shall be to open the returns.

Mr. EDMUNDS. How do you get the constitutional power to do that?

Mr. WRIGHT. Mr. President, I was impressed, when the question was first mooted of the necessity for an amendment to this second section, that some plan should be devised to avoid or prevent what it was said would inevitably follow in case of a disagreement between the two houses, that a State might be disfranchised. I then turned over in my own mind what plan would be better, which of the several amendments that have been suggested it would be better to adopt in order to meet the contingency that might arise. The more I have reflected upon the subject, the more I have been brought to the opinion that I believe it to be better and safer and more logical to leave the bill as it stands.

I confess that so far as the amendment under consideration is concerned, it strikes me of all others as being the most objectionable. I certainly cannot agree to the reasoning or argument presented by the Senator from California. It occurs to me that if that argument be sound, then upon the same principle it were better and safer in all cases to make a man judge in his own case, because that high sense of honor which the Senator presumes would obtain in the person who is to decide this question would necessarily keep him in the right path. All experience demonstrates this one thing, it seems to me, as conclusively as anything else that can be demonstrated, that we know less of the strength of our own prejudices than of anything on earth; and there is no one thing upon which we are such unsafe judges as when we come to determine how strong our prejudices or feelings or interests may be on a given question. If self in any instance this wavering balance shakes, it is rarely, if ever, right adjusted. We may think it is, but it is inevitably true that it is not right adjusted.

Now take the proposed amendment; however much may be the interest, however much may be involved in the question, personally or otherwise, to the person who has to decide it, he may attempt to divest himself of all prejudice and all feeling and all interest, and yet, all unconsciously it may be, he is thus influenced. It is dangerous for that reason to intrust him with the determination of that question.

There can be but one reason, it seems to me, in logic for leaving this question to the presiding officer, and that is by reason of his relations to the two bodies. There is argument in favor of that by reason of his relation, rather than leave it to an outside tribunal; and yet it seems to me that that reason is more than overcome by his possible and in many instances his actual relation to the question; and for that reason, without mentioning others, it seems to me that the argument against intrusting the power of deciding the question to him is all-conclusive.

Now, suppose the presiding officer shall not be the person, then it is proposed either that the judges of the Supreme Court, not as a court, shall be selected as the tribunal to which this question shall be left. Another proposition is that it shall be left to three persons perhaps—the presiding officers of the two houses and the Chief-Justice of the United States; and other tribunals have been named. It occurs to me that it is illogical, and in the face of the very theory of our system of government, the nature and duties and obligations imposed upon the legislative department of the Government, that an outside tribunal shall be selected as umpire. It seems to me to be just as logical that in a case where the two houses are unable to agree upon a bill, upon a joint resolution, or any other measure, you shall provide that an umpire shall be called in to settle this difference. If the presiding officer of the Senate can be trusted by reason of that sense of duty that he feels is imposed upon him, and that fear of public condemnation, then why not the two houses of Congress? Each and every member of either house must be impressed just as much as he would be, and comes to the discharge of the duty impressed with the solemn obligations that are upon him. Now, when the two houses, acting honestly, faithfully, with a sincere desire to arrive at what is right, as we must presume they are thus impressed, are unable to determine, why not there leave the question, and why seek for an outside tribunal to settle this question that they are unable to determine, a question that they have struggled to settle honestly and faithfully and under their oaths?

It is said that it is unfair and that it is unjust to a State that its electoral vote shall be rejected, and that unless you provide some tribunal it may occur, the two houses disagreeing, that the vote cannot be counted. Now suppose that shall occur. It occurs after an honest and faithful effort on the part of the two houses to agree. The two houses have attempted to agree upon a bill and it fails; and the two houses have attempted to agree upon this question and they fail. I think it would rarely occur that the question could be presented in such a form that the two houses could not agree; but if it should occur it results from mismanagement, corrupt, capitions, unfair, unfaithful conduct on the part of the officials of a State, because persons representing the State have sent up their returns in such a form that the two houses, acting in good faith and under their sworn obligations, are unable to determine what shall be done. If in such an event a State shall not have its vote, it occurs to me it is only one of those cases where, whether by reason of the mismanagement of the State or by reason of the inability of the two houses to agree after the most faithful action, or both together, the State fails to have its vote, it may be a misfortune, but it is only another instance of those that frequently occur in legislation or in the administration of our affairs where there is loss, and it were better and safer that the loss should occur, perhaps, than to attempt to encourage any doubtful legislation, or to provide a tribunal or method of settling it that is doubtful and questionable to say the least of it.

I therefore have reached the conclusion that I shall vote for the bill as it stands, so far as this section is concerned. I am opposed to the present amendment. I am opposed to the erection of any tribunal outside of the two bodies to come in and assist in this question. I think the two houses ought to count the vote, and if they are unable to agree where there are two returns, then if it occurs that the vote of the State is lost, it results after the most faithful, deliberate, and conscientious action, as I am bound to suppose, on the part of the two bodies. If then they are unable to agree, we have a case that is not provided for and that we cannot safely provide for perhaps as the Constitution stands.

MR. DAWES. Mr. President, my difficulty with this amendment is that it derives its whole authority from a statute. A statute of the United States in this amendment devolves upon the President of the Senate, or, in the amendment of the Senator from New Jersey, upon three persons designated, or, in the amendment of the Senator from Indiana, upon the members of the Supreme Court—a statute devolves upon them the designation of a President of the United States for four years. Their authority is derived solely from a statute of the United States, for nowhere in the Constitution of the United States is the idea broached that upon any individual in the United States shall be devolved the power of selecting the President of the United States. He who decides this question designates a President of the United States, and he gets his authority from this statute and nowhere else.

Whether the President of the Senate could be trusted, or whether the gentlemen selected in the amendment of the distinguished Senator from New Jersey could be, or those high characters who constitute the Supreme Court of the United States, (which is, in my opinion, the best of all the amendments,) it is enough to my mind that they have no other authority to designate a President of the United States than that which they derive from this statute; and that while the Constitution of the United States took what its framers thought was all necessary pains at that time to guard and secure the selection by the people of a President, it has been left to us here to discuss the question whether by a statute we cannot safely designate a man or men who will select for us a President of the United States. Sir, that is such a departure from the Constitution that I cannot vote for it. If there were no other objection, it is a power

reposed in one man or in ten men, however high their character, that it would not be safe to confer. It is in violation of all the analogies and all the theories upon which the Government itself is based, and it would be the strangest anomaly in what would otherwise be called a free government of the people, that although in all things else the nation and the Constitution had studied to give effect to the voice of the people, we had here deliberately, by a short section of three lines, selected a man and clothed him with the power of saying who shall be the President of the United States.

It may be but the best way out of a difficulty, which I admit (as the Senator from Indiana has over and over again impressed upon the Senate) may exist; but because it exists, it does not authorize us without authority of the Constitution itself to clothe any man with this authority. I agree with what has just been said that while the Constitution does clothe these two houses with power, if they fail to agree, the legal effect of it—if you do not put it into the bill—the consequence of their failing to agree is just what you have written out in this bill, nothing more. If a question arises about the opening of a vote, whether you shall count it or not, and those on whom the Constitution has devolved the duty of deciding it fail to agree, the legal consequence is precisely what this bill says shall be the consequence. It cannot be counted, because those upon whom the Constitution has devolved the power of determining it have failed to agree that it shall be counted, or how it shall be counted. And because they fail to agree, and because the Constitution has not gone farther to dispose of the question, we propose to do so by a statute. The ingenuity of members of the Senate and the House may be exhausted upon selecting the best and the safest tribunal; but still it will lack constitutional authority, and lacking constitutional authority it is naught, and being naught, to set up a man as President of the United States without authority is another definition of usurpation.

Mr. FRELINGHUYSEN. Mr. President, I cannot agree with my friend from Massachusetts that these amendments, or any of them, look to defeating the will of the people, and that this empire, this tribunal, designates who is to be the President. The people who have voted, the electoral colleges, the States whose votes have been counted, have all had much to say as to who shall be President, and the object of these amendments, one and all, is not to defeat the will of the people, but to prevent the will of the people from being defeated. It is in the event of there being two returns that we wish to have a tribunal to select the true one, because we believe that the Constitution contemplated that in that event the vote of each State should be counted. So it seems to me that these amendments cannot be characterized as usurping the rights of the people.

Again, I cannot agree with my friend in his proposition that these amendments have nothing to rest upon excepting statute, that they have not a constitutional basis. Of course if they have not a constitutional basis, that is fatal to them. But I understand that when the Constitution says that "the votes shall then be counted," a duty is devolved upon the legislative branch of the Government. We are not told by the Constitution how we shall discharge that duty; and according to all the analogies of the Constitution, where any subject is devolved upon a legislative department of the Government and we are not told how we are to discharge the duty, we do it by legislation; we are authorized so to do by the Constitution. The Constitution says that there shall be courts inferior to the Supreme Court. We go on and organize them. So here it says these votes shall be counted. We go on by legislation and say how they shall be counted. There is a difficulty in finding a tribunal upon whom we have a right to impose the duty against their will. This is a difficulty perhaps which would exist in reference to making the judges of the Supreme Court, not as a court, but as individuals, the tribunal in this case. If it is a new office created, they may accept it or not as they please; and that is the only difficulty that I see in our arriving at a perfectly satisfactory amendment.

Mr. DAWES. Of course the Senator from New Jersey knows that I did not mean to say that these amendments were designed to defeat the will of the people; but the amendments may have that result, inasmuch as the will of the people cannot be expressed by both of the certificates, and must be expressed through one or the other, and you clothe an individual with power to say which of those two. One of them expresses the will of the people, and the other defeats the will of the people. You give him the power to select between the two, and you give him the power to pervert the will of the people. That is what I meant to say.

Mr. EDMUNDS. You do every judge in all cases.

Mr. DAWES. I know it; and therefore the Constitution thought it not wise to leave the question to one individual. If the meaning of the Constitution is that the votes shall be counted in such manner as the two houses shall prescribe, it would be competent by legislation to prescribe a method for counting; but I have not understood any one, and certainly do not myself understand the meaning of the Constitution to be, that the votes shall be counted in such manner as the two houses may by law prescribe, but they shall be opened by the Presiding Officer in the presence of the two houses as houses, not as members of the houses, and that they shall then be counted.

I have understood all to agree that that means they shall be counted then, when they are in that presence, either by the President of the Senate, or by the two houses, or by the joint action of the two houses. If it is to be done by either, then it cannot be done by anybody else.

I do not know how that could be made clearer. If it is to be done by the President of the Senate, if that is the construction, in the presence of the two houses, then it cannot be done by anybody else; and the attempt to clothe any other tribunal with the power to count the votes is to depart from that provision. If that provision of the Constitution means that it is to be done by the two houses, then it cannot be done by anybody else, and the two houses cannot devolve that trust on anybody else, nor can any law clothe anybody else with the power. That is my difficulty as well as objection, that it would not be safe to trust the President of the Senate with it, it would not be safe to trust any individual with it, it would not be safe to trust ten men picked out of the Senate of the United States with it, because underneath the point to be decided lie questions of fact growing out of the corruption and fraud and passion and disorganization and demoralization in a State, which has so weakened and perverted its government that the State cannot make manifest who are the men it has appointed to be electors. There is the difficulty, there it lies, and nothing will remedy it that does not reach that. Least of all will it remedy it for us to undertake to find an outside tribunal and clothe it by force of law with this extraordinary power.

May I ask the Senator from New Jersey where in the Constitution he gets the idea that the President of the Senate and Speaker of the House and the Chief-Justice of the United States shall be a tribunal to count these votes by determining which of the two votes shall be counted, for that is equivalent to counting them? I do not mean to criticise the propriety of such a tribunal if it were within the power of the Constitution, though I say that, of all tribunals outside, the judges of the Supreme Court are the best, because there is, thank God, still a reverence for the judges of the Supreme Court, and the court itself, and its judgments.

MR. FRELINGHUYSEN. I have no objection to stating to my friend that I certainly do not find it written in the Constitution that the presiding officers of the two houses and the Chief-Justice shall be a tribunal; but I do find it written in the Constitution, mandatory upon us, that we shall see that the vote is counted, without telling us how the vote is to be counted, and thereby imposing upon us as legislators the duty, I think, to make provision that it shall be fairly and justly counted.

MR. DAWES. Then I understand the reading of the Constitution by the Senator from New Jersey to be that, when the votes are to be counted, the "then" in the Constitution (which is a time fixed, and that time is when the President of the Senate is in the presence of the two houses, the Senate and House of Representatives, and "then" they must be counted) means that we can provide by law that in some other presence, before some other tribunal, it shall be determined how the Senate and House shall count the votes.

MR. FRELINGHUYSEN. My friend does not exactly get it yet. I think that the vote has got to be counted in the presence of the houses. But, like the cooking of a fish, you must catch it first. So you must know what you are going to count before "the votes" can "then be counted."

MR. DAWES. In other words, if there are two certificates coming up from the State of Massachusetts, one having thirteen votes for John Smith and the other having thirteen votes for William Wilkins, and if the two houses, clothed with the power of counting the votes, cannot determine whether thirteen votes shall be counted for John Smith or thirteen votes for the other man, we refer it to a tribunal to determine which of them shall be counted, and then that judgment of the tribunal is binding upon the two houses, and that is equivalent to the two houses counting them! I do not so understand it. I think, if this tribunal determine which thirteen shall be counted, they have counted them. They have determined the fact; they have to all intents and purposes counted them, and it is not the two houses that count them after that. It is the two houses that record the judgment of this tribunal, to wit, that thirteen more shall be added to John Smith instead of William Wilkins. That is not counting the votes by the two houses. That is trifling with the question. Somebody else counts those votes, and I do not find that somebody else in the Constitution.

MR. HOWE. Mr. President, I cannot understand myself what difference, except in one point of view, it makes whom you select to decide the controversy that you have in contemplation. If the legislature has authority to name a tribunal to decide that controversy at that time, it does not make much difference who composes the tribunal, except in one point of view. If you want a republican decision, you had better frame your law so as to be sure of having a republican tribunal, and if you want a democratic decision, you had better take care to frame your law so that you have a democratic tribunal. You see the controversy is a very peculiar one that you are trying to have decided. It is a controversy upon which hangs the title to the highest office under our Constitution, the highest office in the world, and it is a controversy to which all the people of the United States are parties on the one side or the other. It is a con-

troversy so difficult of solution, a controversy the facts or the law concerning which are so involved, that, having been submitted to the House of Representatives and to the Senate separately, they have disagreed about it and do not come to the same conclusion. One thinks the right is one way and the other thinks the right is the other way. That is the sort of controversy. Now you want to pick out a man who shall say off-hand what shall be done with that question. Take a blind man, take a fool, take a sage, it will happen, whoever you take, that if he is a republican he will count the republican vote; if he is a democrat he will count the democratic vote. I take it there is not much doubt about that. I do not mean to impugn any man's good faith or his honesty when I say that. You call upon him to do a thing with only so much light before him as has led all the rest of the world to stumble. He finds every republican in the United States on one side of that controversy. He finds every democrat in the United States on the other side of it. He finds one house of Congress on one side of it and one house on the other side of it.

Mr. MITCHELL. Suppose we appointed an independent power?

Mr. HOWE. No matter how independent he is, what means has he within his reach of determining that question with anything like precision and accuracy? What you want is not a tribunal, but a form of procedure, it seems to me. The law will not allow the title to a horse to be disposed of finally and conclusively without a form of procedure before a judicial tribunal, where evidence is heard from the mouths of sworn witnesses, witnesses who are examined and cross-examined, and where every point of law is settled by one learned in jurisprudence. When you have obtained a judgment in such a tribunal, then you allow the title to that horse to be disposed of, considered, concluded, known. That judgment imports absolute verity. You know then who owns the horse; nobody in the world can dispute it. But here the gravest controversy in the world, we suppose, is going to be settled by a man or a tribunal who cannot swear a witness, who cannot read a newspaper, who cannot have a deposition read before it, who cannot have an argument. Off-hand, from what he happens to know or to have heard, he is to pronounce upon the title to the Presidency of the United States, or to pronounce upon a fact which settles the Presidency.

I have voted against all these amendments. I shall vote against this amendment for the double reason, first, that I do not think in the Congress of the United States lies the authority to create any such tribunal, and, secondly, if it had power to legislate such a tribunal into being, I think we might get a better one than either that has been named yet, or at all events we might provide a better form of trial for any one of these tribunals than we yet have provided.

Mr. JOHNSTON. It is a rule that ought never to be departed from in law that nobody shall be called upon to decide a question who has any interest in the result, and that no one shall be a judge in his own case; yet the amendment of the Senator from Texas gives a decision on one of the most important questions that ever arose to the very man in all the United States most likely to have an interest in the result—the Presiding Officer of the Senate.

Mr. CAMERON, of Pennsylvania. I did intend to say a word when the Senator from Wisconsin [Mr. Howe] sat down, but I did not get the floor then. I may perhaps as well say now what probably I would have said then. While the Senator from Wisconsin said justly that men generally vote according to their prejudices and vote with their party and with their friends, yet it often happens that they do go with their consciences in preference to their friends. I believe a case might be found where the Presiding Officer of this body, although interested himself in the decision of this question, would vote with his adversaries. I might bring to the Senator's mind by way of illustration a case which occurred here only a little while ago, when several Senators on this side of the house gave the doubt to their adversaries.

Mr. EDMUNDS. We gave the certainty to our adversaries.

Mr. CAMERON, of Pennsylvania. Undoubtedly not one of them would have done anything but what he believed to be right; but in the case of Pinchback, the presumed Senator from Louisiana, the doubts were given by enough of our friends on this side to deprive him of his seat. So I believe as men acted upon that occasion according to their consciences, men in the future will be found here in this body who will act according to their consciences. I believe it is always right to give the doubts to your friends, personally or politically; but I am sure a good man will always act according to his conscience, no matter what the responsibility may be, no matter how great his personal interest may be in the decision.

The PRESIDENT *pro tempore*. The question is on the amendment proposed by the Senator from Texas, [Mr. Maxey.]

Mr. MAXEY. I presented this amendment because I believed it was a constitutional solution of a very difficult problem. I did it believing, as I yet believe, that the mode provided is sustained by the Constitution. I do not propose to review one solitary argument that I made yesterday, nor to change anything I then said. I do not care, however, that the record of to-day's proceedings shall go forth to the world with the remark of the Senator from Virginia [Mr. Johnston] without some answer to it.

Upon what authority of the Constitution, upon what authority of the law, does he assume that in giving the settlement of the question to the Vice-President of the United States, presiding over the Senate, he is giving it to that man most of all others interested in the settlement of the question? If he be the old Vice-President and the count is of a newly elected ticket, he goes out with that vote. He therefore does not count himself in, because he goes out of office with the coming in of the new President and Vice-President. It rests upon the assumption that the Vice-President is necessarily a candidate for re-election or a candidate for President. It is assuming that because a man happens to be Vice-President he necessarily must be a candidate for re-election or a candidate for President. I have only this to say in reply to that: Under the Constitution of our common country any man having the constitutional requisites has just as much right to be a candidate for the office of President or Vice-President as the Vice-President or Presiding Officer of the Senate; so that the reason amounts to nothing. It is assuming that which is not necessarily true. It may be so or it may not be so. The same reason will apply to any tribunal whatever that might be selected for the settlement of this question, because every man has the same right if he has the constitutional qualification. It is a surpassing strange thing to me that gentlemen should object to reposing this trust in the Vice-President at this late day and hour, after the Government has followed it from its organization down to the year 1869.

Mr. MERRIMON. Eighteen hundred and sixty-five.

Mr. MAXEY. Eighteen hundred and sixty-five was the time of the passage of the twenty-second joint rule, but I believe the election which took place in November, 1865, was the first election held under the joint rule of February, 1865. Up to the year 1869, according to the authorities, the Vice-President, or President of the Senate, had always counted the vote; and yet gentlemen pretend now that this power is so dangerous that of all men in America the last man to intrust with it is the President of the Senate. They speak of it as something strange, and yet if I remember history correctly, at the very time of the contested election between Mr. Jefferson and Mr. Burr, the most excited race that ever was run in the United States, requiring thirty-six ballots to settle the question, Mr. Jefferson himself was Vice-President. I appeal to gentlemen if it is not a correct statement of history that at that time Mr. Jefferson was Vice-President of the United States, having been elected under Mr. Adams at the time he was elected President, following General Washington's election. Over and over again the Vice-President has presided when he himself was either a candidate for re-election or for President; and yet during all that long period of our history we have never had one man in America who was so low, so utterly lost to every sense of honor, and justice, and of propriety, that we should have to leave, when we came to arrange the pictures of the President and Vice-Presidents of this great and glorious Union of ours, one single niche covered with a black pall, as one in the palace of the Doge of Venice. No man yet in this country has betrayed that great trust, notwithstanding the fact that on every occasion up to the year 1868 this vote was counted by the Vice-President. It does seem to me, when that remark is made, it is prostituting into the very dust the character of the men whom the people of this broad land of ours have thought fit to vote for as President and Vice-President of the United States. Are the people of this country so lost to honor, so lost to integrity, that they themselves would select a man to run for one of these high offices who was so corrupt, so steeped in moral iniquity, that he would count himself into office against the will of the people? I do not believe it. I have a higher regard for the character of the American people. I have a higher regard for the men whom the American people have brought to the front. The position will not do. It is degrading our own people and degrading the men whom our people have vested with high trusts.

When is it, under the amendment that I had the honor to offer, that the Vice-President has the power to decide? Never when there is but one certificate of election, because if both houses reject the certificate it goes out, and if one house goes one way and the other house goes the other way, it is counted. When there are two certificates, and both houses agree upon one of the certificates, it is counted. When, then, does this great power of the Vice-President come in? It is only when every effort has been made, and the two houses cannot agree. In that case you have got to do one of two things. If you reject the vote of the State, you may put a man in the presidential office who has not, as the Constitution requires, received a majority of the electoral votes of the people; for if you throw a vote aside, who can say that the man who is put in the presidential chair has the majority of the votes of the people? Our Constitution requires all the votes to be cast. If this great power has been intrusted to the Vice-President from the election of General Washington down to the last election of Mr. Lincoln, and never on a single occasion has he betrayed his trust notwithstanding that he was a candidate, I ask why, when only in one single state of the case power is to be intrusted to him, has he become so dangerous? Have the people of America been so forgetful of their duty in selecting good men and true as to put a man there who would betray the trust that was given him? That would be worse than murder itself. I do not believe it.

I admit, as has been stated often here, that this is a dangerous and a difficult problem. We must believe that there are some honest men in this world. While rumors are afloat all over the land of high crimes and misdemeanors committed by men in high places, while men have covered themselves from the crown of the head to the sole of their feet with infamy and with crime, and have fallen from their high position, yet I thank God He has put it into my heart not to believe that all men are dishonest and that I yet have confidence in man. I yet believe that the American people have the intelligence to put in position whatever may be their politics, men of integrity, men who want to do right. I believe that the two houses of Congress will want to do right; but, when the question comes up before them, honest men may differ. One of the two houses may decide this question in one way and the other house in the other way. If the matter is left to stand at that point, the vote of a State may unquestionably be lost. By the very losing of that vote a man may be placed in the presidential chair who had not a majority of the electoral votes by the people, as required by the Constitution.

The Constitution says:

"The President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates, and the vote shall then be counted."

Not part of that vote shall be counted, but all of it. He who desires to stick to the Constitution as closely as I hope I do wants to see it carried out in its letter and in its spirit. The letter and spirit of the Constitution are that the votes contained in every valid certificate must be counted then and there and by the authority which the Constitution has pointed out for that high duty: that high trust, I will say, because I regard it as a sacred trust. So believing, I cannot conceive that the position which has been assumed here is tenable, unless you hold out the banner and write upon it in the face of all mankind that we have no confidence in man, that we believe that any man who is exalted to a high position will so far forget himself, his oath, his honor, the confidence which the people have placed in him, that he will prostitute all these, and, like Judas Iscariot, sell his master for a price. I do not believe that, and therefore I say that in some stage of this proceeding, if we wish to carry out the will of the people, we must trust somebody. I am willing to trust the man that the Constitution trusts, according to my construction of the Constitution, with the best lights before me. For that reason I have offered this amendment, not that it is a pet measure with me, for I have none. I have done what other gentlemen here say they have been doing: I have been seeking light. If any Senator on this floor will point out a better and clearer plan than the one I have suggested, one that more thoroughly carries out the spirit and the letter of the Constitution, I will adopt his plan. All that I want to do is to secure to the States of this American Union their right beyond peradventure to have their vote counted in the election of President and Vice-President of the United States.

Mr. CAMERON, of Pennsylvania. I would suggest to the Senator from Texas to make a correction in his amendment by blotting out the words "as presiding officer of the two houses."

Mr. MAXEY. I will state to the Senator from Pennsylvania that my attention was called to that by the Senator from Vermont. I think the expression "President of the Senate" is sufficient, and that the words "as presiding officer of the two houses" are unnecessary. I ask that that modification be made.

The PRESIDENT *pro tempore*. The Senator has that right. The Senator from Texas modifies his amendment, and the Secretary will report the amendment as modified.

The CHIEF CLERK. It is proposed to insert at the end of the second section of the bill the following:

"But if the two houses fail to agree as to which of the returns shall be counted, then the President of the Senate shall decide which is the true and valid return, and the same shall then be counted."

The PRESIDENT *pro tempore*. The question is on agreeing to this amendment, upon which the yeas and nays have been ordered.

The Secretary proceeded to call the roll.

Mr. DAVIS, (when his name was called.) On this question I am paired with the Senator from Minnesota, whom I do not see in his seat, [Mr. Windom.] I should vote "nay" and he would vote "yea."

Mr. WEST, (when his name was called.) On this question I am paired with the Senator from Kentucky, [Mr. Stevenson,] who would vote against the amendment, and I, if at liberty, would vote for it.

The Secretary resumed and concluded the call of the roll; which resulted—yeas 7, nays 38, as follows:

YEAS—Messrs. Bogy, Cameron of Pennsylvania, Hamlin, Maxey, Robertson, Sargent, and Withers—7.

NAYS—Messrs. Allison, Anthony, Bayard, Booth, Boutwell, Burnside, Cameron of Wisconsin, Caperton, Christiancy, Conkling, Dawes, Dennis, Eaton, Edmunds, English, Ferry, Frelinghuysen, Goldthwaite, Gordon, Hamilton, Howe, Ingalls, Johnston,

Jones of Florida, Jones of Nevada, Kelly, Key, McCreery, McDonald, Merrimon, Mitchell, Morrill of Maine, Morton, Norwood, Oglesby, Sharon, Whyte, and Wright—38.

ABSENT—Messrs. Alcorn, Bruce, Clayton, Cockrell, Conover, Cooper, Cragin, Davis, Dorsey, Harvey, Hitchcock, Kernan, Logan, McMillan, Morrill of Vermont, Padlock, Patterson, Randolph, Ransom, Saulsbury, Sherman, Spencer, Stevenson, Thurman, Wadleigh, Wallace, West, and Windom—28.

So the amendment was rejected.

March 23, 1876.

The Senate, as in Committee of the Whole, resumed the consideration of the bill (S. No. 1) to provide for and regulate the counting of votes for President and Vice-President and the decision of questions arising thereon.

MR. MERRIMON. I now offer the amendment which I suggested the other day I would offer at the appropriate time.

The PRESIDENT *pro tempore*. The Secretary will report the amendment.

The CHIEF CLERK. It is proposed in section 2 of the bill, lines 7, 8, and 9, to strike out the words—

“The two houses acting separately shall decide to be the true and valid return.”

And in lieu thereof to insert—

“Shall be duly authenticated by the State authorities, recognized by, and in harmony with, the United States, as provided by the Constitution.”

So that the section will read, if amended—

“That if more than one return shall be received by the President of the Senate from a State, purporting to be the certificates of the electoral votes given at the last preceding election for President and Vice-President in such State, all such returns shall be opened by him in the presence of the two houses when assembled to count the votes; and that return from such State shall be counted which shall be duly authenticated by the State authorities recognized by, and in harmony with, the United States, as provided by the Constitution.”

MR. MERRIMON. Mr. President, I offer no apology for venturing to present some views of my own in reference to the important question under discussion. It is confessedly one of the most serious moment, surrounded by a great multiplicity of complications and perplexing doubts. If I shall be able in any degree to assist in removing such difficulties I am sure the Senate will be satisfied; at all events, I will have the consciousness of having endeavored to discharge an important public duty.

It is very much to be regretted that the provisions of the Constitution in reference to the election of President and Vice-President are so general and so meager in their terms; and this regret is heightened by the fact that the debates in the convention which framed the Constitution on this particular matter, which have come down to us, are very limited, and not calculated to afford us any, or very little, light on the subject. Besides, there has been no official act or decision anywhere that is calculated to do so. Whenever action has been taken at all, (and this is an important fact to be kept in view in the course of what I have to say,) it has been taken without question and without debate; so that whatever has been done can scarcely be regarded in the light of precedent or authority binding in any degree the action or judgment of Congress.

The terms of the Constitution are very general. they are meager, upon the subject, and almost everything is left to implication, to construction, and inference under the rules that govern us in the interpretation of instruments like the Constitution. I think I may say with confidence that we are left exactly in the condition of a court that has no prior lights in which to construe a constitutional instrument submitted to it. This being the case, it is important, it seems to me, and I shall take that course in what I am about to say, that we should take a survey of the whole subject of the election of President and Vice-President under the Constitution, and not confine our investigation to a single clause. In my judgment and in my view, in order to have a complete and satisfactory comprehension of the subject under discussion, it is essential that we shall consider particularly and accurately the clause of the Constitution immediately preceding that which has been discussed. Upon that rests the clause that has been debated. It is essential that we should understand the ground-work before we can understand thoroughly and accurately the superstructure.

The second clause of article 2 of the Constitution provides in these words:

“Each State shall appoint, in such manner as the legislature thereof may direct, a number of electors, equal to the whole number of Senators and Representatives to which the State may be entitled in the Congress; but no Senator or Representative, or person holding an office of trust or profit under the United States, shall be appointed an elector.”

This provision of the Constitution is one of those provisions which guarantees to and establishes an absolute right in the States, one to be exercised solely by and for the benefit of the State, rather than for the benefit of the United States. It establishes a right and power in the State which no Federal authority can compel the State to exercise, which no Federal authority can in any way con-

trol or direct. It is as much a matter under the control of the State as the election of the chief magistrate of the State or the legislature or the judiciary of the State. It is a matter that they have complete power to regulate and to determine as they will. The State is more interested in the subject—exercise of the right and power—than any other State or than the Federal Government. It is a right for the benefit of the particular State and by and through which the people may have a voice in the selection of Chief Magistrate of the National Government. The Constitution provides that the State shall participate in the election, and how its right shall be exercised through its legislative authority. It provides that the legislature of the State may designate the manner of selecting electors to cast the vote of the people of the State or of the State for President and Vice-President. The legislature may provide that itself shall elect the electors who are to compose the electoral college and cast the vote. It may provide that the governor shall appoint them. It may provide that the supreme court of the State shall appoint them. It may provide that a commissioner shall appoint them. It may provide that the people of the State as a whole and by general ticket shall elect them; or it may provide that the people of each congressional district shall elect by districts.

This being a matter, I repeat, completely within the jurisdiction of the States through their legislative authority, Congress has no power to direct in that behalf at all. That being true, when the legislature shall have acted, whether in one way or another, and an election shall take place or an appointment shall be made by the authority designated by the legislature, neither Congress nor any Federal authority has any power or right whatever to inquire into the legality of such election or appointment. Why? Because it is a matter completely within the jurisdiction of the State. Suppose, for example, that according to the present prevailing custom in the several States, a general election shall take place in a State and there shall be two political tickets before the people for election; that it shall appear by the final count of the popular vote that the democratic ticket shall have the majority, but the friends of the other ticket insist that the republican ticket really, in fact and in truth, apart from fraud, fraudulent and other unlawful considerations, have a majority. Suppose that should become a matter of great moment in the State, and not only in the State, but that it should become a matter of the greatest moment to the nation, the election of President and Vice-President turning upon the vote in that State. Congress would have no right or power to interfere in any respect whatsoever to determine whether the one ticket or the other was elected. That is a matter with the State, and it is competent for the legislature of the State to provide the proper means of contesting the election in that case. The State legislature alone is vested with power to provide reasons for contesting such election.

If it should be suggested when the electoral vote is cast and is sent to Congress that great frauds have been perpetrated by one party or the other; that votes have been bought by the score and by the thousand, and that force and intimidation have been used, that would be impertinent and vain; for it would be a matter clearly without the jurisdiction of Congress. It is a matter to be investigated, considered, and disposed of entirely by the State; and, if the State will provide no means to investigate and to settle fairly and justly as between contending parties, if it will not provide for a contest of such election, it is the folly of that State; it is the misfortune of that State. But, as I said, it would be perfectly competent for the State to provide a means of contest, just as the States provide means and tribunals of contest for the election of members to the legislature, or the election of governor, or the election of any other officer. The point I make is that this is a matter completely within the jurisdiction of the State, and it remains there until the election takes place and the electoral college shall be organized in pursuance of law. After the election of electors has taken place or the appointment has been made, as may be provided by the legislature of the State, and after any contest has been decided, should there be any provision in the State for a contest, then, under the law, the chief magistrate of the State gives to the person elected the certificate of election or appointment, which is the evidence of his right to sit and vote in and make part of the electoral college. The governor gives to each of the electors elected or appointed according to the law of the State a certificate, which is the evidence of his election, and, armed with that certificate, the electors who receive such certificate assemble together at the time and place prescribed by law and organize themselves into what is commonly called the electoral college of that State. When the electoral college is duly organized, then it is in condition to come in lawful contact with and to establish lawful, cognizable relations with the United States through Congress. And therefore, after the members of the electoral college—that is, the electors—have cast the vote one way or another, when the return of the vote shall come before Congress in the way and manner I will explain after a while, it is then, and not till then, competent for Congress to inquire whether the electoral college proceeded according to law. For example, suppose it should be suggested when the time shall come for Congress to count the vote—I shall show, I think, it has the power and the right and it is its duty so to do—and it should be sug-

gested by a Senator, upon affidavit of some person or on any information of which Congress would take cognizance, that one, two, or three of the electors had been bribed to give the vote cast by them, or any other consideration touching the integrity of the vote cast by the electoral college should be suggested in a proper way, it would be perfectly competent for Congress to inquire into and settle the matter.

It is not competent for Congress to inquire into the organization of the college, the manner of appointment or election, whether that was accomplished by fraud or by other unlawful means; that is for the State; but the college must be established according to the laws of the State, and then, after that, it is competent for Congress to inquire into the action of the college, in order to see whether that was fair and just and lawful, and in that respect it may become of the very gravest moment that Congress should inquire whether the votes of the electors had been bought for the purpose of electing a particular candidate. It is like the case of the election of a United States Senator. Congress has no power to go into the State of North Carolina, for example, when a Senator-elect from that State, or one purporting to have been elected by its legislature, shall make application for admission here, to inquire whether two, three, four, or a dozen members of the legislature were elected by fraudulent means or unlawfully in any respect. That is a matter within the jurisdiction of the State authorities, within the jurisdiction of the legislature; and when the legislature decides, whether its decision be right or wrong, there is the end of the matter, and Congress has no jurisdiction to inquire into it. Congress can have no jurisdiction for any such purpose. It must take the legislature of the State as it is ascertained and established under the constitution and laws of the State. But when such Senator comes here and asks to be admitted, it is competent for the Senate, coming thus in relation with the legislature of the State under the Constitution of the United States, to inquire whether the applicant bought one, two, three, or a dozen votes to secure his election. Nay, they not only have the power to do so, but it is the duty of the Senate to do so. Just so in the case where the electors comprising the electoral college are elected or appointed, according to the laws of the State, and when the college has been duly organized and proceeds to cast the vote, if it shall be alleged that fraud was perpetrated by the college thus proceeding, it is not only the right of Congress, but it is the duty of Congress, and one it cannot in conscience, if it would, evade, to inquire whether such fraud was perpetrated.

This part of my argument is not immaterial; it is very material as tending to show how rights and powers and duties spring up under the provisions of the Constitution, which are so meager in their terms, the meaning of which we must ascertain and understand by inference, implication, and construction.

I trust those who do me the honor to pay attention to what I am saying will keep in view this fact: that it is the duty of Congress or the authority which shall count the votes for President and Vice-President, if it shall be suggested that there was fraud, to look into it, to try the question, and see and determine as the right may be, because, as this is material, this fact goes far toward showing that the President of the Senate is not adapted in the exercise of his powers to count the vote and determine important questions connected with such count.

I come now, Mr. President, to discuss the twelfth amendment to the Constitution, which, as I said in my opening remarks, rests upon the clause of the second article which I have just undertaken to expound. So much of the twelfth article of the amendment as is material for my purpose is in these words:

"The electors shall meet in their respective States and vote by ballot for President and Vice-President, one of whom, at least, shall not be an inhabitant of the same State with themselves; they shall name in their ballots the person voted for as President, and in distinct ballots the person voted for as Vice-President, and they shall make distinct lists of all persons voted for as President, and of all persons voted for as Vice-President, and of the number of votes for each; which lists they shall sign and certify, and transmit sealed to the seat of Government of the United States, directed to the President of the Senate."

These last are very material words, as will appear by and by.

"The President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates, and the votes shall then be counted."

I want to call attention now particularly to the manner in which the electoral college, the State, and the people of the State, come in connection and contact with Congress. Is it not manifest that there must be some means by which whosoever shall count the electoral vote can see that the electoral college was indeed the lawful college? It is not expected, it cannot reasonably be expected, that Congress can take knowledge of it judicially or officially and rest satisfied with that; there must be lawful evidence to that end, evidence provided by law. The Constitution implies by every rule of reason and construction that there must be a means of evidence—muniments—by which it shall appear to Congress, the counting power, that there was a college duly ascertained and established, and that the college did act. Congress in the past has not

been unmindful upon that subject, for it has provided—it was originally provided by the act of 1792—in the Revised Statutes, section 136, as follows:

“It shall be the duty of the executive of each State to cause three lists of the names of the electors of such State to be made and certified, and to be delivered to the electors on or before the day on which they are required, by the preceding section, to meet.”

That provides for the evidence by which the elector shall know that he is an elector and a member of the electoral college, and by which Congress as the authority to count shall lawfully know that he was an elector. Now see how the relations—contact—is formed, fixed, and established by proper evidence—muniments—between the electoral college and through it between the State and the Congress, or the counting power, whatever that may be. This is yet further provided for, by section 133 of the Revised Statutes, as follows:

“The electors shall make and sign three certificates of all the votes given by them, each of which certificates shall contain two distinct lists, one of the votes for President and the other of the votes for Vice-President, and shall annex to each of the certificates one of the lists of the electors”—

These are material words—

“One of the lists of the electors which shall have been furnished to them by direction of the executive of the State.”

That certificate of the election of the elector is material; it is material to show that he is an elector, and has a right to a seat in the college, and to participate in the college as a member; but it is not only material for that purpose; it is material for the further purpose that the counting authority, whether it be the President of the Senate or whether it be Congress, may see that he was elected or appointed according to the laws of the State in which he proposed to vote for President and Vice-President. That is the means; that is the evidence; that is the connecting link between the State and the counting power; and it is through and by means of that that the jurisdiction of Federal authority attaches, to the end that proper action in that behalf may be taken. Through and by the means so provided the State, the people of the State, and the Government of the United States come into conjoint and harmonious action.

What is the next thing to be done after the vote is cast by the electoral college? It were vain that the college should assemble and cast the vote if no means were provided by which it could be delivered to some proper, lawful, constitutional authority to compare and count the vote, to the end that it might be seen who was elected President and who was elected Vice-President. The Constitution provides how that communication shall be made, in these words:

“And they”—

The electors—

“shall make distinct lists of all persons voted for as President, and of all persons voted for as Vice-President, and of the number of votes for each, which lists they shall sign and certify, and transmit sealed to the seat of the Government of the United States”—

That is the place, the general place, to which the return is to be remitted. Now mark the words that follow those; they are—

“directed to the President of the Senate.”

Why “directed to the President of the Senate?” Is there any peculiar function in his office that makes him the very appropriate person to deposit it with? Is there anything about his person, or his character, or his official position or character, that makes him an appropriate person over any other officer of the Government for such purpose? How is he better qualified for the discharge of this high trust than the Chief-Justice, or the Supreme Court, or the Speaker of the House of Representatives, or the Attorney-General, or any of the other executive officers? On the contrary, there are grave considerations why he is an inappropriate person for that purpose; for, as is manifest, and as has been shown here, the President of the Senate may be one of the very parties whose right may be in question and to be examined and decided. His right to be elected as President of the United States may be the question involved. His right to be elected as Vice-President may be the question involved. Surely in such a case he would above all others be the least fit to take charge of the returns, unless there were some special reason why he should do so. Then, besides, he is but one man. He is more liable to be entrapped, to be deceived, to be misled by one consideration or another, infinitely more so, than the Supreme Court, more so than the Chief-Justice, because he has no motive to expect that he is to be President. It is possible that he might be a candidate, but the Supreme Court as a body would be the infinitely more proper place to deposit this vote than the President of the Senate. The debates in the convention that framed the Constitution do not show any official action taken or decision that has been made since the adoption of the Constitution does not show anything which points him out as the appropriate, the essential depository of the returns of the election any more than any other officer of the Government; and there are the considerations suggested, and perhaps others that I have not ad-

verted to, which disqualify, unfit him to be charged with so grave a matter. In view of these considerations, I do maintain, with all respect to everybody who contends otherwise, that it is absurd in reason and law, by inference, by construction, to charge him with the high power and right to receive and count the vote for President and Vice-President.

There is another consideration pertinent to be considered here. Why were the returns required to be sent to the President of the Senate? Why does the Constitution use the words "directed to the President of the Senate?" If it was contemplated that the Vice-President should count the vote, why did it not say so? It was not contemplated that the Vice-President in his character as Vice-President should have charge of the returns at all, but it was in his character as President of the Senate and as President of the Senate alone. Besides, there might be no Vice-President; there might only be a President *pro tempore* of the Senate, and then they are sent to him. But there was a motive for using the words "directed to the President of the Senate," a reasonable motive, a logical motive; and what was it? The Senate is the higher branch of Congress, and the President of the Senate is the higher Presiding Officer in Congress, and by courtesy he has precedence in place and privilege wherever the two Presiding Officers of Congress are brought in contact in their official capacity. The convention had to provide some one to whom should be sent the returns of the electoral vote so that they might be properly counted and the result of the election determined, and as I shall show that Congress was the appropriate body to count it, where else could the returns be so well or appropriately sent to be laid before Congress as to the chief Presiding Officer in Congress, to wit, the President of the Senate? It was provided that the electoral returns should be sent to the *President of the Senate* as the most appropriate, the most direct, the most reasonable, the most orderly channel through which to bring the electoral colleges, and the States through the electoral colleges, in connection and contact with Congress, the counting authority of the electoral vote. That was the purpose and view; none other.

It does seem to me that one, looking with the pure light of reason at the surrounding circumstances of this whole matter, cannot doubt that such was the purpose. If such was not the purpose, I ask this question: why was it provided, after he is charged with the returns, that he should be further charged, in express terms, to do a particular act, to wit, to open the returns in the presence of the Senate and House of Representatives, and the last and most important duty of counting the vote devolved upon him by implication and inference? Can any reason be assigned for such a strange and illogical provision as that? It seems to me not. It was not intended that he should have any absolute control of the returns. Though they may have come to his possession the next day after the vote had been cast, he has no right to open them at his will and anywhere. He is to keep control of them; he is to keep custody of them, and to open them, not when he will, not where he will, not to make any decision about them whatsoever; but at a particular time prescribed, and in a particular place, he is to open them just like he opens any other communication sent to Congress through the President of the Senate. When messages come to Congress addressed to the President of the Senate, whether they come from one department of the Government or another, or when a memorial comes to the Senate through the Presiding Officer, what does he do? By reason of the fact that it is addressed to him, or that it is delivered to him, he holds it until he comes into the presence of the Senate. In the presence of the Senate he does not deliver it sealed up. We never saw the Presiding Officer here deliver a message, or any document, to the Senate sealed up. He opens it, and having opened it to identify it, to see that it is the paper sent to the Senate, he then delivers it to the Senate. He says: "The Chair lays before the Senate the following executive message," or "this memorial," or whatever paper he is requested as President of the Senate to present, and to the end that the Senate may get jurisdiction of the matter he thus lays before it. And all this harmonizes with the provision of the Constitution. These electoral returns are sent to the President of the Senate because he is the chief presiding officer in Congress, and it is provided that he shall open the returns and open them only in the presence of the Senate and House. Why should he open them? For a good reason: to identify them as returns; to see that they are that which the law charges him to lay before the Senate and House of Representatives; and then by such means the Congress has complete jurisdiction, and his authority, as the means, as the officer through which the Congress takes jurisdiction, is over, except as he shall be directed in that behalf by proper order, or resolution, or act of the Senate and House of Representatives.

I asked the question a while ago, was there anything peculiar about his office that fitted him for this duty of counting the electoral vote? I endeavored to show that there was not, and that there are grave reasons why he should not be charged with any such power. Now, sir, I put the pertinent question, is there any power appropriate to that end but Congress? The Congress represents the sovereignty of the American people; it represents the sovereignty of the people *en masse* through the House of Representatives; it represents the sovereignty of the people as composing

States through the Senate. All power in the Federal Government, the aggregated, the absolute power of the National Government, is vested in Congress, except in so far as certain powers of government are limited to the executive and to the judicial departments of the government by the Constitution. All power is in the Senate and House of Representatives, with the limitations I have mentioned. In the absence of any express provision of the Constitution, or necessary implication of the Constitution, (and it is not pretended that there is any in this case,) I ask the question again, is there any power as appropriate to count this electoral vote and determine all questions in connection with it as the Congress representing the sovereignty of the American people as one nation *en masse*, through the House of Representatives, and as composing States through the Senate? Sir, it is important in another view of sound policy and reason. Would it be possible to corrupt seventy-four Senators? Would it be possible to corrupt three hundred Representatives? Would it be as easy to corrupt the Congress as to corrupt one single officer, or the Supreme Court, or the Chief-Justice, or one officer, whomsoever he might be? The aggregate wealth of this country could not be practically used to corrupt so large and such a body as Congress, so as to control their votes and their actions in the election of President and Vice-President. It would be a practical impossibility to do so; it would be an undertaking that the most ambitious, the most unscrupulous and powerful, never would contemplate, and because of the very impossibility.

But there is another consideration why Congress is the appropriate power, and the law fixes it there, and that is this: Congress are responsible directly and indirectly to the people, the House of Representatives more particularly. The House of Representatives are elected directly by the people. They are responsible to them by their election every two years. What better tribunal to effectuate the popular will in a proper way as charged by the Constitution and law? The Senators are responsible to the people indirectly through the legislatures of the States. It is believed by some statesmen, and I believe the doctrine has been acted upon by some political parties in this country, that the legislature of a State has a right to instruct a Senator how he shall cast his vote on a particular question, and if he does not do so, then to ask him to resign his place. At all events, he is responsible to the people of his State through the State legislature every six years. The Supreme Court is not responsible, and the President of the Senate is not responsible to the people. He is in no sense dependent upon them, he is above them, and out of their way and reach.

I submit that these are grave considerations going to support the legal, logical, and necessary implication contained in this provision of the Constitution that the Congress is the proper authority to count the electoral vote.

There is one other consideration which I will mention here in connection with the Presiding Officer. The Senate has decided that it has power to remove the Presiding Officer at will when there is no Vice-President. How easy it would be when the next electoral vote is to be counted, if it should turn out that the prevailing party in the Senate should apprehend that the Presiding Officer would not do their will—I make no intimation of any such purpose on the part of anybody, but only make the suggestion to illustrate the force of my argument—how easy it would be for the majority to remove the Presiding Officer and appoint a supple tool to take the responsibility to do the lawless, wicked work of party. The framers of the Constitution were too intelligent and rational to make any such provision, or to contemplate that any such thing should transpire in this country. To say that, by implication and inference from the provisions of the Constitution to which I have adverted, the President of the Senate is charged with power to count the electoral vote, is to contravene all rules of construction, the reason of the thing, and sound policy, as I have endeavored to make plain.

Having thus shown, as we must be directed and governed by implication and inference, that reason and sound policy force us to the conclusion that Congress should be the power to count the electoral vote, let us see where the law fixes the power by its terms and necessary implication. It is provided that the Presiding Officer, in the presence of the Senate and House of Representatives, shall open all the certificates, and then it is further provided that "*the votes shall then be counted.*" Counted by whom? By the President of the Senate? Surely not. It is provided in express terms that he shall open the returns. Why, I repeat, this the most important duty left to inference? The Senator from Ohio [Mr. Thurman] the other day I thought put this argument with tremendous power. He called upon every lawyer to say, in the absence of any other provision and express words, to what authority was assigned the counting of the votes by that express provision. He insisted that, *per force* of this provision, the Congress, and Congress alone, was charged with the power; that by no rule of law could any other body or officer be charged with it; that intuitively the legal mind so assigned the power. He argued that it shocked the legal mind to contend otherwise. His argument impressed me forcibly. I concurred then most heartily and without hesitation—and reflection has only strengthened my conviction—that it is assigned to Congress. Why? Because it did not charge the President of the Senate

to do it, but it did do another thing. It did not charge the Supreme Court to do it; it did not charge any other functionary to do it; and in the absence of any such provision or charge, by the operation and the force and effect of the Constitution and legal principle *ex vi termini*, Congress is charged with that power. Congress is charged with every power of government unless it be lodged somewhere else by express terms or by necessary implication. In the absence of such provision it fixes it there inevitably. So that it follows, by the necessary fact of the express provision of the Constitution as well as necessary implication and by every argument founded upon sound and rational policy, that Congress has the power to count the vote and no other power can do it, and because Congress is thus charged therefore Congress cannot delegate its power to the Supreme Court, or to commissioners, or to the President of the Senate, or any other power on earth. It is a duty that the Congress is as completely and thoroughly charged with as it is to pass a revenue law or any other act of legislation. It is fixed there. They cannot delegate it, however they may regulate the manner of counting the vote and deciding questions arising in connection therewith.

The Senator from Maryland [Mr. Whyte] and the Senator from Kentucky [Mr. Stevenson] argued ingeniously and with much ability, the other day, to show the contrary of what I have advocated; and instead of resting their argument, as I humbly conceive, upon their own reason and a clear and critical discussion of the provisions of the Constitution, they relied greatly upon what they treated as precedents and speeches which had been made by various distinguished men in the past. Now, sir, with all respect and deference, I do insist that there is no precedent to sustain such a view as they held and contended for, and there is no precedent which contravenes the view of the Constitution which I have been presenting. Take the authority insisted upon by the Senator from Maryland. Before the Constitution went into operation, and in order to put it into operation, the convention that framed it passed an order providing—

“That the Senators should appoint a President of the Senate for the sole purpose of receiving, opening, and counting the votes for President.”

I have to say of this action on the part of the convention that it preceded the organization of the Government; it was an order passed by the convention in order to put the new Government into operation; it therefore cannot be regarded as setting a precedent for proceedings under the Constitution; but there is more than that. It does not provide that he—the President of the Senate—shall count the votes; it provides—that is the legal effect—that he is to be the presiding officer for that occasion, that he is to be the *officer* for the purpose of the count then to be made, and for no other purpose or occasion; and therefore, if a question had been raised, as I have shown a question might be raised, as to whether the electoral college had acted honestly and fairly and lawfully, I take it that Congress on that occasion would not have allowed Mr. Langdon to decide that question. The convention did not direct that he should count the votes: it directed that for a particular purpose, the opening and counting of the electoral votes for President and Vice-President, he should be the presiding officer; he should be the means through which the electoral college would come in contact with Congress. That is all this provides; that is all the effect and consequence that can properly be assigned to that action of the convention.

Then, to show, furthermore, that the Congress did assert its power, let us see what it did do in that behalf. The Senate directed Mr. Ellsworth to proceed to the House of Representatives and notify the House that the Senate was ready to proceed, in conjunction with the House of Representatives, to count the electoral vote. The entry on the Journal reads:

“The Senate is now ready, in the Senate chamber, to proceed, in the presence of the House, to discharge that duty.”

That is, to count the electoral vote. He informed them also—

“That the Senate have appointed one of their members, submitting it to the wisdom of the House to appoint one or more of their members for the like purpose.”

That is, for the purpose of making a list of the votes.

The Senate and House of Representatives at that very moment recognized their right and their power in that behalf, for in counting the first electoral vote they appointed tellers. Tellers for what? To count and compare the vote when it should be opened by Mr. Langdon. If the Constitution charged Mr. Langdon, as is contended, with counting the votes, and if the Senate and House of Representatives were merely there as spectators and witnesses, what right had they to appoint tellers, what right had they to do anything in that behalf but to sit there merely as spectators and witnesses?

MR. STEVENSON. May I ask the Senator from North Carolina a question?

MR. MERRIMON. Certainly.

MR. STEVENSON. Does the clerk who records my vote at a State election count that vote?

MR. MERRIMON. No, sir.

MR. STEVENSON. Then the tellers are merely to record what the Presiding Officer

does. The Senator attempts to escape the force of the argument that a President of the Senate was elected to count the votes because the Government had not then been organized. Could not the House and Senate have then counted at that time as well as at any other time? And if it was a constitutional obligation on them, as is now argued by the Senator, to count that vote, why should they have allowed the President of the Senate to count it?

Mr. MERRIMON. For the plain reason that the Constitution provided no means to bring the electoral college and the Senate and House of Representatives in connection with each other. It had provided no means whatsoever to that end, and the convention in the exercise of supreme power in that respect saw fit to provide how it should be done on that occasion, conforming their action to the provision of the Constitution which was to go into effect from and after that time.

But, further, if he was charged with power to count the vote and it was necessary to have tellers or a clerk to do the clerical work of counting—adding up—the vote, what right had the Senate and House of Representatives to appoint them? Was it within their jurisdiction to appoint? That was a matter within the power and discretion of the President of the Senate, as they contend, and if he needed any persons to aid him in counting the vote, it was his right and his duty to appoint them. But Mr. Langdon did not assert the right and did not exercise the right to do so, but it was proposed by the Senate and by the House of Representatives that they should each appoint a teller, and they did appoint tellers, and the tellers counted the vote. And thus the Senate and House on that the first occasion were not mere spectators and witnesses, they exercised power in connection with the count of the vote; and if any question had arisen, who can say they would not have insisted on deciding it? Suppose it had then been suggested that a return was forged, does any one think that the Congress would have allowed Mr. Langdon to decide the question whether it was or not? I do not think so.

Mr. WHYTE. Will the Senator from North Carolina allow me to ask him where he finds anything about tellers in that original count; whether they were not appointed to sit at the Clerk's desk, and that was all?

Mr. MERRIMON. If my friend is going to "stick in the bark" that way, I stand corrected. The language of the entry is that he informed them also—

"That the Senate have appointed one of their members to sit at the Clerk's table, to make a list of the votes as they shall be declared."

Mr. WHYTE. "As they shall be declared."

Mr. MERRIMON. "Submitting it to the wisdom of the House to appoint one or more of their members for the like purpose." I submit to everybody in all candor whether that is not the exercise of a power on the part of the Senate and House of Representatives which goes to show that they claimed authority in that behalf. I submit they had no such power, if the view contended for by the Senators from Maryland and Kentucky is correct. It was within the power and jurisdiction of the President of the Senate to appoint those persons to sit at the table and take a list of the votes. The fact that Congress asserted the power makes it a precedent to show that such power has been exercised by Congress and may do so on all proper occasions, treating the President of the Senate as their official organ.

At the next counting of the electoral vote the record shows that—

"The Senate proceeded to consider the resolution of the House of Representatives that a committee be appointed, to join such committee as may be appointed by the Senate, to ascertain and report a mode of examining the votes for President and Vice-President, and of notifying the persons who shall be elected of their election, and for regulating the time, place, and manner of administering the oath of office to the President."

"Mr. King, from the joint committee appointed the 6th February, instant, reported, That the two houses shall assemble in the Senate chamber on Wednesday next, at twelve o'clock; that one person be appointed a teller, on the part of the Senate, to make a list of the votes as they shall be declared, and that the result shall be delivered to the President of the Senate, who shall announce the state of the vote and the persons elected to the two houses assembled as aforesaid; which shall be deemed a declaration of the persons elected President and Vice-President, and, together with a list of the votes, be entered on the journals of the two houses."

So that at the second counting of the electoral votes for President and Vice-President the Senate and House of Representatives did exercise power, did exercise control, did appoint tellers—not persons to sit at the Clerk's desk to make a list—but did appoint tellers; so that so far as that goes as a precedent at all it goes to support the argument I have submitted.

But, sir, as I said a moment ago—and if any Senator knows to the contrary I should be glad to be corrected—whatever has been done in connection with the counting of the electoral vote in the past has been done by toleration, without question and without debate. If there is a solitary exception to that rule, it is the case in which, in 1857, Mr. Mason, the then Presiding Officer of the Senate, would not allow a question

to be raised as to whether the vote of Wisconsin was lawful or not, on a motion to reject the vote. He honestly assumed to himself the great power to decide that all objections were out of order and would not allow debate. But history shows, and it is within the recollection of Senators here now, that the Senate was dissatisfied, and the House was dissatisfied, and that, if the election of President and Vice-President had then turned upon the vote of Wisconsin, his act might, it probably would, have produced a revolution. According to the strength of reasoning and justice and right, and in the provision of the Constitution, in my judgment, and with all due respect to his memory, he exercised an unwarranted power on his part. I make no question that he did it in good faith and under a high conviction of duty.

Mr. STEVENSON. I will state to the Senator that Mr. Mason, who then presided, expressly said at the time that he claimed no such power.

Mr. MERRIMON. But he exercised it.

Mr. STEVENSON. He said he did not exercise it; he merely acted under that duty confided to him of declaring the vote returned.

Mr. MERRIMON. I have no doubt that Mr. Mason did exactly what he thought was right and honest. I do not question his integrity, but I question the wisdom and the lawfulness of his view and his action, and it was questioned in both branches of Congress, and the action, I take it, would not have been allowed to stand if the election for President and Vice-President had turned upon the electoral vote of Wisconsin. That is the point I make. So, I repeat, there is no precedent, where there was a question and debate made, that contradicts the argument that I have submitted here to-day.

The honorable Senators from Maryland and Kentucky have cited speeches made by distinguished Senators and others in the past. What are they? Only the opinions, and often hasty opinions, expressed by men of distinction. That is all; their words are no authority; and they have not stopped to cite opinions held by distinguished men on the other side. They were assembled just like we are; they were arguing the question as we are; and their opinion was worth no more than ours, except as some of them might be more intelligent and able than some of us. I could point to the convincing arguments of able and distinguished men, delivered during this debate; they will probably be pointed to in the future, in the line of the view that I have been advocating; but what does that amount to, except as an expression of opinion? What does my argument to-day amount to, except as an expression of opinion? It is no precedent; it is my opinion and my argument; it is to be measured by its strength and its power, if it have any. If it has power in it, if it has strength in it, if it has convincing reasoning in it, it will control the mind of somebody here to-day, or somebody in the next Congress, or in the next age; but its weight as a precedent amounts to nothing. Just so as to the arguments cited by the Senators to support the view they have insisted upon. They were simply the opinions—some of them expressed hastily in a running debate—of Senators or others, and have no authoritative significance.

There is no official precedent, there is no official act that contravenes the view that I have insisted upon here to-day, or the power or right of the Senate to pass this bill, or one substantially like it, providing for and regulating the counting the electoral vote. Not only are the precedents wanting, but the opinions of learned commentators are wanting. The only one that has expressed himself at any length at all upon the subject, so far as I now remember, is Chancellor Kent. He was a great lawyer, and fit and worthy and able to express an opinion on this subject; and if he expressed an opinion, I should regard it as entitled to very great weight. I venerate his memory, and I have the profoundest respect for his learning, his ability, and his opinions as a great judge and law-writer. But so far as he expressed any opinion in this respect—and it is strange that he did not say more—it goes to show, meager as it is, that he recognized as existing in Congress a power to pass some bill like that which it is proposed to pass now, regulating the manner of counting the electoral votes for President and Vice-President; for he says that, "in the absence of legislative authority," he *presumes* that it would be the duty of the President of the Senate to count the votes. That word "presume" is a word which implies a very dubious state of mind; it intimates that he scarcely thought so; he presumes so, because the President of the Senate had done it before. But his opinion was not founded upon reason or any construction of the Constitution, or any language in the Constitution, or any interpretation of it, or any inference from its provisions. His opinion, so far as it goes for anything, in my judgment, goes to show that he contemplated that such a power did exist, and that Congress might, when it saw fit, when the condition of the country and the progress of the Government required it, exercise the power.

Mr. President, we well know that many of the provisions of the Constitution have lain dormant, and act after act has been tolerated, and without question and without argument, which when scrutinized could not be tolerated if the touch-stone of truth were applied. We find ourselves compelled every day to take some new view, to call into action some new provision of the Constitution in many of its features. Why, sir, the late war has developed views of the Constitution that would have startled the men

who framed it, that would have amazed the most advanced statesman before the late war; and it is the province of Congress now to scrutinize in cooler times whether a proper construction was put upon it. What was done will be cited as precedents; but some of these will not be regarded as good precedents; they will only be regarded as good precedents so far as they conform to reason and a proper construction of the Constitution. Many of its provisions are to be settled in the future—settled differently from the action of the past, where the action of the past went unquestioned at the time. The decision of a court is only valuable as a precedent where the question was squarely presented and argued before the court, and when the court considered it, and upon mature deliberation decided it. In such a case the precedent is worth something; it commands respect and confidence. If we shall pass this bill, or one substantially like it, after this long debate and after it shall have been debated in the House, and the bill shall have become a law, it will be a precedent, because, upon due consideration of all the issues raised, the whole subject will have been discussed and examined *pro* and *con* in every light, and the proper authority to decide it will have come to a conclusion and taken action, and thus a precedent for all time will have been established. But if the bill shall not pass, if it shall not become a law, future Congresses will be left to grope along, as we are doing to-day, and to settle the matter as their judgments may lead them.

It will be observed, Mr. President, that the bill under consideration provides, in the interest of the States, that "no electoral vote or votes from any State to the counting of which objections have been made shall be rejected except by the affirmative vote of the two Houses." If but one return shall come, it shall be counted; it shall be counted without reference to its irregularity, its imperfections, unless both branches of Congress shall concur in the opinion that it ought not to be counted. Suppose the electoral vote from North Carolina is sent, and it shall be suggested that it is a forgery; the Senate and House of Representatives have the right to inquire whether it be a forgery; they have the means of inquiring whether it be a forgery; they can send out a committee composed of Senators and members of the House to take testimony and ascertain whether it was indeed a forgery; or suppose some formal defect is suggested, they have the right to inquire into that, and debate the matter. Nevertheless, the vote shall be counted, unless both branches of Congress shall concur in rejecting it. It may be that there are defects about it that one House of Congress think would warrant Congress in rejecting it, and the other House of Congress may be of a different opinion. In such a case the vote must be counted. This is a liberal provision of the bill, and it seems to me a wise one. It is true Congress may decide against the vote of a State and reject it; but any power—the President of the Senate—might likewise decide against it if charged with the power to count the vote.

Now I put this view of this view: Would not the American people be better satisfied that the Senate and House of Representatives should decide a question of that sort than that the President of the Senate, one man and perhaps he interested, should decide it? What other tribunal within the whole range of tribunals in this Government is so well calculated to decide that question as Congress? What other tribunal could decide it more to the satisfaction of the people of the United States than the Congress—the Senate and House of Representatives? And when both branches concur in making such a decision rejecting a vote, can anybody doubt that the American people would submit quietly and cheerfully to a decision so made? The decision would be made by a body representing the sovereignty and the will of the people. The great mass of them would be content, whatever their predilections.

I say, therefore, sir, that the provision is wise, it is in the interest of the States, it is in the interest of the people, the vote will be counted unless both branches of Congress shall concur in rejecting it, in which case it ought to be rejected, and the proper tribunal will have rejected it, and according to reason and theory and the Constitution it ought to be rejected, and therefore the people will be satisfied with it at all events, and better satisfied than if it had been rejected by the President of the Senate or any other tribunal whatever.

But, Mr. President, another case is provided for. The second section of the bill provides—

"That if more than one return shall be received by the President of the Senate from a State purporting to be the certificates of electoral votes given at the last preceding election for President and Vice-President in such State, all such returns shall be opened by him in the presence of the two Houses, when assembled to count the votes, and that return from such State shall be counted which the two Houses acting separately, shall decide to be the true and valid return."

In my opinion the last clause of that section ought to be stricken out and the amendment which I have offered ought to be substituted, and for reasons which I now propose to submit. According to the Constitution and the law, the State governments are at all times in official and harmonious and lawful relations with the Federal Government, and the Congress and the President and all official authorities of the United States take official notice of such harmonious relations. We are bound to know such

a state of things, whether we actually know it or not. A judge is bound to know the law whether he knows it or not. He takes judicial notice of the law. Many things that come within his jurisdiction he is bound to know, whether he does or not. Just so in reference to the relations between the State and the Federal Government. The authorities of the Federal Government take official notice of the proper lawful tribunals of the several States. But it is suggested, suppose a state of things where there is confusion in a particular State and there are two classes of persons purporting to be the officers of the State and to administer its government, and each class sends up an electoral vote so that there are two electoral votes for President and Vice-President: what is to be done in that case? I say that that vote must be counted which is properly authenticated by the certificate of that governor who administers the government of the State in harmony with the Government of the United States. The President recognizes the governor of North Carolina; the authorities of the Federal Government—the Congress and all other authorities—are in proper relations with him; they have been in constitutional relations with him; they recognize him to-day; they recognize him at the time the electoral vote comes, at the time the electoral vote is to be counted and it appears by the signature of that executive and by the seal of the State in conjunction with it that the electoral college was elected by the law of the State as he represents it. Then that vote so authenticated is to be counted.

But it may be said that simply official notice of the existence of State officers is sometimes impracticable, and positive action must be taken. What then shall be done? It is within the power of the President under the act of 1795 to recognize the lawful government of the State; and, when he recognizes a particular governor and a particular class of officers as the lawful governor and officers of the State, that is the State government in harmony with the United States, and the electoral vote sent forward by that authority under the amendment that I have submitted would be counted, or, if Congress had recognized a governor, then the electoral vote sent forward and accompanied by his certificate would be counted.

But there is another power than the President. His power to recognize a State government is derived from the act of 1795. He derives his authority from that, and from that alone. His act is subject to the review of Congress. Congress is the last power to determine what is the true and lawful State government. Congress may by concurrent resolution, and perhaps in other ways, recognize the governor and the other officers who represent the true State government. When Congress has thus recognized them by express resolution or in any other way as a Congress, the electoral ticket sent forward by the government as administered by such officers is the electoral vote which should be counted. That is the government which the people of the United States will be satisfied with, that is the lawful government. I say they will be satisfied with it because the Constitution charges Congress, whenever it shall be necessary for it to determine the relations of the Federal to the State authorities, to decide it, and when they decide a matter thus within their jurisdiction the people submit to it, just as they would to a decision made by the Supreme Court touching a matter that came completely within its jurisdiction, and cheerfully. If they will not, the Government would be at an end and the people but a mob.

That is so, Mr. President, according to the terms of the Constitution, and a reasonable view of it, and it has been so expressly decided; and I take pleasure—I have done it before on former occasions and I do it again—in calling to the attention of the Senate the language of the Supreme Court in this respect. I believe that we ought to talk more and know more about the relations between the States and the Federal Government. We cannot study them too much. I do not believe in the idea that we are not one people under the Constitution. I believe that this is a nation. I believe that the States make up the Union; that they are of the Union and the Union is of the States; that each is made an organ for the other and supports the other, and there is no hostile element anywhere existing, there is no hostility or adverse right; and wherever hostility appears, it is because the machinery is not properly adjusted and is not properly operating; it is because of maladministration somewhere. This Government is *impe-rium in imperio*; it is a national Government and State governments combined. Our system is a mixed government, composed of State and Federal Governments. The National Government within its sphere is absolute and sovereign; the States within their sphere are absolute and sovereign; but the whole make up one government, one system; they operate together like a nicely adjusted piece of machinery. North Carolina is of the Union and for the Union; the Union is for North Carolina. They co-operate each with the other, and each makes up a part of the machinery of the other. The people of the Union and the Government of the Union are interested in every official act done in North Carolina and the people of North Carolina are interested in every official act done by the people of the Union in every State, and by the authorities of the Union under the Constitution and the laws. This is one system of government; it is one whole; and the only difficulty that Senators and statesmen can have is in ascertaining how the machinery shall be kept in harmonious action, and that is the

question, in the respect that we have under discussion, that I am trying to throw some light upon now.

I call attention to what the Supreme Court say as to the manner of ascertaining which is the true government and what is the power to determine that question in an emergency like the one suggested and like others I might mention. In *Luther vs. Borden*, Chief-Justice Taney, delivering the opinion of the court, said:

"Under this article of the Constitution it rests with Congress to decide what government is the established one in a State; for, as the United States guarantee to each State a republican government, Congress must necessarily decide what government is established in the State before it can determine whether it is republican or not. And when the Senators and Representatives of a State are admitted into the councils of the Union, the authority of the government under which they are appointed, as well as its republican character, is recognized by the proper constitutional authority. And its decision is binding on every other department of the government, and could not be questioned in a judicial tribunal. It is true that the contest in this case did not last long"—

This was the Rhode Island case—

"long enough to bring the matter to this issue; and as no Senators or Representatives were elected under the authority of the government of which Mr. Dorr was the head, Congress was not called upon to decide the controversy. Yet the right to decide is placed there, and not in the courts."

"So, too, as relates to the clause in the above-mentioned article of the Constitution providing for cases of domestic violence. It rested with Congress, too, to determine upon the means proper to be adopted to fulfill this guarantee. They might, if they had deemed it most advisable to do so, have placed it in the power of a court to decide when the contingency had happened which required the Federal Government to interfere. But Congress thought otherwise, and no doubt wisely, and by the act of February 28, 1795, provided that 'in case of any insurrection in any State against the government thereof it shall be lawful for the President of the United States, on application of the Legislature of such State, or of the executive, (when the Legislature cannot be convened,) to call forth such number of the militia of any other State or States as may be applied for, as he may judge sufficient to suppress such insurrection.'

"By this act the power of deciding whether the exigency had arisen upon which the Government of the United States is bound to interfere is given to the President. He is to act upon the application of the Legislature or of the executive, and consequently he must determine what body of men constitute the Legislature and who is the governor before he can act. The fact that both parties claim the right to the government cannot alter the case, for both cannot be entitled to it. If there is an armed conflict, like the one of which we are speaking, it is a case of domestic violence, and one of the parties must be in insurrection against the lawful government. And the President must, of necessity, decide which is the government, and which party is unlawfully arrayed against it, before he can perform the duty imposed upon him by the act of Congress.

"Undoubtedly, if the President, in exercising this power, shall fall into error or invade the rights of the people of the State, it would be in the power of Congress to apply the proper remedy."

That seems to me to be in all respects a proper, reasonable, and just exposition of the relations between the State and Federal Governments in the respect referred to.

Mr. President, in the case provided for in the second section of this bill, I say that the President of the United States having recognized the proper authorities of the State, the electoral ticket sent forward by those authorities must be counted, unless Congress shall reverse his action and declare that another body of officers represent the true authority of the State; and in the contingency that Congress shall so declare, then the electoral vote sent by that class of officers must be counted. I insist that the proposed amendment to the bill is wise for this reason: It relieves Congress, and parties in Congress at the time, from getting into squabbles about party ascendancy and party success; it compels Congress in the count to accept the recognized government.

Mr. MORTON. Will my friend permit me to interrupt him?

Mr. MERRIMON. Yes, sir.

Mr. MORTON. While agreeing with most that has been said by the Senator from North Carolina, I desire to call his attention to the particular effect of the amendment which he proposes, so that he may answer the objection that I suggest, if it be an objection. He proposes to strike out all after the word "which," in line 7 of section 2, and insert a clause to make the section read:

"And that return from such State shall be counted which shall be duly authenticated by the State authorities recognized by and in harmony with the United States as provided by the Constitution."

The objection I suggest to the amendment offered by the Senator is, first, that this undertakes to prescribe a rule by which the two Houses shall decide a question arising upon two returns. Congress would be bound to decide it that way if there was nothing

else in it. If there are two returns, and one comes certified by the recognized government of the State and the other comes from a pretended government, if there be no other objection, that which comes from the recognized government of the State must be counted. If Congress should recognize the spurious government or should fail to recognize the only government in the State, of course it would be a gross breach of its duty. I assume, therefore, that this amendment attempts to establish a rule by which Congress must be governed anyhow. But the question is whether it does not go too far. It says "that return which shall be duly authenticated by the State authorities recognized by and in harmony with the United States as provided by the Constitution" shall be counted. Now, suppose there are two returns, one from the recognized government and one from a pretended government. Of course, as between the two, we must take that which comes from the recognized government. But are we bound to take that return?

Mr. MERRIMON. We ought to be.

Mr. MORTON. So far as the government of the State is concerned we ought to be; but are we bound to take that return? We should be under this amendment. It may turn out that the return which is sent up by the recognized government is so defective, or shows such facts, that we cannot receive it. For example, suppose it does not show that the Constitution has been complied with, or suppose it shows on its face that it was not complied with? The Constitution requires electors to vote by ballot; suppose the return shows upon its face that they voted *viva voce* ? Can we receive it? Under this amendment we should be bound to receive it. We might reject it for the same reason under which both Houses would be authorized to reject a return under the first section. Suppose, if you please now, that the return which comes up from the recognized government shows that the persons voted for for President and Vice-President both resided in the same State, in violation of another provision of the Constitution, are we bound to receive it? We should be under this amendment. Under the first section if there was but one return we should not be bound to receive it. Therefore I suggest even where the return comes from the recognized government Congress should be left to reject it under the second section as we should have a right to do under the first if there is but one return. I trust I am comprehended by the Senator.

Mr. MERRIMON. I think I comprehend the honorable Senator.

Mr. MORTON. As the amendment stands, if there are two returns, then the case is taken out from under the operation of the first section, and there being two returns, that return which is authenticated by the recognized government of the State must be accepted; it does not leave to Congress the discretion it would have under the first section where there was but one return.

Mr. MERRIMON. The object of my amendment is to cut off the very difficulties that the Senator has suggested. Surely Congress would be willing to receive the return, if it was right in all other respects, which has been sent forward by the State authorities in harmony with the United States. The object of this amendment, the legal effect of it, is to put the electoral return as sent forward by the authorities in harmony with the United States upon an exact footing with the returns from every other State. It is to put the returns sent forward by the government not so recognized out of the case entirely; and if it should turn out that there is any defect in the returns sent forward by the government so recognized by the United States, of course it would be upon a footing with the returns from all other States, as if it was suggested that there was a forgery or that there was any other defect, a concurrent vote under the first section would reject it.

Mr. MORTON. The precise point I call attention to is whether that would be the legal effect of the second section if amended as proposed. I ask the Secretary to read the second section as it would stand amended as my friend proposes, and then I ask him whether it does not in the case of two returns require Congress to accept anyhow that return which comes from the recognized authority?

Mr. MERRIMON. Not necessarily. The only effect I intended it to have is to put the return that is sent by the authority not in harmony with the United States out of the case altogether, and put the return sent forward by the lawful authority of the State and recognized by the United States on a footing with the returns sent from other States. I think that is legal and fair.

Mr. MORTON. Will my friend listen to the reading as amended? I ask that the section be read as it will stand if amended by this amendment.

The Chief Clerk read as follows:

"That if more than one return shall be received by the President of the Senate from a State, purporting to be the certificates of electoral votes given at the last preceding election for President and Vice-President in such State, all such returns shall be opened by him in the presence of the two Houses when assembled to count the votes; and that return from such State shall be counted which shall be duly authenticated by the State authorities recognized by and in harmony with the United States, as provided by the Constitution."

Mr. MERRIMON. I think that a legal construction of that amendment will give it this

effect: that, if two returns are sent, that one which is sent by the authorities of the State not in harmony with the United States is put out of the count altogether and cast aside; and then it leaves the returns sent by the authorities recognized by the United States upon an exactly equal footing with the returns sent from every other State.

Mr. MORTON. Let me suggest an addition to my friend's amendment to obviate the objection, so that he may present the proposition fairly as I think:

"And that return which shall be duly authenticated by the State authorities recognized by and in harmony with the United States, as provided by the Constitution: *Provided*, That such return shall be otherwise the true and valid return."

Mr. MERRIMON. I do not think I have objection to that. I will scrutinize that suggestion after I get through with my remarks. It appears to me now that I have no objection to the suggestion, because my purpose is simply to put the returns sent forward by the authorities of the State in harmony with the United States upon an exact footing with those of the other States, and to put the returns sent by the authority not in harmony with the United States out of the case altogether. Surely there can be no objection to that.

The United States are in harmony, as I have said in the outset in debating this part of the subject, always with the proper State authorities; and, when an emergency arises so that positive action must be taken, first the President, if called upon, recognizes the lawful State authority; and, if Congress shall not act when the authority thus recognized by the President sends forward the electoral vote, that must be counted. If Congress shall reverse his action by a joint resolution or otherwise, and declare that the other authority is the lawful one, the vote sent by it must be counted. This provision cuts off the debate and dispute that might arise on the occasion of the counting of the vote, in times of high excitement, about whether one government was the lawful government or another government was the lawful government. We need to keep that question just as far from the occasion of counting the votes as possible.

Let me illustrate this point by putting a supposed case. I will take the case of Rhode Island during the Dorr rebellion. Suppose that Dorr's rebellion had succeeded further than it did and that it had gone on to the extent of electing or appointing an electoral ticket for President or Vice-President and the charter authorities had done likewise. Suppose the rival governments had gone to that extent, and the Dorr government had sent forward an electoral return to Congress, and the charter government had done likewise. In that case, under the amendment that I have offered, as the charter government was the government in harmony with the United States, the Dorr return would have been put out of the case entirely. It would have given rise to no debate or trouble. Why? Because the other government was the government in harmony with the United States. The President had recognized the governor under the charter government, and Congress might therefore have recognized the governor under the charter government by joint resolution. In that case, under this amendment, the Dorr return would have given rise to no trouble at all; it would have been cast out. There would have been no doubt about it; and the regular return under the charter government would have been counted just like the return from any other State. That is exactly what I want to effectuate. I wish to cut off disputes and quarrels that might arise at the time of counting the vote by excited factions or excited parties that might attempt to do an act unlawful in itself to affect the result at that moment.

But, Mr. President, I will not avoid any difficulty about this question. I want to meet it, and meet it as fairly as I am able to do. Suppose the case, as it is alleged, was the case of Louisiana lately, where an election has been held—and, under such circumstances as that, it is contended there is no government at all—where the State government is completely dismantled; still there are two factions there. There is the Kellogg faction; there is also the McEnergy faction, each claiming to administer the true State government. The Kellogg faction sends forward an electoral return; the McEnergy faction sends forward an electoral return; and there has been no positive recognition by the President or by Congress of either of them. Then it may be asked, and, I think, with pertinence, what is to be done in that case? My answer to that is this: In the first place, it is not probable, it is only remotely possible, that such a case could ever arise. In the next place, it is not probable that the two branches of Congress, in the discharge of their high duty, would divide, one House against the other, upon a question of that sort.

Mr. JOHNSTON. Suppose one House recognizes one and the other House the other?

Mr. MERRIMON. In that case I think they would be bound to count the one recognized by the President, unless Congress should overrule his action.

Mr. JOHNSTON. Would a State government in harmony with the President, but not with Congress, be in harmony with the United States?

Mr. MERRIMON. Most assuredly not; the Congress is the supreme authority in such a case. But that is to say the President is corrupt and has prostituted his office. We cannot proceed upon such a supposition. Laws are passed on the supposition that the authorities of the Government will do their duty as they understand it and faithfully.

Mr. WHYTE. May I ask the Senator from North Carolina where he gets the authority from the Constitution to require any certificate from the executive authority. I ask whether the electoral college itself may not certify its own vote?

Mr. MORTON. The act of 1792—

Mr. WHYTE. I ask in the Constitution. I know it is in the act of 1792; but where in the Constitution is there such a provision that the electoral college cannot certify its own vote?

Mr. MERRIMON. Plainly, by the necessary, the essential, the inevitable implication. Unless some provision of that sort were made by act of Congress, how could Congress ever come in connection and contact with the electoral college? It is necessary that Congress should take some action to provide some means, some evidence by which the Congress, the counting power, shall know that the State had done its office or the people of the State had done their office in electing electors who make the electoral college. There is where the authority comes from. It comes by necessary and inevitable implication; and therefore the act of 1795 provides that the executive of the State shall give the elector a certificate of his election, and he shall send it with the certificate of the return. It is in that way the power is manifest and proceeds from the Constitution, or, rather, is inherent in it. And in answer to my friend from Virginia, if the President shall recognize an insurgent government, if he is corrupt enough to do it when he knows it ought not to be done, I see no other remedy than that the Congress must be bound by it, unless Congress will reverse his action; and to say to me that he is corrupt, deciding with his party for his party's sake, is to say to me that there must be the end of government, is to say to me the Senate will not act with the House and count the votes, and Congress will not perform that act, or will not do any other act that the Constitution charges it to do. We cannot proceed and act upon the supposition that the President is corrupt or that Congress is corrupt in any particular manner. The Constitution supplies the remedy; and if the President should recognize the State government in the case supposed, and evidence should be offered tending to show that he did it corruptly and prostituted his power, he could be impeached for it; but that is not a supposable case in debating a question like this.

I do not think that in the case of Louisiana the State government was dismantled for reasons which I have given repeatedly on former occasions. But suppose a case—and it is a barely possible case—where a State government is completely dismantled; in the first place, I say, it is barely possible that such a case could ever happen. In the next place, I say that, if it could, it is scarcely possible that when such a return would come to Congress the two Houses of Congress would not concur in rejecting it, and when they did concur in rejecting it the American people would sanction it. If the people of a State should behave so badly, if they should conduct the State government in such a way as to dismantle it and prostitute it by general disturbance, so as not to be able to tell whether they have any government at all, the American people and the people in that very State would say that Congress ought to exclude such a vote from the count. Suppose that in that case the political parties in Congress should be so debased by party zeal as that they would not agree upon what was right in such a case, they would jeopardize the country, and the result would be they would sit and contest and wrangle about it until the 4th of March would come; and, as the law now exists, when that time came, the controversy would be over. The President of the Senate *pro tempore* under the act of 1792 would be President and would remain President until, under the Constitution, a new election for President and Vice-President could take place.

That would be the effect. That is the way the matter would run, and it would give rise to no disorder. I say it is scarcely worth while to contemplate such extreme cases; they are barely possible. I trust in God the case never may arise. It is barely possible that such a contingency could happen.

Before I take my seat, Mr. President—and I beg pardon of the Senate for detaining them so long. My only apology is that this is a very interesting subject, and I want to get and give all the light I can. I wish to consider how the two Houses sit together in counting the electoral vote. At the last session, in a hurried running debate here, I expressed the opinion with some hesitation that they sat together in joint session and acted as one body *en masse*, and that they did so in deciding all questions that came before them. I think that a fair argument can be made in support of that view. I know that one or two gentlemen entertained the view I then entertained, gentlemen for whom I have the highest respect, and they entertain that opinion still. I should be gratified to hear what they have to say on that subject. The strong inclination of my mind however, is the other way after very considerable reflection, and I will submit one or two reasons that have brought me to that conclusion. The Constitution says:

“The President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates, and the votes shall then be counted.”

It will be noted that the Constitution does not provide that it shall be done in the presence of the Senate and House of Representatives sitting *in joint session*, and I do not think by any implication we can supply those words. It is not necessary to do it.

The Constitution can operate leaving these words to have their natural meaning and force, and by implication or inference we cannot interpolate the words "sitting in joint session." If the Constitution read: "The President of the Senate shall, in the presence of the Senate and House of Representatives, *sitting in joint session*, open all the certificates," &c., then I would say without hesitation that they must sit as one body and *en masse* for the purpose of determining all questions that might arise in counting the vote. But it does not say that; it says the *Senate and House of Representatives*. The "Senate" has a technical meaning. It does not imply the seventy-four men who compose the Senate as Senators in their individual capacity. It implies the seventy-four men, or a quorum of them, sitting in this Hall, organized, with a presiding officer, and proceeding to business under the Constitution and laws. That is what is meant by "Senate." It has a technical meaning. It means the Senators composing the Senate, organized in the Senate or in the proper place to proceed and act, to do anything within their jurisdiction under the Constitution.

Mr. MORTON. I want to call the attention of my friend now to what I think is the defect in his amendment.

Mr. MERRIMON. I am not through on this point. I will ask the Senator to do so presently. The same remarks are applicable with the change of circumstances to the House of Representatives. The Constitution in this respect treats them as separate and distinct bodies, and it seems to me that they must vote and act as separate and distinct bodies; and, by the necessity of the case, when a question shall arise, the two branches of Congress proceeding as I have undertaken to indicate in my remarks they ought to proceed, the House of Representatives must decide the question for itself there in its own Hall. If practicable, the Senate might decide the same question for itself there; but, as it would not be practicable to do that, it must retire to its Chamber or some other convenient place and decide it there. When each has made a decision upon any particular question arising, then the two bodies may come together and announce the decision. Suppose they do not agree; then the disagreement has the same effect as the disagreement of the two Houses upon any measure of legislation or any other matter that they are called to act upon in their legislative capacity.

I will thank the Senator from Indiana now to make the explanation that he desired to make a moment ago.

Mr. MORTON. The Senator from North Carolina, in his proposed amendment, strikes out that part of the second section which requires the joint action of the two Houses:

"And that return from such State shall be counted which the two Houses, acting separately, shall decide to be the true and valid return."

And he makes it read:

"And that return from such State shall be counted which shall be duly authenticated by the State authorities recognized by and in harmony with the United States as provided by the Constitution."

I do not know whether he intends to leave out the concurrence of the two Houses, but he leaves the same question to be decided by his amendment. He requires that return to be counted which "shall be duly authenticated by the State authorities recognized by and in harmony with the United States." There is the question still to be decided which of these two pretended governments is recognized by and which one is in harmony with the United States. There being two returns and two pretended governments, somebody must decide that question. We say the President of the Senate cannot decide it; the House cannot decide it alone; the Senate cannot decide it alone. Therefore that government must be selected by both Houses; and the amendment of the Senator still leaves the main question open to be decided which is the government acting in harmony with the United States; in other words, which is the lawful government of the State. I submit to my friend that that question can only be determined by both Houses, and, where the two Houses disagree about that the question is left open just as it was before.

Mr. MERRIMON. My answer to that is this, and I thought I made myself understood a while ago, that there is at all times an authority of the State government in harmony with the Government of the United States. There cannot be a time when the Government of the United States does not recognize one authority or another. Sometimes it becomes necessary to recognize it actively, as where there is a call upon the President to exercise power in suppressing an insurrection against the State or where it becomes necessary for Congress to guarantee to the State a republican form of government. In that case, where the President has recognized the authority, if Congress has not taken action, that electoral ticket would ordinarily be counted. To say that it would not be counted, to say that the Congress sitting here to count the electoral vote would not count it, and count it without debate, that they would go out of the way to raise a question, is to say, it seems to me, that they would be corrupt, that they would not be willing to submit in good faith to a provision of the law. Then I go further and say that, if it was contemplated that such contingencies could arise about a particular State, it would be competent for Congress in advance of the meeting of the two branches of Congress to count the electoral vote, to declare by concurrent reso-

lution, over any action of the President, which was the lawful State government. But suppose that the wrangle, the conflict, that the Senator suggests, should arise, (which I endeavored to show was a bare possibility,) and the two parties, or the three parties, or the contending parties should consent to be prostituted by party zeal, so that they could not make a decision, the controversy would simply go on till the 4th of March, when it would end by limitation of time, and the President *pro tempore* of the Senate would be the President of the United States temporarily, and a new election would take place under the Constitution and laws.

MR. MORTON. I fear I did not make myself understood by the Senator from North Carolina. It comes right back to this point: here are two returns opened by the Vice-President from two pretended governments in a State. His amendment says that that return shall be counted which comes from the lawful government of the State, but the very question to be decided is, which is the lawful government of the State?

MR. MERRIMON. I go on the ground that it has been decided before that time.

MR. MORTON. I submit that is to be decided by both Houses, and my friend in his amendment strikes out that part which requires the concurrence of both Houses.

MR. MERRIMON. But I contend that the decision touching that matter has been made before actively by the President, where necessary for him to take action, or actively by Congress; and if there is a conflict of the parties whereby they cannot agree, the conflict goes on. I admit that you could possibly raise such a question; and if such a contingency should arise, then I think it would go on until, by lapse of time and by operation of law, the presiding officer of the Senate would become President, and a new election would have to take place.

MR. MORTON. The Senator says the decision would be made before as to which was the lawful government of the State; but who is to decide how that decision was made? Who is to decide that question? Suppose that question arises. I say the President has decided it, and we are bound by his decision. Another says no, the President never decided that question; he did a certain act, but that was not a recognition of the State government. I will call my friend's attention to an illustration of this very difficulty on this floor. I have argued in the case that arose from Louisiana that the President, under the act of 1795, had the power, and that he was authorized thereunto by Congress, to decide which was the lawful government of the State, and that that decision was binding upon the whole Government until the United States, through Congress, by the action of both Houses, determined otherwise. I thought that was the law then; I think so now; but that view was disputed, I believe, by nearly everybody on this side of the Chamber and some on the other side of the Chamber. Then it was argued that, although the President had so far recognized one government in Louisiana as to keep the peace under it, he had not done an act which recognized it as the lawful government. So, after all, the question comes right back. Here are two sets of returns. It is said the President has recognized the government that sent one of them; but who is to settle the question whether the President did recognize that government? That very question must be settled by somebody, and I submit it must be settled by both Houses. Therefore I think my friend's amendment is defective.

MR. JOHNSTON. Will the Senator from North Carolina allow me to ask him a question?

MR. MERRIMON. Yes, sir.

MR. JOHNSTON. I understand the Senator suggests as a mode of avoiding the difficulty that the two Houses may settle in advance the question suggested by the Senator from Indiana, but he provides no means of informing the two Houses officially that two returns exist. The returns are required to be sent to the Vice-President and remain in his custody. He opens them for the first time after the two Houses assemble in joint convention. That is the first official information that occurs that there are two returns, and it is too late then to provide for the difficulty suggested.

MR. MERRIMON. We well know if such a state of things exists in a State as that two electoral returns would be sent forward.

MR. JOHNSTON. How do we know it?

MR. MERRIMON. We do not know it officially, but still a member of Congress having personal knowledge of the facts would bring the matter before Congress officially; he could suggest it, and Congress could appoint a committee to institute an inquiry into the condition of the State and take proper action by joint resolution or otherwise.

MR. MORTON. Suppose in that case, if my friend permits me, Congress undertakes to settle in advance and cannot agree about it, then comes the same question.

MR. MERRIMON. I endeavored to explain that a moment ago. That case is barely a possible one, and not at all probable. In that case the controversy would go on until the 4th of March, as the law now stands, and the count of the vote for President and Vice-President would be defeated, and another election would have to take place under the Constitution and laws.

MR. JOHNSTON. I ask the Senator this question: The Constitution provides that the certificate of returns shall not be opened until the two Houses meet in joint convention. How can the question as to which are the true returns be said to be up until the re-

turns are opened? The Constitution provides that they shall not be opened until the two Houses meet in joint assembly. How is it possible to settle the question in advance?

Mr. MERRIMON. I thought I had answered that, but I will do it again.

Mr. JOHNSTON. I do not think the Senator can answer it very well.

Mr. MERRIMON. I think I can. My friend does not make it so by simply saying so. I cannot make anything so by simply saying it is so; I must have some reason to underlie my assertions. There must be reason, there must be substance underlying my declaration or it is worth nothing. I say in the first place, as I said a moment ago, if such a controversy should arise in a State, it could not be done without the notice of the nation, and it would be perfectly competent before the time to count the votes arrives for a member of Congress to bring it before the House or the Senate and raise a proper inquiry in that behalf. That would be a contingency in which it would be proper for Congress to pass a concurrent resolution declaring that one government or the other was the lawful government and the one to be recognized by the United States, and when they had passed such a joint resolution, under the decision of the Supreme Court which I have read from, it would be the duty of Congress, the duty of the Supreme Court, the duty of the President and all other officials of the Union to recognize that as the true and lawful government.

But then my friend's question goes further than that. He says, how could you tell until the returns were opened which was the lawful return? Suppose the moment the return is opened and it is handed to the tellers appointed under the direction of the two branches of Congress, it appears that one return is signed by John Smith. The Congress knows at once that John Smith is the governor of the State recognized by the joint resolution of Congress or the governor of the State recognized by the President, Congress having taken no action, and the count would be made forthwith. That is the way it would be done. Then if there was another return signed by John Jones, who represented the insurgent government of the State, the moment it was opened the Senate and House of Representatives would see that he was the insurgent governor. In that case the return would be rejected. It would not be counted at all, nor would it be debatable. That is the effect of my amendment; and it does seem to me that under it the whole working machinery would operate thoroughly and well. The one main object I had in view in offering the amendment was to cut off a wrangle that might arise in the count of the vote about which was the lawful governor. I do not think it is very material for the reason I assigned a while ago, to wit, that it is barely possible that such a case could ever exist, and, if it should happen, then it is barely possible that Congress could ever become so prostituted by party zeal as that it would jeopardize the interests of the country by refusing to take proper action in that respect.

The PRESIDENT *pro tempore*. The question is on the amendment proposed by the Senator from North Carolina.

The amendment was rejected.

Mr. RANDOLPH. I have withheld the amendments that were under discussion yesterday, partly because I did not intend to speak to them and partly because I felt that some amendments might be offered that would do away with the necessity for those which I had already presented. I have already said in substance all I intended to say as to what seemed to me the value of the amendments that I have placed before this body. There has been laid upon the desks of the members of the Senate this morning an amendment which I shall now offer, and I beg to call the attention of Senators to the fact that the amendment that is now to be offered is not that which was upon their desks a day or two ago, coming from me. It has been changed somewhat, in order to meet the objections urged by the Senator from Virginia [Mr. Johnston] and the Senator from Texas, [Mr. Maxey,] among others. I have offered it in the spirit of compromise. It seems to me to cover some of the objections that have been offered by the Senators from Virginia and Texas, and I believe by the Senator from Tennessee, [Mr. Cooper.] I now offer as an amendment to the pending bill the additional sections which I send to the Chair, and I ask the Clerk to read them.

The CHIEF CLERK. It is proposed to insert as additional sections to the bill the following:

"SEC.—. To insure each State the count of the electoral vote, except it shall be rejected as provided for in section 1 of this act, it is declared the duty of each House of Congress to record its vote by yeas and nays upon all questions as to which are the true and valid returns of a State; and it shall be the duty of the presiding officer of each House to immediately forward to the other a true and detailed return of such vote.

"SEC.—. Should it then appear that the two Houses have failed to agree as to which are the true and valid returns, they shall immediately re-assemble, and the President of the Senate shall announce those returns as valid which shall have received a majority of all the votes cast in both Houses of Congress, considered as if in joint meeting assembled.

"SEC.—. Should it occur that the aggregate vote of both Houses be equally divided upon the question, then, and in that event only, the President of the Senate shall give the casting vote."

MR. RANDOLPH. The Senator from Indiana, in speaking yesterday to this question, said that no plan had been presented, that no plan could be presented, which would not in certain exigencies leave a State unrepresented. I called his attention yesterday to the fact that the operation of the amendment that I had proposed would get rid of that difficulty. Under the amendment that I have suggested there is no contingency in which the electoral vote of a State can fail to be counted. Whether this be the right plan or not, I do not pretend to say; but I do say that the two Houses of Congress in one way or another will decide, and must decide, which the true returns of a State are, and the difficulty that has been so frequently suggested in the course of this debate is overcome by it, and that too in a plain, practical manner.

MR. CHRISTIANCY. The chief objection I have to the pending amendment is that it seems to me to proceed on the erroneous idea that it is competent under the Constitution for the two Houses to meet and act in joint convention. It appears to me from the reading of the Constitution that they act in their separate capacities, and that it is incompetent to provide by an act of Congress for their action in joint convention at all. This amendment evidently proceeds on the idea that it is competent. It provides that:

"The President of the Senate shall announce those returns as valid which shall have received a majority of all the votes cast in both Houses of Congress, considered as if in joint meeting assembled."

If that does not make a joint convention I am incapable of understanding the language. Then, again, the last section of the amendment reads:

"Should it occur that the aggregate vote of both Houses be equally divided upon the question, then, and in that event only, the President of the Senate shall give the casting vote."

That does not touch the point, however. The main thing, and it seems to me the sufficient one, is that it attempts to make a joint convention where the Constitution requires the two Houses to act in their separate capacities.

MR. MORTON. I did not hear my friend from Michigan very distinctly, but I think he stated the objection to the amendment of the Senator from New Jersey. It proposes to have the effect of a joint convention without having it in fact. The two Houses shall vote separately, but, if they disagree, then we shall count the number of votes in the House and the number of votes in the Senate, the number on the one side and the number on the other side, and whichever aggregates the largest in favor of the return, that shall be counted. For example, there are two hundred and ninety-two votes in the House: one-half is one hundred and forty-six; seventy-four votes in the Senate: one-half is thirty-seven. The two Houses not agreeing, if there should be thirty-eight votes in the Senate in favor of one set of returns and one hundred and forty-six votes in the House in favor of the same set, then add those two sums together and that makes the majority, and decides it. I state it correctly?

MR. RANDOLPH. Yes, sir.

MR. MORTON. I think that would be a very great anomaly under our Constitution, and it would hardly work.

MR. RANDOLPH. I endeavored to show, in presenting the original amendment, that so far from this being an anomalous condition of affairs, as the Senator from Indiana has stated, in certain contingencies the States would practically decide the result through the vote of the Senate; that in other contingencies the House of Representatives, and thus the people, would decide; and that in still other contingencies, when the aggregate vote of the two Houses left the matter evenly divided, then, and in that event only, the President of the Senate with his casting vote would decide, as was contemplated by the amendment of the Senator from Texas. So then, it seems to me, if I may use the word, that the chances are equal in favor of one or the other of these plans; that no special advantage is given under the proposition I have made either to the Senate, to the House, or to the presiding officer of the two bodies. I am aware that the plan is open to the objection made by the Senator from Michigan; but if he will consider he will see that it is not a joint meeting, but that it is a law in effect fixing upon the President of the Senate a rule by which he shall in certain emergencies consider calmly the vote. That is all there is of it. It may have the effect of a joint meeting; I grant that it has; but it gets rid of the objection which has been urged, that there is no right in the two Houses to come together in a joint meeting.

I have no further remarks to offer. The Senate has already been detained a long time on this question. I suspect that the amendment which I have offered will meet the fate that all the other amendments have met with. I ask for the yeas and nays upon it.

The yeas and nays were ordered; and, being taken, resulted—yeas 15, nays 37; as follows:

YEAS—Messrs. Bayard, Caperton, Cooper, Davis, Gordon, Johnston, McCreery, Randolph, Ransom, Saulsbury, Thurman, and Withers—12.

NAYS—Messrs. Boggy, Boutwell, Burnside, Cameron of Wisconsin, Christiancy, Conkling, Cragin, Dawes, Dennis, Dorsey, Eaton, Edmunds, Ferry, Frelinghuysen, Goldthwaite, Ham-

lin, Howe, Jones of Florida, Kelly, Key, Logan, McDonald, McMillan, Merrimon, Mitchell, Morrill of Maine, Morton, Oglesby, Haddock, Patterson, Sargent, Spencer, Wadleigh, West, Whyte, Windom, and Wright—37.

ABSENT—Messrs. Alcorn, Allison, Anthony, Booth, Bruce, Cameron of Pennsylvania, Clayton, Cockrell, Conover, English, Hamilton, Harvey, Hitchcock, Ingalls, Jones of Nevada, Kernan, Maxey, Morrill of Vermont, Norwood, Robertson, Sharon, Sherman, Stevenson, and Wallace—24.

So the amendment was rejected.

Mr. WRIGHT. I suggested the first day this bill was under consideration a difficulty that occurred to me under the first section. I have since called the attention of the chairman of the committee to the same difficulty, which is in no manner connected with the question we have been discussing; but it seems to me that the concluding language of the first section is such that it may lead to trouble, and, indeed, to very great trouble. I see no necessity at all for the concluding sentence of the first section. The possible difficulty arises in this way: It will be seen by consulting the prior part of the section that it is provided that unless the two houses agree in rejecting a vote where there is but one return, that vote shall be counted. Then the concluding sentence is:

“And any other question pertinent to the object for which the two houses are assembled may be submitted and determined in like manner.”

It seems to me that if a question is submitted and the two houses do not concur in rejecting it or in the negative, then, under that language, it would be determined in the affirmative. I think it is susceptible of that construction, and therefore I suggest and I move to strike out the concluding sentence. I do not think it is necessary at all, for the reason that the two houses would necessarily have the power and the right to take up any subject pertinent to the matter under consideration; and such question ought to be determined by the ordinary rules that obtain in deliberative bodies; whereas if this language is retained, it seems to me we may be led into the very difficulty that I suggest. Certain it is from this language, “determined in like manner,” if the “like manner” refers to the provision touching the rejection of a vote where there is but one return and the two houses cannot agree in such rejection, then it is to be counted; so if any question pertinent to the manner of counting the votes is presented and the two houses do not agree against the motion made, it seems to me it logically follows that it would be adopted.

Let me put an illustration: Suppose that during the time of counting the votes some person shall move that a committee be appointed, that the subject under consideration be referred to a committee of three or five. The two houses separate and vote upon that question. That is a question legitimate and pertinent to the matter under consideration. The House of Representatives determines to vote for the committee, the Senate against it. It seems to me from this language it would follow that the committee would be raised.

Mr. MORTON. I would say to my friend from Iowa that if he makes a motion to strike out that sentence, as far as I am concerned I shall not resist it. Perhaps there would be some obscurity in it, and I do not think it is necessary.

Mr. WRIGHT. I move to strike out the last sentence of the first section in the following words:

“And any other question pertinent to the object for which the two houses are assembled may be submitted and determined in like manner.”

Mr. THURMAN. The same question was before the Senate at the last session when the bill was up before, and a similar provision was stricken out I believe unanimously.

The PRESIDENT *pro tempore*. The question is on the amendment of the Senator from Iowa.

The amendment was agreed to.

Mr. WRIGHT. I suggest also an amendment in the last section of the bill to remove an obscurity. It is a matter of doubt, as the language stands, whether, if one house shall determine to take a recess, that operates to work a recess as to both houses, or it is intended that a recess may be taken by one house and the other continue in the discharge of its duty. I understand the intention is that one house may take a recess without working a recess of the other. I therefore suggest that in line 16 of section 4, between the words “recess” and “not,” the words “of such house” be inserted.

Mr. MORTON. That is what it was intended to mean. I have no objection to the amendment.

Mr. WRIGHT. I have no doubt that was the intention, but I think the language as it is leaves it a matter of doubt, and therefore I move the amendment.

The amendment was agreed to.

Mr. THURMAN. In order to make the bill consistent with the amendment adopted on the motion of the Senator from Iowa to the first section, I move to strike out of the third section, in lines 3 and 4, the words “or for the decision of any other question pertinent thereto.” That is necessary after having stricken out the last sentence of the first section.

Mr. WRIGHT. I suggest to my friend that I doubt whether it logically follows that you should strike those words out because we have omitted what was in the first section. This is giving a rule, as I understand, to govern the two houses when they shall separate with reference to the discussion; and if you omit these words entirely, it might be con-

strued to follow that you cannot consider any other question except the single ultimate one. My object in striking out the language in the first section was [that it was susceptible of a misconstruction as to the rule that would obtain in deciding such questions.

Mr. THURMAN. I think the words ought to go out. They were stricken out of the previous bill, and I think they ought to go out of this, for the very reason which the Senator has suggested, that they may be liable to a very wrong interpretation and are very objectionable to some Senators for fear of their being misconstrued. There can be no trouble about the Senate exercising any of the powers that are necessary for the convenience of its proceedings, and these words are not necessary in order to enable it to exercise those powers which are necessary to the proper order and convenience of its proceedings. I hope therefore there will be no objection to striking those words out. I want this bill to command as universal assent as it is possible to obtain for it, and these words are very obnoxious to some.

The PRESIDENT *pro tempore*. The question is on the amendment of the Senator from Ohio.

The amendment was agreed to.

Mr. THURMAN. I wish to call the attention of the chairman of the committee to one or two other amendments which were made at the last session, which I think ought to be made in this bill. Line 8 of section 1 provides: "One teller shall be appointed on the part of the Senate and two on the part of the House of Representatives." I do not see any reason for distinguishing between the dignity or the weight of the two houses. I move to strike out "one teller" and insert "two tellers," so that there may be the same number of tellers on the part of each branch.

Mr. MORTON. I see no objection to that. I will only say that I believe that from the first count, which was made in 1789, it has been the custom to appoint one teller on the part of the Senate and two on the part of the House; but I see no reason for that. I have no objection to the amendment.

The PRESIDENT *pro tempore*. The question is on the amendment of the Senator from Ohio.

The amendment was agreed to.

Mr. THURMAN. I now move to insert after the word "votes," at the end of line 11 of section 1, these words:

"Which certificates shall be opened, presented, and acted upon in the alphabetical order of the States, beginning with the letter 'A.'"

The reason for that is that the mode of calling the States upon any question whatsoever is different in the Senate from what it is in the House. In the Senate we always observe the alphabetical order; in the House, on the contrary, they call the States in the order in which they were admitted into the Union for petitions and the like—I do not refer to calling the yeas and nays, for of course then the members are called by their names.

Mr. MORTON. I have no objection to the amendment.

Mr. THURMAN. This adopts the simple plain rule of alphabetical order. The chairman of the committee says he has no objection to the amendment.

The PRESIDENT *pro tempore*. The question is on the amendment of the Senator from Ohio.

The amendment was agreed to.

Mr. MERRIMON. I move to strike out in the third line of section 1 the words "the two houses of Congress," and insert "the Senate and House of Representatives," so as to conform to the language of the Constitution. That was agreed to in the previous bill. It will then read—

"That the Senate and House of Representatives shall assemble in the hall of the House of Representatives at one o'clock," &c.

The amendment was agreed to.

Mr. MERRIMON. At the end of line 4 of section 1, after the words "one o'clock," I move to insert the letters "p. m."

Mr. MORTON. All right.

The amendment was agreed to.

The bill was reported to the Senate as amended, and the amendments made as in Committee of the Whole were concurred in.

The PRESIDENT *pro tempore*. The bill is still open to amendment.

The bill was ordered to be engrossed for a third reading, and was read the third time.

Mr. EATON. Mr. President, I do not desire at this late hour, after the prolonged discussion we have had, to detain the Senate long. I have voted steadily against every amendment that has been sought to be placed upon this bill, and I shall vote against the bill, and I desire to state very briefly the views which govern my action.

In the first place, I am opposed to legislative tinkering of the Constitution; and the first question that each Senator should put to himself is, Is there any necessity for a bill of this character? And the second question is, Has Congress any power to legislate upon this subject whatever? A great deal has been said here with regard to the operation of parties in discussing amendments, and my good friend the senior Senator from the State of Rhode Island [Mr. Anthony] gave the key to it. When a proposition was made that the House

of Representatives as States should vote upon this subject, my good friend the Senator from Rhode Island suggested, why not put in the words "the next democratic national convention?" This question ought not to be approached in any way in a party spirit. I will not be accused of discussing this question from that stand-point, because I undertake to say now that the Constitution is perfect to-day.

Mr. HAMLIN. I was going to make this suggestion with the consent of the Senator from Connecticut: I ask that this bill be informally passed by, to retain its place, and allow the post-route bill to be taken up.

The PRESIDENT *pro tempore*. Is there objection to the suggestion of the Senator from Maine? The Chair hears none; and the post-route bill is before the Senate.

Mr. EDMUNDS. Now, I move that the bill about the electoral votes be printed with the amendments as they stand.

The motion was agreed to.

MARCH 24, 1876.

The Senate resumed the consideration of the bill (S. No. 1) to provide for and regulate the counting of votes for President and Vice-President and the decision of questions arising thereon, the pending question being on the passage of the bill.

Mr. EATON. Mr. President—

Mr. BURNSIDE. I beg to ask the Senator from Connecticut to yield the floor for a few moments. I move a reconsideration of the vote by which this bill was ordered to a third reading, with a view to offer an amendment.

Mr. MORTON. If I understand the purpose the Senator from Rhode Island has in view, he proposes to offer an amendment. It cannot be done without a reconsideration; but, as the bill has been pending before the Senate for a long time, I suggest to the Senator that he have his amendment read for information, and he can speak to it in the present condition of the bill, and let the vote on reconsideration then be the test on his amendment. That will answer his purpose.

Mr. BURNSIDE. I am quite willing to take that course.

Mr. BAYARD. I hope the motion of the honorable Senator from Rhode Island will prevail. I was not aware that the bill had passed to a third reading. I had intended to offer in the Senate the amendment of the Senator from Tennessee, [Mr. Cooper,] the vote upon which was taken in his and my temporary absence from the Senate. Unexpectedly the vote was reached and taken, and I did desire to submit to the Senate a few remarks in favor of the amendment of the Senator from Tennessee. Now, as the bill has passed to a third reading, unless the reconsideration is ordered by the Senate, we shall be excluded from offering amendments; and yet I did desire that that amendment should be voted upon by a fuller Senate than those who were present at the time the vote was reached. I trust, therefore, understanding the motion of the Senator from Rhode Island to be for the reconsideration of the vote by which the bill passed to a third reading, it will prevail, and that no objection will be offered to it.

The PRESIDENT *pro tempore*. Is there objection?

Mr. MORTON. I withdraw the objection.

The PRESIDENT *pro tempore*. The Chair hears no objection. The motion to order the bill to a third reading is reconsidered, and the bill is now open to amendment.

Mr. BURNSIDE. I now offer my amendment. There is a misprint; the amendment is intended to take the place of the second section of the bill instead of the third as printed.

The Chief Clerk read the amendment; which is to strike out all of section 2 and insert in lieu thereof—

"That if more than one return shall be received by the President of the Senate from a State, purporting to be the certificates of electoral votes given at the last preceding election for President and Vice-President in such State, he shall immediately make a report thereof to the Chief-Justice of the Supreme Court of the United States, who shall at once cause the said Supreme Court to proceed to examine as to who are the legal electors of said State, and shall have power to send for persons and papers; and the said Chief-Justice shall, on or before the last Tuesday in January next succeeding the meeting of the electors of President and Vice-President, report to the President of the Senate which of the said electors were legally elected; and the returns sent by the electors so designated shall, if in all other respects they are legal, be counted before the two Houses."

Mr. BURNSIDE. Mr. President, it was my intention to offer an amendment covering the points embraced in the remarks I submitted the day before yesterday; but, inasmuch as a constitutional amendment will doubtless be adopted before the presidential election of 1880, I have decided to confine my amendment to the case of two sets of returns from the same State.

I am aware that there may be a supposed constitutional objection to this, but I think in an emergency like this, if it is possible for Congress to give the Constitution a liberal construction which will enable us to avoid the discord that may arise from double sets of returns from any single State at the next election, we ought to do it. Take, for instance, the case of Louisiana. If the electoral votes should be so equally divided as to make the return from that State decide the election, it is clear to me, and must be clear to every Senator here, that the two houses would disagree upon that subject. It is clear to me that the present

House of Representatives, the same House which is to act when we count the electoral votes at the next presidential election, would declare the McEnery government the legal government of the State of Louisiana. We all know that the Senate would declare the Kellogg government the legal government, because it has already passed a resolution to that effect.

Now, Mr. President, is it at all reasonable to suppose that either party would be satisfied with the result in such a case when the electoral votes are counted next February? Does any Senator believe that there would not be great discord in the country if that state of affairs should arise? Yet under this bill it may arise. I hold it to be the duty of Congress to pass some law or make some joint rule that will avert the difficulty.

The objection that my amendment is not constitutional does not strike me with the same force that it does many of the Senators with whom I have talked. I do not consider this a judicial question; I do not consider it a "case" within the meaning of the Constitution. It is simply a call from Congress on the Supreme Court to perform the reasonable duty of instructing them as to which is the legal government, and which set of electors were legally elected in a State. If it is a "case" at all, it is a "case" in which a State is interested, and therefore the Supreme Court has original jurisdiction.

I may say many things that seem absurd to the legal gentlemen in the Senate; but I am striving to get at some practical means of avoiding a very serious difficulty which may arise at the counting of the next electoral votes. If we cannot refer this question directly to the Supreme Court as a court, can we not refer it to it as a board of arbitration? Can they not resolve themselves into such a board for the time being? Is it not their duty as citizens of the United States, and as officers of the United States, and officers of the highest court of the land, one of the co-ordinate branches of the Government, to perform this work for Congress?

It is clear to me, and must be clear to the mind of every Senator here, that the people of the United States would bow to a decision of that kind without complaint. They are accustomed to regard the decisions of the Supreme Court as of great authority; they are accustomed to respect them, whether they are for or against them. There is no mode I can think of that would give such universal satisfaction to the whole people.

Another thing is very clear to me, that it was never the intention of the framers of the Constitution to make Congress the judge of the qualifications of the electors. If it had been so, the Constitution would have distinctly stated it. It makes each house the judge of the qualifications of its own members in express terms, but it does not imply even that Congress has any right to judge of the qualifications of the electors.

The framers of the Constitution probably never expected a difficulty of the kind we are discussing would arise. It is an unforeseen trouble which is presented to us, and we as representatives of the people are bound to grapple it in such a way as to avoid discord and danger.

I offer this amendment in the best possible spirit. If it does not prevail, I shall vote for the bill as it stands; but I see a gap, and a very wide one, which in my opinion should be filled. I agree entirely with the Senator from Massachusetts (Mr. Daves) that as it stands, with the exception of creating a method by which we can have an orderly meeting of the two houses in case the returns are all regular, there is very little in it.

I am much obliged to the Senator from Connecticut for yielding me the floor.

Mr. EATON. I had supposed, Mr. President, that all amendments that were to be offered to the bill had been offered and disposed of; but now comes in this new amendment, and before I proceed to the discussion of the bill, I will say a word or two in regard to the amendment which has been offered by my distinguished friend from Rhode Island, [Mr. Burnside.]

In my view of the Constitution of the United States, it is not competent for Congress to legislate on this subject, to throw into any other department of Government, or to give to any other man in the world or to any other set of men in the world, the power to decide this question. By the terms of the Constitution of the United States it belongs to the Congress of the United States to decide—to no other power, no other body, no other man. I beg leave to suggest to my distinguished friend that by an amendment to the Constitution of the United States, passed by two-thirds of each house of Congress and ratified by three-fourths of the States of the Union, he could arrive at the terms of his proposition, and, in my judgment, in no other manner. Therefore, Mr. President, I shall vote against that amendment.

Mr. BAYARD. With the permission of the Senator from Connecticut I will offer now an amendment, the amendment originally proposed by the Senator from Tennessee, [Mr. Cooper.]

The PRESIDENT *pro tempore*. The amendment will be read for information.

The CHIEF CLERK. At the end of the second section it is proposed to insert:

"And that if the two houses do not agree as to which return shall be counted, then that vote shall be counted which the House of Representatives, voting by States in the manner provided by the Constitution when the election devolves upon the House, shall decide to be the true and valid return."

Mr. EATON. Mr. President, the amendment which has just been offered by the Senator from Delaware I have no question as to the constitutionality of. If the House and Senate

see fit to legislate on this question, it is competent for them to adopt an amendment of that character in accordance with the Constitution of the United States, as I understand that instrument. Objection was made the other day to this amendment, or one of a similar character, by the honorable Senator from Indiana [Mr. Morton] because it gave to the States too much power, because it gave to the small States a power which they ought not to have under our Government. With all that argument I take issue. I shall not vote for this amendment; but the argument against it in that regard in my judgment is not sound. Sir, by the terms of the Constitution of the United States, under certain circumstances the States hold that power, and I know of no reason why Connecticut and Delaware and New Hampshire and Massachusetts, States belonging to the old thirteen, should not exercise the same power with Indiana and Ohio and Missouri, children of the old thirteen. But I do not care to follow that line of argument, because I intend to vote against the amendment.

As I said yesterday, so I again say to-day, that the remarks which I shall submit to the Senate will not be in any degree tainted by an exhibition of party feeling. My views of the importance of the subject, for upon it rests the peace of the whole Federal Union, the peace and well being of the entire people of this broad land, I trust will prevent from allowing any partisan feeling to appear.

It may not be unimportant to allude to the great contest in 1801, which contest discovered to the people of the Union that there was a great and lamentable defect in the Constitution of the United States. By the very means of that defect in the Constitution the wishes of a large majority of the people of the United States came very near being defeated; an individual came very near being elected President of the United States who did not receive in fact one single vote within the limits of the Union for that high office. Thomas Jefferson and Aaron Burr were the candidates of the then republican party for the offices of President and Vice-President. They received an equal number of votes, and by the terms of the Constitution as originally framed neither of them was elected President because a majority was necessary in order to constitute either of them President of the United States, and so the election was devolved on the House of Representatives. For many days a great contest went on; public feeling was aroused all over the country; but I am happy to be able to say here in 1876 that there were in 1801 honest public men, as I believe there are in 1876 honest public men. There were on that occasion men who trod under foot their political views, and one of them, a distinguished Representative from Delaware, the grandfather of one of our own number, a federalist of great renown, did not press the vote of his State, and thus Mr. Jefferson was elected to the office that the people designed him for. There were then, as there are to-day, public men in whom the people had confidence, without regard to their political opinions. Mr. Jefferson was elected. Mr. Burr, of course, by the terms of the Constitution was elected to the second office. An amendment to the Constitution was necessary that there might not again be a difficulty of that character. The Constitution was amended, and from that day to 1865 the Constitution answered a proper and a beneficent purpose. In 1865 a little tinkering was thought necessary to be done and legislative action was had upon this very subject, and perhaps in another part of my remarks I may say more in regard to the unwisdom, the absurdity, the foolishness of that action. I take occasion now to say that we had better not again be guilty of any such absurdity or foolishness of that character.

Sir, there are two questions which each Senator ought to answer to himself. First, have we the power to legislate on this subject? Under a clause of the Constitution, I have no doubt that where the instrument is not plain in its terms, where its implied powers are not thoroughly understood and agreed upon, it is within the province of Congress to legislate upon the subject. Therefore in my judgment, as in the opinion of other Senators, legislation may be had when necessary to carry out the implied powers of the Constitution; but I desire to impress it upon every Senator in this body that all such legislation should be avoided, if possible. It is a dangerous power to exercise even when you possess it under the Constitution.

It becomes necessary, Mr. President, that we should look at the Constitution, because the second question to which I address myself is this: Is there any necessity for legislation? I desire to call the attention of the Senate in this connection to a clause in the Constitution which has before been read:

"The President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates, and the votes shall then be counted."

"The President of the Senate shall open all the certificates." That is his duty; that devolves upon him by the Constitution of the United States; and there is the end of his duty. So far as the Constitution is concerned, he opens the certificates, "and the votes shall then be counted." The duties of the President of the Senate or of the Vice-President of the United States are defined by the Constitution. There are other duties, and I shall have occasion, if time serves me, to speak at length upon the duties which devolve upon the Senate and House of Representatives; but right here I desire to speak of the operation of that law, that constitutional law, as it sufficed to carry this people from 1801 to 1865. For more than sixty years the people of the United States went on and elected their electors of President and Vice-President; the certificates were sent to the Vice-President of the United States, the Presiding Officer of the Senate, and there never was any trouble, there never was

any difficulty, there never was even (and that is the trouble we find to-day) discussion enough upon that very clause of the Constitution for the lawyers of the land to form their opinions: and we come now to the discussion of that question to-day, when, in my judgment, it has not ever been thoroughly discussed before, because there has been no necessity for the discussion.

But, sir, in 1865—and why, I do not know; why, I cannot conceive; why, I have never heard anybody say—honorable gentlemen, acting under doubtless a high sense of duty, passed a certain rule which was called the twenty-second joint rule. Why they passed it nobody has ventured here to say; perhaps I shall learn by and by. There never had been any difficulty under the Constitution. Right in the throes of war, with a Vice-President occupying the seat which you honor and dignify, sir, of secession sympathies, a candidate himself for the high office of President of the United States, the certificates of the electors were opened according to law, and Lincoln and Hamlin were declared President and Vice-President of the United States. Why the necessity, then, for any such rule as the twenty-second joint rule? When the country was on the very verge of the most destructive civil war ever known to man, this instrument, this Constitution of the United States, controlled, and the personal honor, the personal integrity, of the then Vice-President of the United States forbade him not to do his whole duty, his full duty. Sir, I thank God I have not lost all confidence in the personal honor and the personal integrity of man.

Then why was the twenty-second joint rule adopted? I will not undertake to say that it was adopted for the very purpose of disfranchising a people, but I say it has had the effect. But no matter why; the very fathers of it disown the child. It is no longer the rule. It is repealed. Now, sir, where does the repeal of that rule leave us? That is the question. One good thing was done when the rule was repealed; but where does that leave us? The repeal of that rule leaves us exactly where we were before the rule was passed. The Constitution of the United States is now the governing power of the Senate and House of Representatives with regard to the election certificates of which I have spoken. The action of the Congress of the United States, or, if gentlemen desire to be technical, the action of the Senate and House of Representatives of the United States, under this clause of the Constitution, was for seventy years honest, honorable, upright, just. What business has any man to suppose that it is going to be dishonest and corrupt hereafter? Sir, it is an old saying, and perhaps smacks somewhat of a vulgar saying, to speak well of a bridge that carries you safely over. Now, with this clause of the Constitution, which has carried us along for three-quarters of a century, why should we find fault to-day?

We are told that it is a dangerous power to be intrusted to a single man, and he a possible candidate. There never was a cause in the world so weak but what its advocates could find reasons, poor ones, not unfrequently; but one of the reasons that have been most harped upon here is that this is a dangerous power to place in the hands of one man. Sir, is this question properly understood? I said some minutes ago that the question had not yet been thoroughly discussed by the legal talent of the United States; it has been discussed, but not thoroughly. Does it rest with one man? Not in my judgment would the exercise of the power be dangerous if it did, but I will speak of that in another place; but does it rest with one man? I say no, sir, a thousand times no; it does not rest with one man. But suppose it does; let us for one moment consider the question from that stand-point. Suppose it does rest in the hands of the Vice-President of the United States or the President *pro tempore* of the Senate. For seventy-five years it has been properly exercised. We have been told on the floor of the Senate that six times within the last seventy-five years Vice-Presidents who have been candidates for re-election or for the presidency have exercised this power. Six times in the last seventy-five years have candidates exercised this power; and yet the stars have not fallen, no injury has been done to any of the people of this land, and why beg a fight now? Why insist upon it that there is to be corruption hereafter?

Mr. President, one would suppose, I have been almost induced to suppose, that honorable Senators here gravely fear, assuming that the power is in the hands of the President of the Senate, that some time in February next the President of the Senate of the United States will degrade his character and dishonor his high place. Sir, I do not fear it. I deny the power. I say, and shall endeavor to show before I get through, that it is somewhere else; but, assuming the power to be in the Vice-President of the United States, I do not fear it.

But now what is the true intentment of the Constitution? I desire to say, and particularly to my honorable friend from Indiana—for I know his ability and the power with which he grapples with constitutional questions—that for more than sixty years no question was ever raised; and there is the trouble with this whole matter to-day. The votes were opened, the certificates were counted, the election declared; everything went along as pleasant as a marriage-bell.

Mr. MORTON. Let me ask my friend if he thinks we ought to wait until after the trouble does occur?

Mr. EATON. No.

Mr. MORTON. I call my friend's attention to the fact that in 1857 in the counting of the votes a question arose which happened to be unimportant because it did not change the result. It was in regard to the counting of the vote of Wisconsin; but the danger that the nation passed through at that time, and avoided simply by the fact that the vote was not im-

portant to the final result, was such as to fill every member of both houses of Congress with alarm, as is shown by the debate that subsequently occurred. Had the result of that election depended on the vote of Wisconsin, nobody can tell what might have happened.

Mr. EATON. The Senator from Indiana reads me rightly; I do not wish the horse to be stolen before a lock is put upon the stable-door. I do not intend that it shall be stolen. I simply desire to say that, in my judgment, this question has not yet been thoroughly discussed; I hope it will be by my honorable friend from Indiana before the debate closes upon this bill. In the minds of many men whose opinions are deserving of great respect, among them the honorable Senator from Indiana and my distinguished friend from Ohio, [Mr. Thurman,] the time has arrived when something ought to be done.

Now, Mr. President, I desire again to look at the clause in the Constitution: "The President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates, and the votes shall then be counted." By whom? I insist, and I assert without fear of successful contradiction, giving due weight to the argument of my distinguished friend from North Carolina [Mr. Merrimon] made yesterday, that the votes are counted by the Senate and the House of Representatives, and not by the Vice-President or the presiding officer of the Senate. In my judgment, the Vice-President is the organ of the two houses, and nothing else. It has never been my fortune, whether good or ill, to be present there as an actor or a spectator when the votes have been counted for President and Vice-President.

Mr. SAULSBURY. If the Senator will allow me, he says the presiding officer of the Senate is the organ of Congress. I wish to propound this question: Is it competent, if the two houses of Congress see proper, to appoint some other organ for Congress to make known its will, or whether he considers that under the Constitution the President of the Senate is made the organ of the two houses?

Mr. EATON. Of course he is. It is said by the Constitution that he shall be.

Mr. SAULSBURY. To count?

Mr. EATON. No; to open. Will my friend state the question again?

Mr. SAULSBURY. I understand the Senator to say that the President of the Senate was the organ of the two houses for the purpose of counting. I do not know whether I understood him correctly. Then I follow the precedent. It has been the practice, I understand, that he does open and announce the vote. I ask the Senator if he thinks it competent for the two houses of Congress, when assembled, to appoint some other organ for the purpose of counting the votes?

Mr. EATON. They do now. They do it every time they meet. They always do it.

Mr. JOHNSTON. Will the Senator allow me?

Mr. EATON. Certainly, but I would like to answer one first. The Constitution of the United States points out who shall open the certificates. The two houses appoint counters now. Who are counters? The tellers. Who appoints them? The Senate appoints its teller and the House of Representatives appoints its tellers. Am I wrong? I suppose I am entirely right. The misunderstanding of my distinguished friend from Delaware consisted in this: I said that the President of the Senate was the organ of the two houses for a certain purpose. He is the organ of the Constitution to open the votes; he is the organ of the two houses to declare the result after the two houses have counted. There is no doubt about it in my mind; it is as clear as God's sun. Let me read. For another purpose, I sent for the *Globe* of 1860-'61, and I will read from page 894. I think I am entirely right. The manner of going into the House, &c., I will not read:

"The Vice-President took his seat on the right of the Speaker of the House of Representatives, and presided over the joint convention of the two houses. The members of the Senate occupied seats provided for them in the area of the hall.

"Mr. Trumbull, the teller appointed on the part of the Senate, and Messrs. Phelps and Washburne of Illinois, the two tellers appointed on the part of the House, took their seats at the Clerk's desk."

Mr. JOHNSTON. Tellers appointed by the President or by the Senate?

Mr. EATON. I have said by the Senate or by the House. "The teller appointed on the part of the Senate" is the language, and "the two tellers appointed on the part of the House." I have been informed, I will say to my friend from Virginia, by a member of this body who has acted as a teller in the other house, that he was appointed by the House, and the Senate appointed its teller.

"The Vice-President then said:—

And this is important—

"The two houses being assembled, in pursuance of the Constitution, that the votes may be counted and declared for President and Vice-President of the United States for the term commencing on the 4th of March, 1861, it becomes my duty, under the Constitution, to open the certificates of election in the presence of the two houses of Congress. I now proceed to discharge that duty."

That is all he had.

"The Vice-President then proceeded to open and hand to the tellers the votes of the sev-

eral States for President and Vice-President of the United States, commencing with the State of Maine.

"The votes having been opened and counted, the tellers, through Mr. Trumbull, reported the following as the result of the count."

And then follows the result.

Mr. JOHNSTON. When was that?

Mr. EATON. February, 1861. Now, sir, what can be clearer to the mind of any constitutional lawyer than that the duty of the Vice-President is to open the certificates? They are sent to him; he is their custodian. On a certain day he meets the two houses together in joint convention. He, their Presiding Officer, opens the certificates, and the Senate and the House of Representatives, through their tellers, count; not he. Sir, I have no doubt on this subject. That is the entire duty of the Presiding Officer of the Senate; not that, if I am wrong, and it is his duty to count, I fear that he will not discharge his duty. I am talking now about what I believe the law is, the organic law of the land. Take the other view of this case. What are we, if we should live until the time arrives, and what are the members of the House of Representatives? Witnesses of a pageant; that is all. According to the theory of my friend from Indiana, and I believe also of the distinguished Senator from Ohio, we are simply witnesses of what transpires, got together in the House of Representatives or somewhere else as mere witnesses of a pageant; under, as some Senator observed, a separate organization: the House under its Speaker, the Senate under its President. Our fathers who formed this Constitution had been at town-meetings. They were known and are now known all through New England. It has been my good fortune to preside at many a one, but I should have hated to see another one in another corner of the hall.

I do not apprehend that there can be any doubt upon this subject. The two houses go into joint convention for that purpose. When in joint convention, the Vice-President, the second officer under and known to our form of government, becomes the presiding officer of that joint convention; and in case of his inability to be there, the President *pro tempore* of the Senate occupies the position. Further, for I propose to meet this whole question, I will suppose that we are in joint convention next February. Our distinguished friend, the Presiding Officer of the Senate, who, I take the liberty to say has been exceptionally fair as Presiding Officer of the Senate, is the presiding officer of that joint convention. Two returns come up from the same State—I will say my own State. I do not know well how anybody can steal the seal of the "Nutmeg" State and get two returns here; but I will suppose that two returns do come up from Connecticut. I will suppose that, not the distinguished Senator from New York [Mr. Conkling,] (for he might not like to count on that occasion,) but my good friend the Senator from Massachusetts nearest me [Mr. Boutwell] is the teller appointed by the Senate. Two tellers have been appointed by the House of Representatives. What is it the duty of the honorable President of the Senate to do? Here are two returns from the State of Connecticut. Does he count them? No; a thousand times, no. He has no warrant for it. There is no warrant in the Constitution; there is no warrant in practice for it. What does he do with those two returns? He passes them over to the honorable Senator from Massachusetts, our teller, and the two honorable tellers from the House of Representatives, and those three men count and determine the matter.

I will go further. Suppose that there are two returns from the State of Connecticut, both, for the purposes of this argument, with the great seal of the State attached. It has been known for months that there were two such returns. Everybody has known it. It has been canvassed through the public press. There is not a member of the Senate nor a member of the House of Representatives who is not thoroughly informed with regard to those two returns and all the antecedents of those two returns. Do not let us blink this question. It is known that one of them is a bare, open fraud. One is the valid one; the other is the fraudulent one. The Senate know it; the House of Representatives know it. Suppose, for the purposes of the argument, that there is a supple tool in the Chair, not you, sir, as President of the Senate. Suppose he assumes to count, against the Constitution and against all practice under the Constitution, the well-known and absolutely false return. He never would count it in the world. He could not count it before the Senate and the Representatives of forty millions of people. Instantly a motion would be made by somebody, my friend from Vermont, or my friend from Indiana, and if by nobody else I would make it. This question would be tried, tried there, and properly tried. Then the joint convention would determine which was the true return; and, after the joint convention had spoken, the world would be satisfied. I say that, after the joint convention of the Senate and House of Representatives of the United States speaks authoritatively with regard to the return from any State, the world will be satisfied.

Mr. MORTON. Will the Senator permit me to ask him a question at this point? Could this joint convention determine it acting as one body, each Senator and each Representative having one vote?

Mr. EATON. Undoubtedly. Under my view, it is decided by a majority vote of the convention. I am very well aware that the Constitution does not expressly say that.

Mr. JOHNSTON. Will the Senator allow me to ask him a question?

Mr. EATON. Certainly.

Mr. JOHNSTON. Does not the Constitution provide that the two houses shall separate?

Mr. EATON. On this point?

Mr. JOHNSTON. On any question.

Mr. EATON. I do not know; but I would like my distinguished friend to point it out to me.

Mr. JOHNSTON. It applies to all questions that come before that joint convention.

Mr. EATON. It applies to this I admit. I do not see the point, and there is not any, in my judgment. I assume that it is a joint convention; because everybody else for three-quarters of a century has assumed the same thing.

Mr. WHYTE. Will the Senator allow me to ask a question?

Mr. EATON. Certainly.

Mr. WHYTE. I ask if that very question did not come up in 1857: whether Mr. Mason did not walk out with the Senate, without having any vote in the body at all?

Mr. MORTON. Held it was not in order to make any motion.

Mr. WHYTE. Refused to hear any proposition.

Mr. EATON. Then all I have to say about it is that he did not do his duty. That is all there is about that. The question was a new one. It will not be new next February. We are now discussing that question, and this is the time to discuss it.

Mr. SARGENT. Will not that be a precedent?

Mr. EATON. It will be; but, to use a common expression, "that skewer will not hold water," in my judgment. It is a joint convention. I have not time to go back and find, but I presume that the very Globe in which the account is printed calls it a joint convention. If I am right, (and I have no doubt about it,) the vote of every State in this Union will be counted next February; there will be no disenfranchising of the people of a State. The question will be opened and settled and passed on, not by any act of Congress, not by any legislative tinkering upon the Constitution, but by the great governing power of the land, the Constitution itself.

Sir, I should be glad, if time would serve, to discuss at greater length my construction of this clause in the Constitution; but time forbids. Is there any danger to be apprehended to the country—that is the point that I desire to be calmly considered by every Senator—is there any danger to be apprehended to the country, to its institutions, to the welfare of our people by this construction of the Constitution? Why, sir, the great right of the people is preserved intact, the right to have the certificates opened and counted and the result declared.

There is another point. A friend might say to me from the other side of the chamber, "There is an objection to this construction of the Constitution, because a party majority would rule." That is true. Party majorities rule everywhere. I recognize the objection and its force; but let the construction of the Constitution be final: let us know what the law is forever. Parties change, but let the Constitution not be changed. This objection comes and must always come under this form of government of ours. Party comes in everywhere. The very amendment that has been offered to-day in good faith by the distinguished Senator from Rhode Island gives to a party man the decision of this question. There is nobody in the United States that is worth having, there is nobody in the United States that can decide the question intelligently, that is not in some way connected with some party organization. Of necessity he will not be a partisan in the decision of this question. God forbid! If you should give to the Supreme Court, if you could, the right to decide a question of this magnitude, while I should know that a majority of them belonged to a party different from the one to which I was attached, yet I should believe and expect that their decision would be honorable, just, and upright. We shall all agree upon one thing: no matter what we do, no matter what construction we give to the Constitution, no matter what law of Congress you may pass in order to carry out the principles of the instrument, something must be left to human integrity, something must be left to man's honor, and I thank God for it.

One objection that I have to giving this power to any other body than the two houses is because the Constitution lodges it with us. We are forced by the Constitution not to shirk the duty, but to perform it, and I ask honorable Senators, have you not confidence in your own integrity?

Mr. President, I have discussed this question at some length, but let me suppose that I am entirely wrong—it is very possible that I may be—let me suppose that under the Constitution the power is vested, not as I claim it to be vested in the Senate and House of Representatives, but in the Vice-President of the United States or the President of the Senate, as the case may be. If it be so, in God's name let it rest there. I thank God I have left in me some confidence in human nature. While I do not desire to say an improper thing in this high body, I have to say this, and I feel I have a right to say it: There is no Vice-President of the United States; there is a President of the Senate, and in that President of the Senate I have entire confidence. Therefore I say that if I am wrong in my construction, let us have no legislation and let this power rest where our fathers placed it.

Again, by a decision of the Senate the power is claimed—and I will not undertake to say wrongfully—that they have the right daily or hourly or fifteenminutely to make a new presiding officer of the Senate. If that is suggested as an objection, I have to say that I have confi-

dence in the American Senate. I do not believe a majority of the American Senate would place a man in that chair to disgrace common humanity and cast a blot upon the fair fame of the United States. I have no fear, I will not have any fear, on that subject. If my view and construction of the Constitution is wrong and that taken by others is right, whoever occupies that chair in February next will have the proud honor of declaring and announcing the future President and Vice-President of the United States; and, sir, he will do it honestly. With the eyes of the Senate and House of Representatives, with the eyes of forty millions of free people, with the eyes of the whole civilized world upon him, he cannot disgrace himself. Whatever other men may think, I will not believe that integrity is a myth; I will not believe that our form of government has become a mockery all over the civilized world.

Mr. President, believing as I do that the power is ample now, I have voted steadily, as I said yesterday, against every amendment to this bill, and I shall vote against the bill itself for the reasons that I have given, and for the further reason that the second section of the bill is a bid for fraud, open, unmitigated fraud; not that my distinguished and honorable friend from Indiana [Mr. Morton] and my equally distinguished and honorable friend from Ohio [Mr. Thurman] so intended it; God forbid. They cannot think that I charge them with anything wrong; but I say the second section of the bill is a bid for designing men under it to defraud the people of their rights. Let every Senator read it; that very section tells men all over this Union how to get up a set of returns, to bring them here, and to destroy and disfranchise the vote of a State. Therefore I will vote against the bill.

No legislation in my judgment is required. That Constitution under which we have lived, that clause under which we have acted for nearly three-quarters of a century, is all we require to-day, no matter how it is construed, either my way or the other way. If anything is required, it is an amendment to the Constitution itself, and not legislation. If I could become convinced that there was any necessity for an amendment to the Constitution, then I would unite with my friend from Indiana in the purpose of framing such an amendment as would in my judgment answer for the people in the future; but no legislation upon this matter is required, especially no legislation under which one, two, three, or four States may be disfranchised. Let us go on as our fathers did; let us go on under this clause in the Constitution; and, my word for it, the spirit which comes before the eyes of the distinguished Senators from Indiana and Ohio will down, down, at the bidding of the President of this Senate when the votes are counted next for President and Vice-President of the United States.

Mr. BAYARD. Mr. President, the debate that has taken place in the Senate upon this grave and important subject is a very strong proof of the want of direct provision in the Constitution in relation to this question of the count of electoral votes. It is seldom that so many views so diverse have been expressed in relation to a matter that should seem so simple in itself. At the election that shall have been held before the body of the American people, they will have expressed their will in regard to their candidates, and it would simply seem that nothing more was left than a declaration of results which had already been completed. From the foundation of this Government up to 1872 there had been one remarkable feature, the complete acquiescence at all times and under all circumstances of the people in every State with the result of the election for electors for President and Vice-President. Such a thing as an attempt to contest the election of the presidential electors never was known in our history until 1872. Such a thing as a double return of electoral votes from any State never had been heard of until the evil case and shocking precedent of Louisiana in 1872.

It seems to me that, in considering a question like this, a very grave and important lesson may be learned by us all. If there be a dishonest disposition, it will find some way or other a pretext for its exhibition and gratification. If there be a will, a way will be found for it; and if the disposition fraudulently to escape from the popular verdict does exist and dares to exhibit itself before the people of America, before one of their chief executive officers in the presence of the two houses chosen by those people as their representatives, and shall not be withered and blasted in the attempt, then it will be a proof that the spirit that made this Government possible, that alone can make it permanent, has died out in the hearts of the American people. This Government of ours, frame it as we may, legislate upon it as we please, was meant, and meant only, for an honorable, a virtuous, and an intelligent people; and if those qualities have so sunk out of sight and practice that fraud in a matter touching their interests so deeply as their choice of their Chief Magistrate can be perpetrated in the presence of the two houses of Congress, and the man survive it or the party survive it, then I say that our Government has been framed in vain, and we have only proved that we are unfit and unworthy of it.

In the various attempts which have been honestly made, intelligently made, to prescribe some means by which perfect justice may be reached in this important matter of counting these votes, I have felt the truth of Lord Bolingbroke's saying, versified by Pope:

For forms of government let fools contend,
Whate'er is best administer'd is best.

We had in this country no question as to the action of the Vice-President in opening the certificates; the count of the tellers appointed for the mere arithmetical calculation of the

votes cast never was questioned in this country until in 1872. Then, under the maleficent working of a rule adopted without regard to the Constitution, under the assumption of powers utterly unwarranted by the two houses of Congress, there came the assumption of a veto power by either branch of Congress, in silence, without debate, without reason, to throw out the electoral vote and disfranchise one or more communities at will. It was done. It was done in the case of Louisiana. It was done in the face of ballots then in existence, done in the face of returns then in existence which proclaimed palpably that the election had been held and that a majority of many thousand votes had been cast in favor of one electoral ticket. And yet the people of that State were deprived of any voice, and that majority was silenced in respect of its declaration as to who should or who should not be the President of the United States.

Now, sir, I can well understand that in the scant language of the Constitution, in those brief, unsatisfactory phrases in which we find all that is to guide us—simply that the two houses are to meet; that a certain officer is to preside, and that he is to open the certificates, and that then the counting is to take place—there is no suggestion of judgment, no suggestion of discretion, but simply the power to recite in a public meeting the result of action which has taken place theretofore in the States, and which is certified, according to the Constitution of the United States, to a certain officer of the Government. If the spirit which I trust will yet be the ruling spirit of this country, of self-respect in officers, of self-respect in people, of duty and fidelity to the great trusts of government—if this spirit shall prevail, I shall not fear that low fraud can ever be perpetrated in high places without instant moral and I had almost said I trust physical death would follow to the persons who attempt it. But nevertheless the time may arise, the suggestion, the evil suggestion has been made, and this bill unfortunately recognizes that fact as a possibility, that without the machinery for conducting a contested election of electors you are still to have a contest without the proper means of deciding it; and how is that to be done? A, B, and C, with their confederates, ten in number say, from the same State, are voted for against ten other men as electors respectively. One of the tickets is defeated. It is so declared by the executive power of the State to have been defeated. Those on the defeated ticket, not satisfied with the verdict of the people, losing sight of that great duty of acquiescence in the popular declaration, meet and go through the forms of casting their electoral votes for a candidate, and send up here to the President of the Senate that which purports to be the result of their proceedings and a certificate of how their votes were cast. It has been done; the evil suggestion has been made, and this bill proposes to meet it. I for one am glad that it takes not the shape of a joint rule, which may be rescinded at will, as we have seen in this late joint rule begotten and carried into effect in silence and retired from without notification to the other branch of Congress simply by the sole action of the Senate. That rule is at an end. It has proved (not speaking of its own intrinsic want of merit) to have one of the greatest vices that a regulation can have, and that is a want of stability and certainty, because its existence depends upon the pleasure of the accidental majority of either body of Congress. Therefore it is plain that, if we can provide a wholesome and just and proper rule for this important subject, it should take the permanent form of a law, which can only be rescinded by the vote of each House and the signature of the President. Therefore to provide for meeting this question by legislation seems to me the proper way; and the only remaining consideration is whether we have the power under the Constitution so to deal with the subject.

I am inclined to think that there is some power in Congress on this subject. At the same time, I think the discussion we have had will develop to any thinking man the necessity for an amendment to the Constitution, so that there shall be, with greater clearness, a deposit of unquestioned and unquestionable power in some tribunal upon whose decision the American people will rest with satisfaction and with safety. But until that may be done, I still hope that there may be found warrant for some action which will make confusion, injustice, fraud, and escape from popular results difficult, if not absolutely impossible.

Here, by this first section, provision is made for the orderly count of the votes, and that no votes shall be rejected without the concurrent action of the two houses. Then comes the questionable section, the second, which provides that, in case more than one return shall be received from any State, that one of the returns only shall be counted which the concurrent voices of the two houses, acting separately, shall concur is the proper one to be counted, which means that, if the houses fail to agree, the vote of the State is not to be counted at all. It will be then perceived that by a disagreement the same result is reached as though you had an absolute veto. The two houses have but to disagree in regard to the counting of one and then the other of these duplicate returns, and no vote is cast. Sir, I do not believe that by any ingenuity, arguing either by the letter or the spirit of the Constitution, it is possible to show that it ever was intended that the two houses of Congress should disfranchise any State and keep her voice from being heard, according to her right, in the electoral college. I do not believe such a result can be honestly or fairly inferred or obtained from either the spirit or the letter of our charter of Government; and, therefore, when this question may arise it is bound to be settled in such a way that the voice of the State shall be heard, and that her electoral vote shall not be excluded from the canvass.

Many propositions have been made, and chiefly on this side of the chamber, to insure this

result. That which was offered by my friend from Tennessee [Mr. Cooper] came nearest to meeting my approbation. I was absent accidentally from the chamber, as was he, at the time the vote was taken upon it, and for that reason I have renewed the amendment, and now occupy the attention of the Senate for a few moments while I discuss it.

It will be observed that the sole duty and the sole power of the two houses meeting to witness this counting, and the sole result of that joint convention under the Constitution in the hall of the House of Representatives, is the ascertainment of a majority of the electoral votes for a candidate for the Presidency and likewise for the Vice-Presidency. The Constitution requires that the person taking this office shall have a majority of all the votes of the electoral college; and, unless that majority shall be found and shall be declared, no election has taken place; and then, immediately upon the failure to ascertain and declare such majority, the power and the duty at once devolve upon the House of Representatives to choose by ballot the President from those two persons having the highest number of votes. What shall defeat the possibility to declare a majority if there be but one return from each State, as there should be if decorum, if self-respect and decency shall govern the American people as heretofore, with the single exception of the case of Louisiana in 1872? Then there will be nothing but the arithmetical calculation of the votes as contained in the single certificates sent by each State to that joint assembly. But if there be a double return, the impossibility of declaring the majority becomes manifest; and then what is the course plainly provided by the Constitution? An election by the House of Representatives, the States voting as States. I do not propose to discuss—it is not necessary—the advisability of this feature of the Constitution. I think a great deal could be said to show why it was wise and right; but, whether wise or otherwise, it is the method pointed out by the Constitution, which we are all sworn to obey; and it seems to me that, when we have reached a point when a decision must be made in regard to matters not apparently provided for, we can show our duty to this Government and our subordination to the provisions of this charter in no way so well as by adapting them to the case in hand. Therefore, if it shall be that two returns come up and the two houses do not agree that the proper return shall be counted, then the amendment of the honorable Senator from Tennessee proposes instantly that the tribunal shall settle the question of the proper return which the Constitution has required to choose the President, in case a majority has not been declared of the electoral votes in favor of one the candidates. The method proposed is in precise analogy, it is not only in analogy but it is in direct obedience to the requirements of the Constitution that confide the question of election immediately to the House of Representatives, that they shall vote as States individually in the event of the joint convention failing to find that a majority of all the votes of the electoral college have been cast for any particular candidate.

Such a proposition, it seems to me, ought to be satisfactory to those who look, as I trust we all do, to the provisions of the Constitution for all the just powers which we propose to exercise.

Sir, it is very important in my opinion that an arbitrament should be provided in advance for this question of double returns. Double returns are in their nature and suggestion fraudulent on one side or the other, because there can be but one set of electors chosen, and those who contest it unjustly necessarily are fraudulent. Now, if it shall be known in advance that we have provided a test for this, if it shall be known that we have provided a tribunal capable of making a prompt decision, then I believe the attempt will never be made. The very fact of providing for the arbitrament of choice between two returns, and having that before the eyes of the rogues who propose to contest elections in this way, will deter and discourage them, and the Senate and the House will have no trouble whatever on the subject. Nor have I any idea that the House of Representatives will be called upon at all to act under the provisions of the amendment which I have sent to the Clerk's table. Those who propose this species of contest—because there must be of these two returns but one that is right—will see the folly of the attempt, which can end only in defeat. And when we shall have established a tribunal competent and trustworthy, the very one provided by the Constitution for the election of the President himself in case a majority of the electoral votes has not been declared by the joint convention, when the States acting in their independent and sovereign capacity shall vote as individuals upon this subject, when that power and duty is confided to them, we may be sure that the attempt at a double return will never be made, and the count of the electoral vote will proceed with all that dignity, with all that simplicity, with all that impressiveness which marked it in days gone by.

The spectacle of an administration charged and possessed with all the great affairs of a Government like this, quietly, subordinately giving way to the new expression of the popular will, has been always something that has impressed not only those accustomed in other lands to the violent emotion of rulers no longer desired by the people, but it has been, I believe, a source of more pure patriotic pride to the American people to see their Government a Government of law and of order before which when the wish of the people is duly expressed instant acquiescence to it took place with order, with dignity, and with simplicity.

It is my earnest desire that all causes of dissatisfaction, of conflict, of misunderstanding, of possible difference should be removed, if possible, in advance by some action now in the shape of legislation by Congress. I believed at the beginning of this session, and still be-

lieve, that it would have been wiser to commit this question in advance to a joint committee of the two houses; that they could, in seclusion and retirement, without any of the excitement of debate, arrange upon some plan that would have been mutually satisfactory to each house, and therefore likely to command the assent of both. I will not yet despair. I still hope that, if this measure as it shall be passed by the Senate may not meet the concurrence of the House, a committee of conference may yet arrange it. I cannot conceive how any man can so degrade this subject as to bring it down to a mere partisan level. I cannot see how any man contemplating the great difficulty of this subject should not be willing to sink his private opinion in regard to measures in order to do everything that in him lay to produce a quiet, orderly, dignified, and just settlement of this question. Believing that the amendment offered by the Senator from Tennessee is the best solution thus far submitted to the Senate, and that the vote upon it was taken before, perhaps, with somewhat of inadvertence, I trust it now will receive the approval of the Senate.

As I have said before, I believe the constitution of this tribunal of the House as the ultimate judge in case of difference between the two houses as to which of the two returns shall be the just one—the mere constitution of that arbiter will of itself destroy the possibility of attempted contest or of attempted duplicate returns. The attempt will not be made, because defeat certainly will await it. “Forewarned is forearmed,” and, therefore, I will not believe that in the next presidential election, if this present measure shall become the law, the country will be distracted, disgusted, or disgraced by the sight of an attempt to contest an election by a defeated minority.

For these reasons, Mr. President, hastily and very lamely expressed, I hope the Senate will give its assent to this amendment.

Mr. MORRIS. Mr. President, I submit to the Senate that this discussion has demonstrated the absolute necessity of the adoption of a law upon this subject. The diversity of opinion that has been developed here in a season of profound repose, when no party question can enter into it, when it is above and independent of party considerations, shows the necessity of having some established rule when the time comes to count the presidential vote.

Let me suppose, for the sake of the argument, that the two houses have assembled in the hall of the House of Representatives to count the votes; let me suppose that two sets of electoral votes have been sent here from the State of Connecticut, and they are opened by the President of the Senate. What shall be done? The Senator from Maryland [Mr. Whyte] rises and says, “I demand that the President of the Senate shall decide which set of votes shall be counted.” The Senator from Connecticut [Mr. Eaton] rises and says, as he said here to-day, “No, a thousand times no; the President of the Senate has no such power; the decision must be by this joint convention acting as one legislative body, each Senator and each Representative having one vote; that is the only constitutional method of settling this question between these electoral votes.” He takes his seat. Then the distinguished Senator from Ohio [Mr. Thurman] rises in his place and says, “No, a thousand times no! There is no such thing as a joint convention; a body of that kind has never been recognized under the Constitution, never has been recognized by anybody in three-quarters of a century.” I understood my friend from Connecticut to say to-day that for three-quarters of a century the idea of a joint convention had been recognized. I submit that my friend was mistaken in this, that for three-quarters of a century it never was recognized, and I think was never seriously proposed by anybody. The Senator from Ohio says the Senate and the House of Representatives are present here under the Constitution as witnesses and as judges; and if a question shall arise involving a high discretionary power, it cannot be decided by the President of the Senate, whose duty is ministerial; it cannot be decided by a joint convention utterly unknown to the Constitution, entirely anomalous under our system of government; but it must be decided like any other question, by the Senate and House of Representatives, each acting for itself and in its own capacity.

This is the state of the case. The election is to depend upon which set of votes is counted from Connecticut. If one set is counted, the republican candidate is elected; if the other set is counted, the democratic candidate is elected; and here is a diversity of opinion and confusion equal to that which prevailed at Babel. How is it to be settled? Shall the two houses separate, go to work, and legislate on that question? That may take days. It has taken us seven days here now, in a time of profound repose, to consider this bill, and I am not sure that we shall get through with it to-day, for I am in momentary apprehension that some Senator will get up and move an executive session. But here the votes are to be counted. The 4th of March is close at hand. An utter diversity of opinion exists as to where the power is. The two houses cannot separate and legislate. What is to be done? We can easily understand what will intervene. It was suggested by the Senator from Delaware a while ago that, in case an officer shall make a wrong decision, the moral reprobation of the world would fall upon him, and he said perhaps physical punishment; that is, he might fall like Cæsar. We can understand when such vast consequences are to depend upon the exercise of a power that may be a clear usurpation, and would be in the opinion of a majority of the people of this country, that that usurpation could not pass with impunity. How, then, can we decide that it shall be done by a joint convention in the passion and excitement of the hour and with such vast consequences depending upon it? How, then, can we decide that it shall be done by the two houses, acting separately? It might be under-

stood that, if the two houses were to act separately, the question might be decided one way if by a joint convention, another way; and if by the President of the Senate, possibly another way; and the immediate result of the adoption of one or the other of these methods would come in largely to influence the judgment and increase the confusion and the danger of the hour. Therefore, I exhort Senators to avoid this danger by agreeing upon some method. It is not so important what that method is as that there shall be some plan agreed upon that will avoid these dangers which are right before us.

Mr. BAYARD. I concur most earnestly and warmly in this invitation of the Senator from Indiana; and there is now, by the amendment of the Senator from Tennessee, which I have offered again, a fair and a constitutional arbitrament, where the two houses shall disagree, to prevent the occurrence of that which my honorable friend from Indiana and I both so justly dread and deplore. The proposition is this, that we shall leave it just where our fathers left it; we shall leave it to the same body, acting as they said that body should act when the broad question of the election of President, without respect to the mere contest of votes, should be before them. Leave it just as they left it, to that body for its decision which they said was the proper one to decide the great question of elections, when a majority of the votes of the electoral college had not been declared by the houses in joint convention to have been cast in favor of any candidate. I agree with my friend that it is not so much the question as to how you shall have this matter settled, although it is important to us as citizens under a constitutional government and acting under its limitations, that we should not create a tribunal unwarranted by the Constitution; but here is a tribunal pointed out by the Constitution as the peculiar and fitting one upon whom immediately shall devolve the duty of electing a President and Vice-President in case a majority of the electoral votes have not been ascertained to have been cast for any particular candidate. What objection can there be in my friend's mind to adopting this proposition now, offered by the Senator from Tennessee?

Mr. MORTON. Very briefly will I attempt to answer the question of the Senator from Delaware and to state the objection to referring the decision of the question to the House of Representatives voting by States. First, because the Constitution has made no provision for the decision or settlement of any question, judicial or legislative, by the House of Representatives voting by States. It has provided for the election of a President, an anomalous, unfair, and, in my judgment, dangerous method, in a certain case; but in no other contingency is there to be any question settled in this Government by the House of Representatives voting by States. I would not extend the idea of settling questions by the vote of States, giving to the State of Nevada the same voice with New York, which has one hundred and fourteen times the population of Nevada.

Mr. WHYTE. I want to ask the Senator from Indiana if he does not really, under the second section of this bill, in a certain contingency, do the very thing that he now objects to doing; that is to say, upon a certain contingency throw the election into the House of Representatives? Take this case, and it is a mathematical calculation. It takes 185 votes to elect a President of the United States in the present college, counting Colorado. Suppose there are three candidates at the election. The republican candidate gets 177 undisputed votes; and the independent candidate 24 undisputed votes, which he could do by getting Illinois and Nevada and Nebraska. Suppose the democratic candidate gets 160 undisputed votes, leaving 8 votes, the votes of Louisiana, to determine whether the republican candidate was elected or not. Suppose that in Louisiana there is a contested election of great violence. The independent candidate is supposed by one party to be elected; the republican candidate is supposed by the other party to be elected. The republican electors get a certificate from Governor Kellogg of their election, cast their vote for the republican candidate, and that return comes to the President of the Senate. Suppose the electors on the independent ticket meet as a college, cast their votes for the independent candidate, certify under the Constitution, if there is no provision for the executive authentication of their election, that they have voted for the independent candidate. Those returns are opened by the President of the Senate. The House honestly believe that the independent electors were elected in Louisiana. The republicans in the Senate believe that the republican candidates were elected. They separate. The House stands by the independent organization, the Senate stands by the republican election, thus defeating the election of President and throwing it into the House of Representatives under the second section of the bill.

Mr. MORTON. I think the precise contingency mentioned by the Senator from Maryland may happen either by the vote of a State being lost, the two houses not being able to decide, or by being cast in favor of an independent candidate; but that is the precise contingency which the Constitution has provided for when it declares that unless some one person shall have a majority of all the electors appointed, the House shall immediately proceed to elect by States. How does that change the principle? The Constitution has provided for the action of the House by States only in one case. Shall we extend that principle? The Constitution does not provide for the House ever deciding any legislative or judicial question by States, but simply an election in certain cases; and in my opinion it is the most dangerous contrivance ever put into the Constitution. Would you extend that principle to the mere decision of a question on the electoral vote when that may decide the question of an election?

The first election of President by the House took place in 1801, the House voting by States. The delegation from two States was divided from the 10th of February to the 17th, from the first to the thirty-sixth ballot, Vermont and Maryland. The dead-lock was finally broken by an intrigue, one member from Vermont dodging the vote, going out of the House, and two members from Maryland casting blank ballots. The history of that election, given by the distinguished member from Delaware, Mr. Bayard, two years afterward, shows that it was thoroughly corrupt in the sense in which that word is used in these times; that that election was controlled by appointments of members of the House of Representatives to office. More, there is an affidavit on file—I have it here, but I will not stop to read it—which shows that the vote of another State, on the last day when the election of Jefferson was finally made, was controlled by an agreement that the collectors of the district of Delaware and of the port of Philadelphia should not be removed by Mr. Jefferson. That election came near making shipwreck of the Government at that time. What followed in 1825, when Mr. Adams was elected? The same charge of corruption existed, a charge from which the great Clay never escaped, because he voted for Adams in the House, and was afterward appointed Secretary of State. How did that election result? Mr. Adams was elected, who received less than one-third of the popular vote of the United States; and General Jackson was defeated, who received the largest popular majority that any President ever has done up to this hour. The will of the people was overridden in 1825, and this form of election presents the opportunity and the power of doing that always. It presents the greatest possible inducement and the greatest possible opportunity for corruption. God grant we shall never have to pass through the ordeal of another election of President by the House of Representatives.

I want to make a remark in regard to the amendment of my distinguished friend from Rhode Island, [Mr. Burnside;] and what I shall say will touch the whole question of furnishing an umpire either by the Supreme Court or by the House of Representatives or in any other form. The amendment proposed by the Senator from Rhode Island is this: That as soon as the electoral certificates are sent to the President of the Senate, before the time comes for counting the vote, they shall be sent to the Chief-Justice of the Supreme Court or to the court.

Mr. BURNSIDE. If the Senator from Indiana will allow me, it does not provide that they shall be sent to the Supreme Court, but the fact is to be reported to the Supreme Court.

Mr. MORTON. I give the substance, the idea of the amendment, that when the certificates are made up by the electoral colleges they shall endorse on the outside of the envelope, so that it can be read, (because the envelopes cannot be opened under the Constitution until you come to count the vote,) the names of the electors, by whom certified, and when elected, so that the Supreme Court shall be able to determine, by an inspection of the outside of the envelope, whether or not these electors were chosen under the recognized State government, and have been certified by the recognized authority of the State. I submit to my friend, and I will read a very brief extract from the opinion of the Supreme Court to show it, that that transfers to the Supreme Court of the United States one of the great powers expressly reposed in Congress under the Constitution. The United States shall guarantee to each State a republican form of government; and to decide which is the government of a State, and whether it is republican in its form, is a power expressly devolved upon Congress, and cannot be transferred or deputed except for a single purpose, and that is to enable the President to determine what government he will sustain in a case of insurrection or domestic violence. In the case of *Luther vs. Borden*, a case familiar to you all, the court say:

“Under this article of the Constitution, it rests with Congress to decide what government is the established one in a State; for, as the United States guarantee to each State a republican government, Congress must necessarily decide what government is established in the State before it can determine whether it is republican or not; and when the Senators and Representatives of a State are admitted into the councils of the Union, the authority of the government under which they are appointed, as well as its republican character, is recognized by the proper constitutional authority.”

In the case supposed, where there are two sets of electors certified from two different pretended State governments, to decide which electors have a right to vote you must decide which is the government, and the decision of that question, which controls all others that may arise on it, is expressly vested in Congress under the Constitution. We cannot transfer it to the Supreme Court in advance. We cannot transfer it to any other power, except for the single and sole purpose of carrying out another provision, and that is to enable the President to protect the State against invasion or domestic violence, where it may be necessary, under the act of 1795, for the President to determine, when Congress is not in session, which is the lawful government of the State, as he undertook to do in the case of Louisiana.

Mr. BURNSIDE. I will ask the Senator from Indiana if there can be no case before the Supreme Court by appeal which would require them to decide which is the lawful State government? Could there not be a case by appeal from a lower court by which the Supreme Court would be called upon to decide which was the State government?

I want to ask the Senator from Delaware [Mr. Bayard] one question. He says that in settling this question we should adhere to the rule established by the framers of the Constitution, and allow the same method to be used in determining which are the correct returns

as is used to elect the President when no one of the candidates has a majority. I submit to him and I submit to the Senate that in case no one candidate receives a majority, every State has a right to vote as a State, according to its political proclivities. It becomes a political question. They are bound to adhere to their separate political parties, in honor bound to vote for the men who represent their party, no matter whether they have received the highest number of votes or not. The question under discussion should not be decided politically; but if you leave it to be decided in the same way that you elect a President, in case neither candidate receives a majority, it will be decided in a partisan spirit; whereas by the method I propose, it will be decided upon its legal merits.

I submit that no party ties are so loose as to allow a member to vote just exactly as a judge on the bench of the Supreme Court would vote on a question of this kind. It is quite clear in my own mind that the proposition made by the Senator from Delaware, which he intended to make in all fairness, is not fair.

Mr. MORTON. It would perhaps be very desirable to have the solution of every question submitted to some tribunal entirely outside of political influences; and yet it so happens that the Supreme Court have said in this very case that the decision of the question as to which is the lawful State government in a State is a political question to be decided by Congress, and when decided by Congress that the Supreme Court of the United States and every other branch of the Government must abide by that decision. The power to settle that question has by the Constitution been placed in Congress, and I am trying to argue that we cannot take it out of Congress and lodge it anywhere else.

I come now to the other question asked by my friend, whether under certain circumstances the Supreme Court could not decide which was the lawful government of the State. So they can and did in the Rhode Island case. In that very case they recognized the doctrine that Congress is the power to settle the legal status of a State government, a political question, by which the courts are all bound; but in the absence of a decision by Congress, in that very case they said, as I have had occasion to argue in another matter before this body, that the supreme court of Rhode Island not being in question, its legitimacy not being questioned, the courts of the United States would follow the decision of the supreme court of the State of Rhode Island in determining which was the lawful government of that State. If the supreme court of Rhode Island had said that the charter government was the lawful government, and not the Dorr government, the Supreme Court said it was bound to follow and to recognize the charter government as being the lawful government of Rhode Island. In that case the Supreme Court did decide it; but as a question coming up not from the decision of the lower court by appeal; as a political question to be decided as to which is the lawful government so as to know which government may certify to the electoral vote, that is a power that has been lodged in Congress, and it cannot be divested. We cannot commit it to anybody else.

I agree with my friend that if we could create an umpire, if it was in our power to refer the decision of this question to any other tribunal, I would prefer the Supreme Court of the United States. I believe the people would have more regard for its decision, that it would carry more authority, than any special tribunal we could create. Therefore I should prefer to refer it to that arbitrament if it were possible; but not regarding that as being within our power, I vote against the creation of any umpire. The least acceptable of all would be to refer it to the House and have it decided by a vote by States.

I wish here to call the attention of the Senate to a fact which I have overlooked in the previous examination of this question, and that is, that so long ago as 1837 the Congress of the United States virtually assumed the jurisdiction to count the vote of a State in a case where the right of the State to vote at all was denied. I refer to the case of the State of Michigan. In that election there was a question as to whether the vote of the State of Michigan should be counted on account of a condition attached to her constitution. I am not entirely familiar with the details of the question, but the following joint resolution was adopted by the two houses, showing that at that time the two houses of Congress assumed the power to determine whether the vote should be counted in that case. The resolution was adopted by a vote of 34 to 9 in the Senate, and reads as follows:

"That, in relation to the votes of Michigan, if the counting or omitting to count them shall not essentially change the result of the election, they shall be reported by the President of the Senate in the following manner: Were the votes of Michigan to be counted, the result would be, for A B for President of the United States, — votes; if not counted, for A B for President of the United States, — votes; but in either event A B is elected President of the United States; and in the same manner for Vice-President."

That was followed by the two houses of Congress as late as 1869 in a joint resolution in reference to counting the vote of Georgia. The language of the two resolutions is identical. Evidently that offered by the Senator from Vermont [Mr. Edmunds] in 1869 was copied from that in regard to Michigan in 1837.

Mr. WHYTE. I would suggest to the Senator from Indiana that it is copied from Mr. Clay's resolution of 1821 in regard to Missouri.

Mr. MORTON. I simply refer to it briefly for the purpose of showing that Congress assumed substantially the power over these contested votes long ago, and that seems to have been the better judgment of members of the two houses at different periods of our history.

Mr. MAXEY. I should like to ask the Senator from Indiana a question, as he has the floor, and I desire his opinion upon it. The amendment of the Senator from Rhode Island in substance is that where two certificates come up from the same State, purporting to be the certificate of the electoral vote cast by that State, those returns are to be turned over or transferred by the President of the Senate to the Chief-Justice of the Supreme Court—

“Who shall at once cause the said Supreme Court to proceed to examine as to who are the legal electors of said State, and shall have power to send for persons and papers; and the said Chief-Justice shall, on or before the last Tuesday of January next succeeding the meeting of the electors of President and Vice-President, report to the President of the Senate which of the said electors were legally elected.”

The Constitution declares that—

“The President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates, and the votes shall then be counted.”

What I desire to have the Senator's opinion upon is this: Is it constitutional or legal for the President of the Senate to transfer to the Supreme Court or anybody else these certificates unopened? Second, if he has to open them, does not the Constitution require that “the votes shall then be counted?” Then where does the opportunity come in for the action of the Supreme Court as contemplated by this amendment? That is a question I cannot understand myself, and I should like to have the Senator's opinion upon it.

Mr. MORTON. The Senator from Texas I think is quite right in his suggestion. If I understand it, his suggestion is that the President of the Senate is the custodian, and the sole custodian, of these certificates from the time they come to his hands; that he cannot transfer the custody of them to anybody; that he is responsible for them, and if they shall be lost he is to be held responsible. In the next place, clearly he cannot open them until he does it in the presence of the two houses. Not until that moment is anybody entitled to know what the contents of these envelopes may be.

Mr. MAXEY. And then the votes must be counted.

Mr. MORTON. And then and there the votes must be counted. These provisions grew out of the theory of the electoral college, that it was to be composed of a body of independent men, acting entirely independent of pledges, of all outside influences, who should come together, and without each other's knowledge vote by ballot, so that one should not know how the other voted; and then that they should seal these votes up and they should be kept a secret until the very moment they were to be counted. We have seen how the whole theory failed, but still this is the provision of the Constitution of the United States.

One word in regard to the bill and I am done. In regard to the first section of the bill there seems to be little or no controversy. That is, that there shall be no electoral vote rejected except by a concurrent vote of both houses. There seems to be little difference of opinion about that, and that is the most material provision. Nearly all the questions will arise under the first section of the bill. It may not occur for fifty years again that we shall have two sets of electoral votes from the same State. It may occur next fall, but the chances are small of such an event. If it should occur, it is not very likely that the two houses of Congress, acting under the pressure of high and solemn considerations of duty, would not be able to agree as to which return should be counted; so that that contingency in regard to which all this debate has sprung up is very remote indeed. There seems to be a desire to get some tribunal which shall decide the question, and the introduction of the House, voting by States, is suggested, the one way of all others which is the most liable to have a dead-lock; for if there should be an even number of States upon each side, or if the delegation from the States should be divided, as occurred in two States in the very first election even, then there is no decision. So that you can hardly imagine a tribunal that might be created, even if we had the power, where this contingency would not happen; but if the second section of the bill were stricken out altogether the first is of inestimable importance. If there be a contingency in the second section that is not quite provided for, still it does not take away the importance of passing the first section, or the second section either, because that contingency is exceedingly remote. We can understand in view of what took place three years ago last month the necessity of providing some method for counting these votes. We cannot as common lovers of our country and patriots, sworn to stand by this Government, pass over the duty of providing against such dangers as lie right at the door.

Therefore I trust, Mr. President, that this bill will not be defeated because of a remote possibility. I trust we will consider the main subject and the principal dangers that are covered by this bill, and I hope it will pass. As I said before, any plan is better than none almost. After hearing all that has been said upon both sides—and I must say this debate has been conducted with great candor and I think with great ability and fairness—I am not now able to see where the bill can be improved.

Mr. FRELINGHUYSEN. I would call the attention of the Senator from Indiana to the second section. It provides that that return from such State shall be counted “which the two houses acting separately shall decide to be the true and valid return.” The question has been suggested to me as to what is to happen in case the two houses acting separately do not agree as to which return is the valid return.

Mr. MORTON. I suppose there would be no vote counted in that case.

Mr. FRELINGHUYSEN. Ought it not to say so? It might be insisted by those who hold

that the Constitution imposes the duty of counting the vote on the Vice-President that he was to count it. At all events, I think it ought not to be left in doubt, but the words ought to be added at the end of that sentence :

"And if the two houses do not agree as to which is the true and valid return, then no vote shall be counted from that State."

Mr. MORTON. The Senator would arrive at the same thing by inserting the word "only" after the word "return;" "that return only from such State shall be counted."

Mr. FRELINGHUYSEN. I do not see that you can put it in fewer words. I am sorry to see this bill not in a better shape than it is. I have no doubt when the Constitution imposes a duty upon Congress, and says we shall count the vote, that we have the constitutional right by legislation to do everything that is necessary to the safe counting of that vote. We have a perfect right by legislation to carry it out by creating a tribunal, and doing everything that it is necessary to do in order to secure a safe and complete count. The Constitution says so. The Constitution says we have got the right to pass all laws that are necessary to carry out the powers conferred by the Constitution.

As to the plan of referring the question to the House of Representatives, that house voting by States, it does seem to me that that is contrary to the Constitution. There is one point where I differ from the Senator from Delaware. It seems to me the Constitution precludes us from adopting the plan he proposes, because the Constitution has spoken. It has told us in what exigencies the election shall be determined by the House voting by States, and the expression of the case in which that is to be resorted to is the exclusion of all intendment that the House in any other emergency might decide upon the vote.

Mr. BAYARD called for the yeas and nays on his amendment, and they were ordered.

Mr. SAULSBURY. Mr. President, I will vote for the amendment proposed by my colleague, though I would have preferred to have the amendment adopted as it was offered originally by the Senator from Tennessee, [Mr. Cooper.]

The bill of the Senator from Indiana does provide expressly for the rejection of the vote of a State. I am unwilling to vote for a measure which provides that the vote of any State of this Union shall be rejected, because I believe it is within the power of Congress to provide some fair and proper mode by which the vote of every State in this Union may be counted in the election of President. The amendment offered by my colleague is one mode, and perhaps the fairest mode that we can now hope to obtain for reaching that result. I shall therefore support the amendment, and hope that it may be adopted.

I have listened to this whole debate, I am free to say, with unusual interest, because the questions presented by the bill and the amendments are, as I conceive, of vital importance. If I understood the Senator from Maryland [Mr. White] aright, and also the Senator from Kentucky, [Mr. Stevenson,] they believe that there is an omission in the Constitution and that the defect can only be remedied by a constitutional amendment. With that view I do not concur; but I think that if there is any defect, the power is granted to Congress by express provision to make all laws necessary to carry out the grants of power contained in the Constitution; and that the power to count the votes having been expressly given, Congress may determine the mode by which the votes shall be counted.

This is not a new question. It has been here before. The Congress of the United States as far back as 1800 considered this subject. I do not believe the discussion that occurred in the year 1800 upon this very question has been referred to in this debate, and perhaps it may not be amiss to call the attention of the Senate to that debate. The Senator from Maryland favored the idea that the President of the Senate was to count the votes. So far back as 1800 this question was brought to the attention of Congress, and was discussed in Congress, and I propose to show what the view of Congress, or at least a number of the members of Congress, at that time was upon the question of the power of Congress to deal with this subject. On January 23, 1800, on the motion of Mr. Ross, the Senate—

"*Resolved*, That a committee be appointed to consider whether any, and what, provisions ought to be made by law for deciding disputed elections of President and Vice-President of the United States, and for determining the legality or illegality of the votes given for those officers in the different States."

On the next day it was—

"*Ordered*, That Messrs. Ross, Laurance, Dexter, Pinckney, and Livermore be the committee."

And that committee reported a bill the provisions of which in full I have not been able to ascertain. On February 14—

"Mr. Ross, from the committee appointed the 28th of January last, reported a bill prescribing the mode of deciding disputed elections of President and Vice-President of the United States, which was read and ordered to the second reading."

Some of the provisions of that bill I have been able to find, but not the whole of it in detail. The bill took up the whole subject. Some of the provisions of the bill provided for the appointment of what was called a grand committee selected out of the two houses of Congress to meet in secret session, there to examine all the votes cast for President and

all the petitions and reports that were made from the several States in connection with those votes, and to determine upon the legality of the votes thus cast.

Mr. MERRIMON. Where did it lodge the power?

Mr. SAULSBURY. It lodged it in the two houses of Congress, so far as I have been able to gather from such provisions of the bill as I have been able to find in this book. On March 3—

"The Senate resumed the consideration of the amendment proposed to the first section of the bill prescribing the mode of deciding disputed elections of President and Vice-President of the United States."

I will read what was the substance of the provisions of the bill from a speech made by Mr. Pinckney, of South Carolina, who opposed the bill and spoke against it. In the course of his speech he said:

"What is the mode proposed by this bill? That the Senate and House of Representatives of the United States shall each of them elect six members, who, with a chairman, be appointed by the latter from a nomination of the former, would form a *grand committee*, who should, sitting with *closed doors*, have a right to examine all the votes given by the electors in the several States for President and Vice-President, and all the memorials and petitions respecting them, and have power finally to decide respecting them, and to declare what votes of different States shall be rejected and what admitted, and, in short, that this committee, thus chosen, and sitting with closed doors, shall possess complete, uncontrollable, and irrevocable power to decree, without appeal from their decision, who has been returned, and who shall be proclaimed President of the United States."

That is the synopsis of the bill reported by the committee, contained in a speech of Mr. Pinckney, of South Carolina. That bill was considered at various times during the session and various amendments were offered. One amendment I will read:

"The bill prescribing the mode of deciding disputed elections of President and Vice-President of the United States was read the third time.

"On motion to strike out the ten first sections and insert"—

I will read now what was proposed to be inserted as showing what the opinion of members of Congress at that time was as to the power of Congress to deal with the question of counting, determining, and passing upon the votes of electors. The amendment is as follows:

"Whereas, on an election of President and Vice-President of the United States, questions may arise whether an elector has been appointed in a mode authorized by the legislature of his State or not; whether the time at which he was chosen and the day he gave his vote were those determined by Congress; whether he was not at the time a Senator or Representative of the United States, or held an office of trust or profit under the United States; whether one at least of the persons he has voted for is an inhabitant of a State other than his own; whether the electors voted by ballot, and have signed, certified, and transmitted to the President of the Senate a list of all the persons voted for, and the number of votes for each; whether the persons voted for are natural-born citizens, or were citizens of the United States at the time of the adoption of the Constitution, were thirty-five years old, and had been fourteen years resident within the United States; and the Constitution of the United States having directed that 'the President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates, and that the votes shall then be counted,' from which the reasonable inference and practice has been that they are to be counted by the members composing the said houses, and brought there for that office, no other being assigned them; and inferred the more reasonably, as thereby the constitutional weight of each State in the election of those high officers is exactly preserved in the tribunal which is to judge of its validity, the number of Senators and Representatives from each State composing the said tribunal being exactly that of the electors of the same State."

And then follows the amendment in the form of a section to carry out the objects proposed in the preamble. I will read the section:

"SECTION 1. *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That whensoever the members of the Senate and House of Representatives shall be assembled for the purpose of having the certificates of the electors of the several States opened and counted, the names of the several States shall be written on different and similar tickets of paper and put into a ballot-box, out of which one shall be drawn at a time; and so soon as one is drawn the packet containing the certificates of that State shall be opened by the President of the Senate, and shall then be read, and then shall be read also the petitions, depositions, and other papers and documents concerning the same; and, if no exception is taken thereto, the votes contained in such certificates shall be counted; but if the votes, or any of them, shall be objected to, the members present shall, on the question propounded by the President of the Senate, decide, without debate, by yea or nay, whether such vote or votes are constitutional or not; and the votes of one State being thus counted, another ticket shall be drawn from the ballot-box, and the certificate and the votes of the electors of the State drawn shall be proceeded on as before directed; and so on, one after another, until the whole of the votes shall be counted; and if the counting cannot be completed in one day, the members of the said two houses may adjourn from day to day until it be completed.

"A division of the question was called for, and that it first be taken on striking out.

"A motion was made to strike out of section 1, lines 10 and 11, these words: 'and finally to decide,' and to insert 'into and report upon;' and a division of the motion was called for, and that the question be first taken on striking out; which passed in the negative—yeas 11, nays 13."

After several amendments were considered the bill was finally discussed at length by Mr. Pinckney, of South Carolina. He opposed the bill, but he seemed to admit in his argument the right of Congress to count the vote.

"Knowing that it was the intention of the Constitution to make the President completely independent of the Federal Legislature, I well remember it was the object, as it is at present not only the spirit but the letter of that instrument, to give to Congress no interference in or control over the election of a President. It is made their duty to count over the votes in a convention of both houses"—

That favors the idea of the Senator from Connecticut, [Mr. EATON]—

"and for the President of the Senate to declare who has the majority of the votes of the electors so transmitted."

While he opposed the general provisions of the bill he went to the extent of passing upon the qualifications of the electors, taking it entirely away from the State; and he seemed in his argument to admit the power of Congress to determine the question of the votes. In that debate one of the questions that arose was that which has arisen in this debate, what is to be done with double returns. Mr. Pinckney took up that question, and after reading his speech I undertake to say that he did not deal with it with that frankness which his eminent character justifies us in supposing he ought to have dealt with it. He seemed to evade the question, did not meet it, but he seemed to meet it as my friend from Connecticut met it this morning, by expressing his confidence in Congress and his confidence in every public man in the country. He could not anticipate that there would be any difficulty; he could not in the first place anticipate that such returns would be made. He had then the unbounded confidence that is exhibited by the Senator from Connecticut today. And yet our history proves that Mr. Pinckney was mistaken, just as I fear the subsequent history of the country will prove that the Senator from Connecticut is mistaken when he expresses such unbounded confidence, not only in the Senate of the United States, but in every public man, the Vice-President, the Speaker of the House, and the members of this house and of the other. I share largely in the confidence which he has expressed in reference to humanity, but I have seen enough of life to know that our confidence is frequently misplaced, and I want to prepare against any contingency that may happen.

That bill came finally to a vote in the Senate of the United States after the exhaustive argument of Mr. Pinckney, and I wish to read the names of the Senators who voted upon that bill.

"When Mr. P. had concluded, the question was taken on the passage of the bill, and it was determined in the affirmative—yeas 16, nays 12; as follows:

"Yeas—Messrs. Bingham, Chipman, Dayton, Dexter, Foster, Goodhue, Greene, Hillhouse, Latimer, Lloyd, Paine, Read"—

From my own State—

"Ross, Schureman, Tracy, and Wells.

"Nays—Messrs. Anderson, Baldwin, Bloodworth, Brown, Cocke, Franklin, Langdon, Livermore, Marshall, Mason, Nicholas, and Pinckney."

The proceedings to which I have referred show that at that early day the power was claimed for Congress not only to deal with the question we are now discussing, but to deal with other questions, questions which I do not believe we have the right to deal with. But the power of providing the mode of counting the electoral vote by legislation, especially where there is a seeming omission in the Constitution itself, was then fully recognized, and these proceedings clearly indicate it.

I would not attempt to confer upon one house or both houses of Congress any power which is not expressly granted to them, for I am a strict constructionist of the Constitution. I believe that we have no right as a Congress to exercise any power which is not expressly given or which is not necessary to carry out the grants of power expressly given in the Constitution. I would not usurp any power whatever. I am as free from doing that as my honorable friend from Maryland or my honorable friend from Connecticut; but I do contend that the criticisms upon the position of my friend from Ohio are not warranted by the precedents that have been referred to as conclusive upon the contemporaneous interpretation of the provisions of the Constitution in this behalf. I hold that the incident which I have cited shows that at an early day, when the men were living who took part in the formation of the Constitution, when they were members of the Congress of the United States, this power was claimed for Congress. Some of the gentlemen who participated in the formation of the Constitution were there and voted upon the question. I would not, I repeat, invade that Constitution. I believe that the true interests and the true destiny of this country require a strict adherence to the provisions of the Federal Constitution. I would not usurp the power by Congress, but I would carry out the provisions of the Constitution. I would count the vote as it is. There is a provision in the bill of the Senator from Indiana that in a certain contingency the vote of a State shall not be counted, and I am opposed to that bill without

some amendment to secure to every State in this Union the right to have her electoral vote counted.

Mr. President, I conceive that this is an important question. It is one that ought not to be hastily passed upon, and I think the seven days which have been spent in the investigation and discussion of this subject have not been spent in vain. I hope that no hurried action will be taken, but that some action may be adopted in this house which will be concurred in by the other house, and that we may make proper provisions to remedy the evil which is seen and acknowledged by all.

I have said much more on this question than I designed to say at the present time.

Mr. BURNSIDE. Mr. President, I desire to make but a single remark, and that is, that the Supreme Court of the United States substantially decided in the Rhode Island case, to which the Senator from Indiana referred, that it was in the power of Congress to call upon the courts to decide which of the representatives of the State governments was in accord with the Government of the United States. I am indebted for this suggestion to the honorable Senator from Florida, [Mr. Jones.]

If Congress has the right to call on the Supreme Court of the United States for a decision upon that point, it has the right to do it in this case. Some of the most distinguished Senators have said that this amendment presented the most desirable way to settle the difficulty, if it could be done constitutionally; and here, it seems to me, we have this point settled by the Supreme Court of the United States, unless I misconstrue the substance of that decision.

Mr. JONES, of Florida. Mr. President, it is perhaps necessary for me to say a word in regard to my view of what the court did decide in the case of Luther vs. Borden. It did say, and the opinion will bear me out, that it was competent for Congress to designate a court that should have the power to say which of two rival powers in a State should be recognized as the legitimate power, with a view of obtaining the assistance contemplated by the Constitution to be extended by the Union. That was decided, beyond all doubt.

Mr. MERRIMON. Have you the decision before you?

Mr. JONES, of Florida. I have not. The court said that Congress had delegated the authority to the President by the act of 1795, and that it had done so wisely; but that it was equally competent for Congress to delegate the same authority to a court for a like purpose, and to withdraw it from the President.

The PRESIDENT *pro tempore*. The question is on the amendment of the Senator from Delaware, [Mr. Bayard,] upon which the yeas and nays have been ordered. The amendment is to modify the second section before the question is taken on the amendment of the Senator from Rhode Island [Mr. Burnside] to strike it out and insert a substitute. The Chair understands that this is the same amendment originally offered by the Senator from Tennessee, [Mr. Cooper.]

The question being taken by yeas and nays, resulted—yeas 18, nays 34; as follows:

YEAS—Messrs. Bayard, Boggy, Caperton, Cooper, Davis, Goldthwaite, Johnston, Kelly, Key, McCreery, McDonald, Maxey, Randolph, Ransom, Saulsbury, Thurman, Wallace, and Withers—18.

NAYS—Messrs. Allison, Anthony, Booth, Burnside, Cameron of Pennsylvania, Cameron of Wisconsin, Christiancy, Conkling, Dawes, Dennis, Dorsey, Eaton, Edmunds, English, Ferry, Frelinghuysen, Hamilton, Hamlin, Howe, Jones of Nevada, Logan, McMillan, Merrimon, Mitchell, Morrill of Maine, Morton, Oglesby, Paddock, Patterson, Sargent, Sherman, Whyte, Windom, and Wright—34.

ABSENT—Messrs. Alcorn, Boutwell, Bruce, Clayton, Cockrell, Conover, Cragin, Gordon, Harvey, Hitchcock, Ingalls, Jones of Florida, Kernan, Morrill of Vermont, Norwood, Robertson, Sharon, Spencer, Stevenson, Wadleigh, and West—21.

So the amendment was rejected.

The PRESIDENT *pro tempore*. The question recurs on the amendment proposed by the Senator from Rhode Island, [Mr. Burnside.]

The amendment was rejected.

Mr. WRIGHT. I suggest an amendment to come in the second section—and I call the attention of the Senator from Indiana to it—in order to make that clear which by possibility is not so clear as it stands now. As it reads now it is:

“And that return from such State shall be counted which the two houses, acting separately, shall decide to be the true and valid return.”

I propose to insert after the word “return” in line 7 the words “and that return only.”

Mr. MORTON. That is what it is intended to mean, but I have no objection to the word “only” going in.

The PRESIDENT *pro tempore*. Is there objection?

Mr. JOHNSTON and others. Let it be reported.

The CHIEF CLERK. In the seventh line of the section, after the word “return.” it is proposed to insert “and that only;” so as to read:

“That if more than one return shall be received by the President of the Senate from a State, purporting to be the certificates of electoral votes given at the last preceding election for President and Vice-President in such State, all such returns shall be opened by him in the presence of the two houses when assembled to count the votes, and that return, and

that only, from such State shall be counted which the two houses, acting separately, shall decide to be the true and valid return."

Mr. MORTON. I think the word "only" would be sufficient; but I have no objection to the words "and that only."

The amendment was agreed to.

Mr. WHYTE. I desire to offer an amendment merely to take the sense of the Senate. I move to strike out all after the word "certified," in the twenty-sixth line of the first section, down to section 4, and to insert in lieu of the matter stricken out the following:

"The President of the Senate shall in the first instance decide without debate upon all such questions and announce his decisions thereon; and when he shall have counted all the votes he shall announce the result according to his decision. After the whole count has been so made and the result thereof announced, if it appears that the result will be changed by the reversal of decisions made by the President of the Senate, any member of either house may appeal from any such decision. Upon such appeal the vote shall be taken by States, the members of both houses from each State severally giving one vote."

The PRESIDENT *pro tempore*. The question is on the amendment of the Senator from Maryland, [Mr. Whyte.]

The amendment was rejected.

The bill was ordered to be engrossed for a third reading, and was read the third time.

The PRESIDENT *pro tempore*. Shall the bill pass?

Mr. STEVENSON. I ask for the yeas and nays on the passage of the bill.

The yeas and nays were ordered; and being taken, resulted—yeas 32, nays 26; as follows:

YEAS—Messrs. Allison, Anthony, Booth, Burnside, Cameron of Pennsylvania, Cameron of Wisconsin, Christiancy, Dawes, Dorsey, Ferry, Frelinghuysen, Hamilton, Hamlin, Hitchcock, Ingalls, Jones of Nevada, Key, Logan, McMillan, Merrimon, Mitchell, Morrill of Maine, Morton, Oglesby, Paddock, Patterson, Sargent, Sherman, Spencer, Thurman, Windom, and Wright—32.

NAYS—Messrs. Bayard, Boggy, Caperton, Cockrell, Conkling, Cooper, Davis, Dennis, Eaton, Edmunds, English, Goldthwaite, Howe, Johnston, Jones of Florida, Kelly, McCreery, McDonald, Maxey, Randolph, Ransom, Saulsbury, Stevenson, Wallace, Whyte, and Withers—26.

ABSENT—Messrs. Alcorn, Boutwell, Bruce, Clayton, Conover, Cragin, Gordon, Harvey, Kernan, Morrill of Vermont, Norwood, Robertson, Sharon, Wadleigh, and West—15.

So the bill was passed.

Mr. THURMAN. Before the doors are actually closed, I move a reconsideration of the vote just taken on the passage of Senate bill No. 1, relative to counting the electoral votes; and I wish to say a word. The vote on the bill strikes me with some surprise. What there is that gives any advantage to one party over another in it is past my comprehension. I do not see it in the bill, but there is an objection that has weighed no doubt with many who voted against the bill, and that is that it leaves a case unprovided for, a case where there are two returns from a State. It does not arrive at an ultimate decision, or at least it may not, on that question. I am strongly impressed with the belief that unless the Senate can become more harmonious than it is on this bill, we have no chance to get a law on the subject at this session. Therefore, I, for one, am anxious to make one more effort in this body, where such a thing as debate is allowed, where a calm consideration of a great question can take place, to have this matter further considered.

Mr. MORTON. Do you propose to have it considered to-night?

Mr. THURMAN. No; but I ask that the motion to reconsider may be entered in order that it may be further considered.

The PRESIDENT *pro tempore*. The motion to reconsider will be entered.

APRIL 3, 1876.

Mr. MORTON. There is a motion pending to reconsider the vote on the passage of the bill (S. No. 1) to provide for and regulate the counting of votes for President and Vice-President, and the decision of questions arising thereon. The motion was entered by my friend from Ohio, [Mr. Thurman.] I hope, if the motion is not to be withdrawn, the Senator will be prepared to have it taken up and disposed of to-morrow morning.

Mr. THURMAN. I wish to say that if I cannot be ready by to-morrow morning, I will try to be ready by the day after to-morrow, or at the very earliest moment. I have been so much engaged in other matters that I could not attend to it. I want to prepare an amendment, and desire to have the case considered without delay. I will try and call it up at the earliest possible day I can.

APRIL 17, 1876.

Mr. THURMAN. I rise merely to give notice that at the earliest time I can have opportunity I will ask the Senate to take up the motion submitted by me to reconsider the vote on Senate bill No. 1, to provide for and regulate the counting of votes for President and Vice-President, and the decision of questions arising thereon; and I will ask the Senate to hear me for a very few minutes to give the reasons why I think the vote ought to be reconsidered.

APRIL 19, 1876.

Mr. THURMAN. I want to fulfill a promise which I made the Senator from Indiana, [Mr. Morton,] that I would move to take up the motion to reconsider the vote on the bill relative to counting the electoral votes for President and Vice-President. I move to take up that motion to reconsider.

The PRESIDENT *pro tempore*. The Senator from Ohio moves to proceed to the consideration of the motion to reconsider the vote by which Senate bill No. 1 was passed.

The motion was agreed to; and the Senate proceeded to consider the motion to reconsider the vote on the passage of the bill (S. No. 1) to provide for and regulate the counting of votes for President and Vice-President, and the decision of questions arising thereon.

Mr. THURMAN. Mr. President—

Mr. THURMAN. I understand from the Senator from Indiana [Mr. Morton] that he desires to leave the chamber soon, and I hope therefore we shall proceed with the electoral bill. I shall not occupy more than ten minutes of the time of the Senate, I think, and there will be ample time after that to take up the bill of the Senator from Nebraska.

Mr. HITCHCOCK. Very well.

The PRESIDENT *pro tempore*. The question before the Senate is the motion of the Senator from Ohio [Mr. Thurman] to reconsider the vote by which the bill (S. No. 1) to provide for and regulate the counting of votes for President and Vice-President, and the decision of questions arising thereon, was passed.

Mr. THURMAN. Mr. President, I shall not enter into a discussion of the general subject of this bill on the motion to reconsider, but will simply state the reasons which induced me to make the motion. I have, if it is proper to state it, a very firm conviction that if this bill should go to the House of Representatives with no larger majority than that by which it was passed, with the votes of a very large majority of one of the parties in this chamber against it, it would not pass the House of Representatives, and the result would be that no law on the subject would be passed. I have said again and again that I think some law on this subject ought to be passed, and I have made the motion to reconsider because I think so, and because I believe that if the bill goes to the House as it has been voted upon, it will not become a law and, in fact, no measure for this purpose will become a law at this session. I wish the vote to be reconsidered in order that one more attempt may be made in the Senate to harmonize the views of Senators upon this measure. I believe that if the Senate by a substantially unanimous vote were to approve a measure it would most likely become a law, and I am not without hope that that unanimity of opinion upon a measure like this, which ought not in any sense to be considered a party measure, may be procured. It is very obvious that the reason why there was so large a vote against this measure was the omission of the bill to provide any ultimate umpire or arbiter or tribunal to decide in cases where there were two or more returns from a State. The omission in that bill was considered by a large number of Senators to be an invitation in fact, or that it would operate as an invitation, to bad men in some of the States to make a second return from those States, and thus produce the case mentioned in the second section of the bill. And it was the fear that it would be so considered and so acted upon, and that we should have from some of the States perhaps, and States whose votes might affect the general result, two returns, and that then the operation of the bill might be to deprive those States of their electoral votes altogether—it was that consideration, I am quite sure from the debate, which led so many Senators to oppose the measure, because upon the main question as to the right of Congress to legislate upon this subject the votes showed that an overwhelming majority of all parties concurred in that right. It was not upon constitutional grounds that the bill was opposed to the extent that it met opposition, but it was upon the ground and the sole ground that here was a fatal omission in the bill, the effect of which might be to deprive States of their electoral votes.

Now, if that fatal omission can be supplied, if some mode fair and just and within the scope and the spirit of the Constitution can be adopted which shall remedy that omission and thus perfect the bill, it is my belief that the bill will receive almost or quite the unanimous support of the Senate; and, receiving that, will become a law. But I do very much fear that if the bill go to the House of Representatives upon the vote that has already been taken, instead of being amended in the House it will simply be defeated, and we shall never have any committee of conference upon the subject and the measure will be wholly lost. If I could see that the bill would be amended in the House and that the result would be a conference committee between the two houses, I should greatly prefer that, because then each house would be represented in framing this great measure; but I very much fear that would not be the result, and therefore I am anxious that one more effort should be made in this body, where discussion and deliberation still prevail, to perfect this measure which in my judgment ought to be perfected and then ought to be passed.

This is all that I have to say. Upon the general subject of the bill I have already expressed my opinion, both at this session and at a former session, as fully as I desire to do. It is true that since the vote was taken upon this bill I have discovered, or there have been pointed out to me, some very instructive proceedings in Congress more than three-quarters of a century ago upon this very subject, proceedings that I think might be read and studied with great advantage by every Senator; but it would take up too much time to go into them

now. If, however, the vote shall be reconsidered, then I shall feel it to be my duty to lay those proceedings before the Senate for its consideration.

Mr. MORTON. Mr. President, the Senator from Ohio voted for this bill, and is its friend; but I think he is mistaken in supposing that any good is to be attained by the reconsideration, and by making another effort in the Senate. If the House of Representatives does not like this bill, it can amend it. If it is in favor of any bill at all, it can put the bill into the shape that suits it, and if the Senate disagrees to that, it will then go to a committee of conference, and there the matter can be adjusted; and that will realize the first motion made by the Senator from Delaware, who wanted it considered by a joint committee. I think the only way of getting it before a joint committee is by a committee of conference; and I have faith to believe that, whatever may be the first action of the House of Representatives, the two houses will finally come together in that way.

But, Mr. President, I must take occasion to express my surprise at the vote which was taken on this bill. I certainly supposed it was as far above party considerations as any bill that could possibly be brought into this body. I could not comprehend how there could be any partisan feeling about it, or any partisan interest one way or the other; and when I found that the vote was comparatively a party vote almost, I was surprised.

The argument in favor of reconsideration on the part of the Senator from Ohio is that the majority for the bill was not large enough. That is rather a novel argument for the reconsideration of a bill. What is the point in dispute? There was but one, substantially but one point of disagreement, and that was upon the second section. That was in regard to a case where there were two returns from a State, and the two houses did not concur in adopting one return as being the lawful return—a very remote contingency. I, having faith in men and faith in parties and in the final integrity and patriotism of all parties, will be slow to believe that in a case of that kind the return which is the true and lawful return will not receive the sanction of both houses, although the parties controlling the two houses may be different. I am not willing to believe that there is in either party of this country such an absence of patriotism as to do great violence to the rights of the people of the States and to the Constitution in a case like that; and hence the contingency that has alarmed so many has not alarmed me. In such a contingency as that it should be subject to the decision of both houses, just like every other grave question of legislation that comes before Congress.

Since that vote was taken a circumstance has been brought to my knowledge, a historical fact which I am sure will surprise and astonish this country when it is made known. The discovery was made by another Senator and I shall not state what it is; but it shows the overwhelming importance of some action upon this point.

Mr. BAYARD. Will the Senator state the nature of it?

Mr. MORTON. I will not give the name of the Vice-President or the names of the parties concerned; but it was where a Vice-President was counting the vote, himself being a candidate, and he counted a false or null return in his own favor, a return that was no return at all. The facts are in possession of the Senator from Vermont. But it is just one of those things that at any time might occur when a man is to be the judge in a case where he is a party interested.

Mr. President, I hope this vote will not be reconsidered, for I have but very little expectation that anything will ever come of it. It seems on the part of a majority of our friends on one side of the chamber there was but one arbitrament that they would accept. If I remember the vote, eighteen distinguished Senators, representative men of their party, voted to make the House of Representatives, voting by States, the umpire in deciding upon a question of that kind. It was simply going back a hundred years in this Government; it was simply going back to the confederation, where every question was decided in the Congress of the confederation, not by representatives of States but by States, each State having one vote. This proposition, so far from showing any progress, is retrogression, a retrogression of one hundred years. If that is the only arbiter that can be accepted, I am sure it will never meet with my approval.

I think it is better all around to let this bill go to the House of Representatives and let the democratic majority there fix up such a bill as will meet with their approbation. If it comes back here and we cannot agree to it, let it go to a committee of conference. I am sure that the House will see the necessity of doing something, and the only argument my friend offers is that the majority here for the bill was not large enough. It is a bigger majority than you will get again. My opinion is that if this bill is now reconsidered that will be the end of it.

Mr. BAYARD. Mr. President, I have stated to the Senate too often to make it necessary for me to repeat now my sense of the very great importance of this measure or of a measure satisfactory in its nature and its results upon this most important subject. I shall vote in favor of the motion of the Senator from Ohio to reconsider the vote by which this bill was passed by the Senate, because, if it has no other effect, it will lead to a prolonged consideration of a subject that it seems to me thus far has had what I must think a wrong view taken of it.

I regret that the Senator from Indiana should be so thoroughly possessed at all times, as it seems to me, with an idea of distrust, and almost of dislike, for the very name of State existence or the exercise of State power or the recognition of State individuality. Why, sir,

it seems to me that he is forgetting constantly the very federal nature of our system; and everything that tends to give a State individuality, to allow it to act as one of the units in our Union, is distasteful to the Senator. Why should he say it was retrogression; why should he say that it was advancing backward, to intrust a question so vital as the decision of the people in the choice of their Chief Executive Magistrate to the tribunal deliberately selected by those who framed the Constitution, in the event of a majority of the electoral votes not being ascertained at the first count to be in favor of one of the candidates? Why, Mr. President, if it be true that there was a more distinctive recognition of separate State existence under the old Articles of Confederation, yet that was known to have its uses. It was known as a practice, worthy of recognition when, after their experience as a Confederacy, the States resolved themselves into a Union under a national form of government, and carried into that, on this very subject which we are now considering, the recognition of the right and power of the States, as separate communities, each voting individually, to elect a President, in case a majority of the electoral votes should not be found to be in favor of any one candidate. In the present case it was proposed by an amendment offered by my friend from Tennessee, [Mr. Cooper,] and subsequently renewed by me, and on both occasions, I am sorry to say, rejected by the Senate, that in event of the two houses of Congress not having reached that happy condition of mind which enabled them to judge totally irrespective of partisan bias in respect to candidates, the two houses failing to agree as to which of two returns should be counted by the tellers in calculating the electoral vote, then, in the event of that disagreement, the House of Representatives, following the analogies of the Constitution as expressly declared, should, voting by States, become the arbiter between the two houses who had failed to agree.

Mr. President, look at it. I do not say that the Senator from Indiana is over-sanguine, but I am afraid that he is over-sanguine in supposing that that day of political millennium has arrived in which he and his party friends, or I and mine, shall be able to look at facts imbued with all the color of party feeling, and yet decide them as though we were entirely indifferent to the result of our decision. Why, sir, there have been too many votes lately cast in this body. Need I refer to the unhappy and discreditable case of the State of Louisiana, in which we saw what party would do or what party could do? I do not refer to it for the purpose of suggesting whether on one side or the other the blame or the merit lay. I only state the facts as they exist, facts that astonished me, holding my views, that persons could so be blinded by political prejudices to the extent that perhaps they thought I myself was. But so it is that it would be, in my opinion, a very dangerous experiment to submit to the two houses of Congress a question for their separate and distinct decision, the result of a difference of opinion between them being the total disfranchisement of one or more of those political communities that form this Union.

Sir, what must be the feeling of the citizens of a disfranchised community? Bring it home to yourself, sir, (Mr. WALLACE in the chair,) a citizen of the honored Keystone State of this Union. Suppose there a dissatisfied minority, not accepting the results of an election, should meet and go through the form of a count of electoral votes and send forward a certificate, so that from Pennsylvania a double return should be made to the Presiding Officer of the Senate, and then came the question of counting them, the vote of that State determining the contest, what would be the feeling of every citizen of that State to find that the voice of Pennsylvania was absolutely silenced in a contest of that kind, when her vote would have been productive of a decision complete and final on the subject? Why, sir, it must be dissatisfaction. It cannot be satisfactory to any man who will look at the matter in advance; and, therefore, the very gross defect of the bill as it passed the Senate is that, contemplating just such a difference of opinion as that, it provides no arbitration to settle it. The Constitution has provided and to-day provides for an arbitration where the original electoral vote has failed to contain a clear majority in favor of one or the other of the candidates. Is it not analogous, not simply to the Constitution, but is it not analogous and amenable to reason, justice, propriety, expediency, that we should have an arbitration created, and accept that as an arbitration which has been suggested by the Constitution to us for the decision of this very question?

Mr. President, I do not see that it is out of order, but perhaps it may be inopportune to have gone into a discussion of this question, so deeply interesting, at this time. If there has been party feeling in the vote cast upon this bill, I sincerely regret it. The Senator from Indiana, however, will agree with me in saying that there was no party feeling exhibited in the debate which preceded the vote. There was at least that feature, which I am sure was a grateful one in this chamber.

Now, sir, I do not know that a reconsideration of this vote and a re-argument of the question before the Senate will change opinions; and yet at the same time I can but remark at the present time what I have often observed before, that here, in the face of a matter of the most vital importance, confessedly so, not more than one-third or one-fourth of the seats in this chamber are filled by their proper occupants; and so it was before. I believe, could the fact be ascertained, that not more than one-half of the members of the Senate who voted *pro* and *con* on the proposition of the Senator from Indiana heard the debate that preceded it, or could, it seems to me, have given much attention to the subject. It is, therefore, with a view of provoking, if possible, their attention to this matter of making their vote even more

deliberate than it was before, that I shall vote for the reconsideration of the vote by which this bill passed the Senate.

I did believe, and still believe, that it would have been wiser to commit this whole matter, in advance of any expression of opinion of either house, to a joint select committee, selected for the purpose of coming together in a proper non-partisan tone for the settlement of this great question. Still it has been the pleasure of the Senate to choose another course; and now the opportunity may arise by a committee of conference to meet somewhat the object which I originally proposed. But still, sir, as I was one of those who did not concur in the action of the Senate, and believe still that there should be further consideration before we come to adopt as a measure, by a vote of the Senate, that which I scarcely believe will meet the approval (judging from the color of the vote) of the other house of Congress, believing that every effort should be made, dispassionately made, to arrive at a proper solution, I trust the Senate will consent to have this vote reconsidered.

MR. MORTON. No Senator, Mr. President, was more gratified at the tone and character of the debate on this bill than myself, for there was no partisan feeling in it. There was no indication that there was any party interest in the question, and hence my surprise when the vote was taken. As the Senator from Delaware says, the bill did not appear to excite a very great degree of interest, and yet it is fraught with the very deepest interest to the country. If we shall adjourn without passing some bill upon the subject, we shall have left the seed of a revolution to grow. You will then have left this great power, that you are now not willing to trust to the two houses because they may not agree, to the decision of one man. That is the practical result of it, because when we come together to count the votes next February, if there be no law and no rule upon the subject, none can then be made. You cannot then make a rule and agree upon any plan to meet these difficulties. You have then got to decide it as it was in 1857, as it was in 1801, as it was in 1805, and in 1825, by the President of the Senate. The returns that he presents will be counted and those that he withholds will be withheld, and there will be no remedy. You are simply voting to leave this to the decision of one man, because, as I said, when the time comes you can then make no law nor agree upon any rule. As there will be no remedy, it must be left just where it has been from the beginning, to the decision of the Vice-President of the United States, and as one Vice-President did count a vote in his own favor where there was no return, the same thing may be done some time in the future.

I do not propose to go into an argument upon this question. It is one of a most important character. We cannot have a subject demanding more important consideration before us at this session. If we desire to have a law to avoid this danger, let the bill go to the House and let the House put upon it just such amendments as it chooses. Then we can come together in a committee of conference and we can agree upon some measure I doubt not. If the vote is to be reconsidered, and if the bill is never to go to the House until you get a bill that can be carried by a big majority here, you may just as well give it up. I have no more interest in it than anybody else. It is a matter of no personal importance to me over any other Senator, and I have no feeling about it.

MR. MERRIMON. Suppose the House should reject the bill, then we could have no conference at all.

MR. MORTON. That would be because they do not intend to pass any bill. If they should do that, it would be simply saying, "We intend to leave this thing just where it is now." It will be in their power to frame any measure they choose. They can put the bill in such a shape as to refer the decision of the question to the House voting by States, if they choose, and then we can come together in a committee of conference and agree possibly upon some measure. If they should choose the House to be the umpire, as eighteen Senators in this body voted solidly to do, we can then come together and consider the matter: but if they pass nothing, it is simply saying that they do not want any bill; and of course that would be the end of it.

MR. EATON. I should like to ask the Senator from Indiana a question. I understood him to say that a Vice-President of the United States counted a vote that was fraudulently returned. Did I understand him correctly?

MR. MORTON. I did not mean to say that.

MR. EATON. Will the Senator state again what he said?

MR. MORTON. I undertake to say that the return-lists will show that the Vice-President counted a vote in his own favor where there was no certificate of return; where there was simply a certificate by the governor of a State of the election of certain persons as electors, and on the back of the return was a little table, not signed by anybody, not certified to by anybody, stating that so many votes for one man and so many votes for another had been cast.

MR. EATON. Will the Senator inform the Senate who that Vice-President was?

MR. MORTON. I will not make that statement now. There is a Senator here who has the record in his possession.

MR. SAULSBURY. Mr. President, the conclusion to be drawn from the remarks of the Senator from Indiana is that the votes cast on this side of the House in opposition to the bill which he reported were governed by partisan considerations. In reference to the main question which was under consideration, the constitutionality of this bill, the power of Con-

gress to pass laws and make the provisions contemplated by the bill, I was with the Senator from Indiana. I submitted my views upon that point and they were in harmony with his own. I believe that a majority of the members on this side of the chamber concurred with the view of the Senator from Indiana as to the power of Congress to make provisions for counting the electoral votes. But there were provisions in the bill which we did not like. I was fully impressed with the importance of making some provision for ascertaining the vote of the people of this country in reference to the election of President, believing that it ought to be done at the present session. I tried in my humble way to so shape the bill that it should be perfectly fair and right, proposing such amendments to the bill reported by the Senator from Indiana as I believed would accomplish that purpose. There was a positive provision in the bill as it passed the Senate for throwing out the vote of a State. I was unwilling to commit myself by my vote to the provisions of any bill which provided affirmatively for the rejection of the vote of a State. There is no such provision as that in the Constitution, and I was unwilling to assume the responsibility of voting for a bill which affirmatively provided for throwing out the vote of a State.

Mr. MORTON. Let me suggest to my friend on this point that the bill cannot be said to make provisions for throwing out the vote of a State, but it simply provides for the decision of a question arising upon the vote of a State. In the absence of the bill you let the matter stand just as it is now. When we come to count the votes next February, if there are two returns one of those returns must be rejected. It must be rejected by somebody. Who will be that person? It will be the President of the Senate. Nobody else can act upon it, because there would be no rule under which anybody else could act. You cannot frame a law then. He may select the wrong return. In such a case the bill provides that the right return shall be selected by the two houses, and if the matter is so doubtful and so obscure that the two houses cannot agree upon it, then, as a matter of necessity, in the very nature of the case, it goes out. That is all there is of it.

Mr. SAULSBURY. I contend, nevertheless, that a fair interpretation of the bill proves this to be an affirmative provision that upon a certain contingency the vote of a State shall not be counted. To such a proposition I was unwilling to commit myself. I am aware that grave difficulties may arise if the matter is left to stand as it is now. I would prefer therefore to remedy it, and I will assist the honorable Senator from Indiana in shaping the provisions of a bill that shall provide for every possible contingency in order to secure to the people of every State in the Union a voice in the election of the Chief Magistrate. I was as anxious as the Senator from Indiana that some provision should be made in regard to this matter; I feel the importance of such a provision fully as much as the Senator from Indiana; and I tried in my humble way, as honestly as the Senator from Indiana tried, to make some provision. It was because, and only because, the bill of the Senator from Indiana did not do what I in my judgment thought it ought to do, because it did not provide for the counting of the votes of every State in the Union, that I cast my vote against the bill. I was governed by no party consideration. It is a question that ought to rise infinitely above party feeling and party interests. It addresses itself to the nobler sentiments of our being, and we ought not to be governed by party interests in it. I hope that no inference will arise from the remarks of the Senator from Indiana that the democratic party in the Senate was governed in the vote it cast by anything of party consideration. We were governed by the fact that the Senator's bill did not make proper provisions for ascertaining the popular will in reference to a choice of the people for President of the United States.

I hope the motion of the Senator from Ohio will prevail so that fair and proper consideration may be given to this subject and some proper provision made for securing to the people of every State in the Union their just voice in determining the election of a President.

Mr. THURMAN. I have but a word more to say before the vote is taken. I think I have never heard a discussion in the Senate on any great public measure that was freer from anything like party than was the discussion on this bill. There was not an allusion on any side that could be considered in any sense partisan. The Senator from Indiana is greatly mistaken if he supposes that party feeling dictated the vote upon this bill. There were republican Senators as well as democratic Senators who voted against the bill—republican Senators of great distinction, and of great ability, and of great experience. There are Senators on this floor who rather than leave open the possibility of a State losing her vote would prefer that it should be decided by the President of the Senate. They would rather trust to one man to decide the grave question of which return should be counted, and leave it to his conscience, his honor, his official responsibility to the American people, than leave it open to any possibility that a State should be disfranchised.

It cannot be denied that the bill does make a possibility of depriving a State of any voice in the election. The Senator from Indiana says that it is a misfortune that cannot be avoided where a tribunal that is to decide is unable to form its judgment; but there are Senators here who would, as I said before, follow the early usage of the country and let the President of the Senate, though opposed to them in political sentiment, decide the question, rather than open the door to the possibility of depriving a State of her voice in the election of a President. That is the reason which induced so large a vote against the bill. This reason and the belief that, although no such thing was intended, although any such idea was the farthest possible from those who supported the bill, yet that bad men might take advantage of the second

section of the bill, and, taking advantage of that, send up double returns for the very purpose of depriving a State of its voice in the election of President, induced the large vote that was cast against this bill. I do not believe that men ever voted from more patriotic impulses in the world than actuated those Senators who voted against this bill. I voted for the bill. I voted for it although I considered it imperfect. I voted for it in the hope that it would be amended in the House of Representatives; but when I saw the large vote against it, I believed, as I still believe, it will not be by amendment there in all probability that this measure will be perfected. We cannot conceal the fact that the Senate of the United States is alone the department in this Government in which there is full and free and unrestrained discussion. I say this not to reproach any other department of the Government, but because from the very nature and necessity of the case such is the truth. A measure like this (and no greater measure can engage our attention than this very bill) ought, if possible, to be perfected here where there is deliberation and discussion without trammel and restraint. The Senator from Indiana certainly knows that I moved to reconsider the vote on this bill in the most perfect good faith. I may be mistaken as to the effect of a reconsideration and he may be right; but I believe that I have the right view on the subject.

Allusion has been made to a circumstance which I perhaps would not have noticed if something had been said more definitely about it. It was said that a Vice-President of the United States once counted for himself the votes of a State without any return from that State. I have seen it stated in the newspapers that when his attention was called by the tellers to the fact he directed them to record the vote and then tore up the paper in order to prevent a detection of the fraud. I venture to say that that good man never committed any such fraud in this world; and, if there is any paper that is apparently insufficient of itself, it is not all the return that was before him at the time and that was counted. What is conclusive in the matter is that the vote of that State, if it had been rejected, would not have affected the result in the slightest degree. The election would still have been determined by the House of Representatives, for there was no choice by the people. Therefore he could have had no possible inducement to count for himself the vote which they say he counted without any return. Does anybody doubt how Georgia voted on that occasion? Is there any pretense that she did not vote as her vote was recorded? Is there any pretense, or can there be, that if her vote had been rejected it would have affected the result? She would still have the right, when the President came to be elected by the House of Representatives, to cast her vote. It is of no use to conceal the name of this great man who is charged with this offense. It is no less a man than he whose hand wrote the Declaration of Independence. It is no less a great name than that of Thomas Jefferson that is impugned in this way. It is no less a man than he who at this late day is charged with having counted in his own interest the vote of a State without any evidence whatsoever that it had been cast for him. O, no, Mr. President, it will not do now to make such a charge. I await the production of the evidence upon that subject, and when it shall be produced I venture to say that nothing that impugns the integrity or the honor of that man will be found to exist. But this is apart from the question.

I grant, as fully as the Senator from Indiana can argue, that there is danger. I grant, as fully as he can assert, that the President of the Senate ought not to be the man to count the vote, he himself being interested. I read the Constitution as he reads it, that the duty of the President of the Senate is to open the votes, and not to count them. I know the precedents, when he did count them, in support of his counting them. I understand all that; but I know too, I think, the value of precedents where there was no contest and where there was no question. I therefore agree, as the Senator knows, with him in his view of the constitutional power of Congress to regulate this matter; and I urged, therefore, the passage of his bill. I did so at the last session as well as at this, and I hope that it may yet be passed; but I say to him in all frankness that I do not believe that any measure which, so to speak, creates a possibility of depriving a State of her voice in the election of President can pass this Congress.

MR. MORTON. I did not intend to impugn the motive of any Senator who voted for any amendment to which I referred or who desires to reconsider the vote by which the bill was passed. All I said was that I was surprised at the final vote in view of the general tone of the discussion. I think I was no more surprised than my friend from Ohio, and perhaps not so much as he was. The Senator says that no bill can become a law that leaves a possible contingency by which a State can be deprived of a vote. I tell my friend that we can pass no bill that will not leave such a contingency. He said he would rather leave it to the Presiding Officer of the Senate to decide. Can we compel the Presiding Officer of the Senate to decide? Suppose there are two returns, and the Presiding Officer says, "I will not take the responsibility of deciding between these two returns; I will refer the matter to the two houses," a thing the Presiding Officer of this body often does; you cannot make him decide it. And then, if the two houses, having no knowledge about it, cannot decide it, if they separate and vote by common consent, they may not agree, and in that case the vote is lost. How will you prevent the vote from being lost in that case? In the very amendment offered by the Senator from Virginia [Mr. Johnston] to refer the decision of this question to the House of Representatives voting by States there were two possibilities

for the votes of States to be lost. I have that amendment here. In voting by States the amendment provides:

"But if the representation of any State shall be equally divided, its vote shall not be counted."

As a matter of course, if you vote by States, and the State has two, four, or six Representatives, and they are equally divided, the vote of the State is lost.

Mr. WITHERS. O, no; the vote of the State in deciding the question in the House is lost; but the vote of the State is not necessarily lost in the election of President.

Mr. MORTON. Precisely, the vote of the State in deciding that question, and who will decide the other question?

Mr. WITHERS. That is very remote indeed.

Mr. MORTON. I will bring the question right home to my friend from Virginia. Suppose it is referred to the House under the amendment of his colleague. The House is to decide which of two returns shall be counted, and to decide by a vote by States. Suppose the States are equally divided; I ask him if the vote of the State is not lost then?

Mr. WITHERS. That is a more remote contingency, possibly, than the other.

Mr. MORTON. If you come to count contingencies, that may be a little more remote; but my friend from Ohio says that no bill can pass which will leave that contingency open. I say you cannot pass a bill which will not leave that contingency, and that contingency is not so very remote either. When you come to decide it there may be half a dozen States which will lose their votes in deciding it. I call my friend's attention to the fact that when the President was first elected by the House in 1801 there were three States that were deadlocked from the first to the thirty-sixth ballot, and then they were only released from the deadlock by one member dodging and the other two changing their votes.

Mr. RANDOLPH. The Senator from Indiana has said three or four times in the course of this short debate that Congress cannot pass a bill that will provide for every contingency. He has not said that Congress has had no opportunity of passing a bill so framed as to provide for every contingency. I beg to remind the Senator that during the previous discussion I presented an amendment which provided for every difficulty, and the Senator not only voted against it, but, as I believe, spoke against it. If the opportunity is offered, I propose to renew that amendment. I propose to do that which he claims he desires to do, that is, to provide that in no contingency shall the people of a State be disfranchised.

Mr. MORTON. What was my friend's amendment? Will my friend read it?

Mr. RANDOLPH. The amendment has almost passed out of my mind, because the debate occurred some time ago.

Mr. MORTON. Has my friend his amendment?

Mr. RANDOLPH. I have a portion of it here. The copy that I finally presented is not now in my possession, but the substance of my amendment is here. In substance it is this:

"Should the two houses of Congress, acting separately, fail to agree as to which is the true and valid return of a State, then, and in that event only, the President of the Senate shall render a decision of the question, and such rendition shall be in favor of that return of a State which shall have received a majority of all the votes cast in both houses of Congress, considered as if both houses had cast their votes in joint meeting assembled."

I submitted the amendment at first in this form, and it was afterward put in a better shape, a copy of which I have sent for.

Mr. MORTON. I have it here.

Mr. RANDOLPH. Has the Senator from Indiana the last one?

Mr. MORTON. My friend from New Jersey thinks he has found the method by which the vote of a State shall not be lost in any contingency, and he provides that where there are two returns "such rendition shall be in favor of that return of a State which shall have received a majority of all the votes cast in both houses of Congress, considered as if both houses had cast their votes in joint meeting assembled," counting so many votes in the Senate and so many votes in the House, and then adding them together as if they had all been cast in one body, and that return which has a majority of all the votes cast is to be adopted. Suppose there is a tie; in that case no return is adopted, and the vote of the State is lost on my friend's own hypothesis.

Mr. RANDOLPH. In the amendment, which is not now in my hand—the one that was finally substituted for that which I have just read—I provided for that very contingency, leaving the President of the Senate to give the casting vote in that exceedingly remote contingency. I regret very much that I could not obtain the Senator's attention upon that subject. I tried very hard, but he seemed to be wedded to his own plan so that he appeared to me to listen very little to the suggestions of others.

Mr. MORTON. My friend proposed to leave it in that case to the determination of the President of the Senate. If he should be a President *pro tempore*, as is the case now, he would vote originally and his vote would be counted in the vote of the State, and then if he decided as President *pro tempore* he would vote on it again. He might refuse to exercise the extraordinary power of voting twice on the same thing. My friend from New Jersey [Mr. Frelinghuysen] suggests that he may himself be a candidate for President or Vice-President and it would place him in a very delicate position. He would not want to be embarrassed and might decline to vote at all.

Mr. RANDOLPH. The difficulty is that there are so many gentlemen in this body who are in that condition that we can pass no bill that will not be surrounded with some such difficulty as the Senator has suggested. [Laughter.]

Mr. MORTON. I appreciate that difficulty, because my gaze falls upon about twenty-five distinguished gentlemen over here who are all in that condition, and I should think they would desire to avoid the embarrassment which may arise from being called upon to decide in that case. [Laughter.]

Mr. MAXEY. Mr. President, I gave the bill to count the electoral vote as much care and deliberation conscientiously as I was capable of. I regarded the bill as the most important that has been before the Senate during the present session. I think so yet. The bill as originally presented and as it passed the Senate does contain a defect which was made manifest to everybody during the progress of the discussion. If the two certificates are presented and the two houses disagree, one voting for one certificate and the other voting for the other certificate, both coming from the same State, then according to the bill as it passed the vote of that State is lost. Various propositions were presented to cure that defect. I had the honor of presenting one myself. The Senator from Indiana states that no proposition could come up that would cover every possible contingency. With all deference to the opinion of the distinguished Senator, it does seem to me that the amendment which I presented covered any sort of contingency. That was that where the two houses disagreed, one voting for one certificate and the other voting for the other, the Vice-President should give the casting vote. A great many of my friends were so very fearful of the power of the Vice-President that they placed themselves in this condition, in my humble judgment, that by refusing to give him a right to the casting vote in that contingency, (the only case in which he would have the power to cast a vote at all,) the result is that he counts the entire vote. That is my judgment about it; so that they practically, as the Bible says, "strain at a gnat and swallow a camel." That is, in my judgment, the result of voting down that amendment. But I was not wedded to that amendment, as I stated. I wanted some amendment adopted that would cure that defect. I voted against the bill as it passed, conscientiously, because I then believed and now believe that the bill as it passed is, though not designedly, an invitation to fraud; for if an election for President is coming to a close vote, and there is the slightest excuse for a State to send up two certificates, that State will send up two certificates—and we have a case directly in point where that might be done—and the vote thus sent up, if one certificate only were to come up, would turn the scale and elect a President. Then the result of sending up two certificates from that State will be that both will be ruled out, one house voting one way and the other house the other way; and thus it would happen, under the bill as passed, that the voice of the people would not be heard in electing their President. For that reason I voted against the bill. It was not with me a party question. As I stated in the argument when that question was here before, it was a great constitutional question, rising high above and beyond all party considerations; and I should regard myself unworthy of a position on this floor if I were to permit party to control my vote in a matter where the great rights of the people were concerned in the selection of a President of the United States. So I can say for myself at least that I did all that my poor judgment could do to relieve the difficulty. I presented an amendment which I then thought would relieve that difficulty. The wisdom of the Senate saw proper to vote down that amendment, and the bill passed without any amendment. The bill contains a defect which, in my judgment, is an invitation to fraud unwittingly embodied in the bill. So believing I voted against it.

Mr. MERRIMON. Mr. President, I felt a very serious interest in the bill and gave it the most serious attention when it was before the Senate. I did not regard it from a party standpoint at all. The idea of party never entered into my consideration of it for one moment. My vote went upon the grounds that the Constitution charges Congress with the duty of counting the vote. I believe that Congress is as much charged by the Constitution with counting the electoral vote for President and Vice-President as it is charged to pass a revenue law or any other law; and so believing, I was logically constrained to vote against every proposition which provided an umpire in the case of any difference between the two houses. I cannot conceive a case in discharging the ordinary legislative duties of Congress, where the two houses disagree about a passage of a bill, where Congress would have the power to provide an umpire to decide what amendments should be adopted and what amendments should be rejected, or what action of any character should be taken upon a bill passing between the two houses. No more can I conceive of any possibility that Congress in counting the electoral vote shall provide that the President of the Senate, or the Chief Justice, or the Supreme Court, or any other tribunal shall decide whether the vote of a State should be accepted or rejected in that count. It is a duty that devolves upon Congress exclusively, after the President of the Senate, being the medium by which Congress comes in contact with the States, shall have opened the returns and laid them before it. It cannot escape the duty. I admit that I have some embarrassment about the question when two electoral returns shall be made from a State; but I cannot see that if the matter is permitted to remain as it is now we shall be free from that embarrassment, and it did seem to me that under the bill which was passed the possibilities of such a difficulty were so remote that we need not trouble ourselves a great deal about it. I had the honor to offer an

amendment which I thought would relieve the difficulty. The judgment of the Senate, however, was against it. Still I was willing, though not entirely satisfied, to accept the bill as it passed. After having given the matter considerable deliberation since the bill passed, I have not come to any conclusion variant from that which I sanctioned by my vote. I should be willing to stand by that vote to-day, unless I thought the bill could be amended in such a way as to obviate the difficulty that we have all talked about so much. I hear no plan suggested by which that difficulty can be obviated. I do not see from anything that has fallen from Senators in this debate that we shall be in any other condition after the bill is reconsidered, if it shall be, than we were at the time the bill passed. If we had to vote again, I should give the same vote under similar circumstances. I am very sure I never could vote for an amendment which would provide an umpire. If, however, it is thought that by a reconsideration of the bill new light can be thrown upon the subject, and that we can come to a more definite and satisfactory conclusion, I have no objection to that, and without desiring to change my vote on the bill as it stands, I shall vote for the motion of the Senator from Ohio to reconsider, hoping that some amendment in the line of the view that Congress, and Congress alone, shall count the vote, may be adopted which will make it more satisfactory. Upon that ground alone I vote to reconsider.

Mr. BURNSIDE. Mr. President, the more I hear this discussion the more I am convinced that the amendment which I submitted to the committee's bill suggests the proper course to be pursued in order to meet the case in all its points. It is clear to me that Congress has a right to delegate to a court the power to decide as to the electoral returns where there is a dispute in regard to them. In the famous Rhode Island case to which I referred in the former debate, it was decided by the Supreme Court of the United States that Congress had the right to refer a question of equal importance to a court. What was that case?

"The fourth section of the fourth article of the Constitution of the United States provides that the United States shall guarantee to every State in the Union a republican form of government, and shall protect each of them against invasion, &c."

The court goes on to discuss the question, and says finally:

"It rested with Congress, too, to determine upon the means proper to be adopted to fulfill this guarantee."

So here it is the plain duty of Congress to adopt measures which shall ascertain the will of the electors. The court goes on to say:

"They might, if they had deemed it most advisable to do so, have placed it in the power of a court to decide when the contingency had happened which required the Federal Government to interfere."

So spoke the Supreme Court in the great case of *Luther vs. Borden*, uttering its voice through Chief-Justice Taney in a decision which is still regarded as settled and fixed law. Now I say that the duty devolves upon Congress to see that the electoral returns are properly counted and that each State shall have its representation in the electoral college; and if any contingency arises which makes it advisable for Congress to impose the duty upon any court of this country to decide for them upon certain points involved in these returns, they clearly have the right to require that court to perform that duty. It seems to me that that comes precisely within the rule prescribed by the Supreme Court in the decision from which I have read. If, as the court there hold, Congress had a right to determine when it was necessary for the Government to interfere in a State under the guarantee clause of the Constitution; if, in other words, Congress had a right to delegate to a court of the United States the power to decide when the occasion for that interposition arose, then Congress certainly have the right to delegate to a court of the United States the power to decide as to which is the lawful return of the votes of electors from any State where two sets of returns from any one State are presented.

It seems to me that the decision to which I have referred is one of great importance. The case there spoken of probably is not of equal importance to the one under discussion, but there certainly can be no reason why all good citizens of the United States would not be satisfied with the decision of the Supreme Court in a case like this. As I said the other day, we have been in the habit of abiding by its decisions. Whether they accord with our own views upon the matters at issue, we all acquiesce in their decisions. No safer or more impartial arbitrament can be selected, in my opinion.

Mr. MORTON. Mr. President, my friend from Rhode Island, before the conclusion of the former debate, had his attention called to this decision. The remark that he quotes as having been made by the court in that case was clearly outside of the case; but it does not refer to the question of the power of Congress to establish an umpire to decide the thing other than Congress itself. It refers to the question of fact when the contingency of fact had arisen of domestic violence, and as to that the court say incidentally, in passing:

"They"—

Congress—

"might, if they had deemed it most advisable to do so, have placed it in the power of a court to decide when the contingency had happened which required the Federal Government to interfere. But Congress thought otherwise, and no doubt wisely, and, by the act of February 28, 1795, provided that "in case of an insurrection in any State against the government thereof it shall be lawful for the President of the United States, on application of

the legislature of such State, or of the executive, (when the legislature cannot be convened,) to call forth such number of the militia of any other State or States as may be applied for as he may judge sufficient to suppress such insurrection."

That was a case where the Constitution had not located the power of determining when the contingency of fact had happened; but Congress did vest the President with that power by the act of 1795-'96. I think the language of the court falls short of the principle my friend refers to, and it is mere *obiter* anyhow; it is not in the case at all.

MR. BURNSIDE. I am quite aware that the court made no decision on this question, but simply said that Congress might, if it chose, delegate this power. It did not delegate the power, I know, as the Senator from Indiana says; but the court said it might have delegated the power. I consider that a case of the kind now under consideration, of two returns from a State, is a question of fact just as much as the question to which the Senator from Indiana refers, and which the Supreme Court said Congress might delegate the determination of to a court.

THE PRESIDING OFFICER. (Mr. Wallace in the chair.) The question before the Senate is, Shall the vote by which this bill passed be reconsidered?

MR. STEVENSON. I ask for the yeas and nays on the motion to reconsider.

The yeas and nays were ordered; and being taken, resulted—yeas 31, nays 23; as follows:

YEAS—Messrs. Bayard, Boggy, Caperton, Cockrell, Conkling, Cooper, Davis, Dawes, Dennis, Eaton, Edmunds, English, Goldthwaite, Gordon, Hamilton, Howe, Kelly, Kernan, Key, McCreery, Maxey, Merrimon, Norwood, Paddock, Randolph, Ransom, Saulsbury, Stevenson, Thurman, Wallace, and Withers—31.

NAYS—Messrs. Anthony, Booth, Bontwell, Burnside, Cameron of Pennsylvania, Cameron of Wisconsin, Clayton, Cragin, Ferry, Frelinghuysen, Hamlin, Harvey, Ingalls, Jones of Nevada, Logan, McMillan, Morrill of Maine, Morrill of Vermont, Morton, Oglesby, Robertson, Sargent, and Windom—23.

ABSENT—Messrs. Alcorn, Allison, Bruce, Christiancy, Conover, Dorsey, Hitchcock, Johnston, Jones of Florida, McDonald, Mitchell, Patterson, Sharon, Sherman, Spencer, Wadleigh, West, Whyte, and Wright—19.

THE PRESIDING OFFICER. The motion to reconsider is agreed to. The question recurs on the passage of the bill.

MR. MORTON. I give notice that I will call up the bill to-morrow.

MR. EDMUNDS. The bill is before the Senate now. The motion should be to postpone it until to-morrow.

MR. MORTON. That is to be done by common consent.

THE PRESIDING OFFICER. That is the understanding of the Chair.

MR. THURMAN. Before the electoral bill passes over, I wish to suggest that it cannot be amended without a further vote of reconsideration, which I suppose is a mere matter of form, and that is to reconsider the third reading. I make that motion.

THE PRESIDING OFFICER. It is moved to reconsider the vote by which Senate bill No. 1 was ordered to be engrossed for a third reading.

The motion to reconsider was agreed to.

THE PRESIDING OFFICER. The bill will be regarded as postponed until to-morrow by common consent.

AUGUST 1, 1876.

MR. THURMAN. It will be remembered that in the early part of the session a bill was reported by the Committee on Privileges and Elections respecting the counting of electoral votes for President and Vice-President, and after a long discussion was finally passed. I voted for it, and moved to reconsider the vote by which it was passed, and that motion has never yet been taken up. I am now informed that if taken up it will lead to a discussion, and that at this late period of the session would be fatal to any measure whatsoever on this subject. I therefore suppose that the only way in which the two houses can come to an arrangement is for the bill to go to the House, and let the house propose such amendments as it may in its wisdom deem to be proper. I therefore ask leave to withdraw the motion to reconsider.

THE PRESIDENT *pro tempore*. The vote on the passage of the bill (S. No. 1) to provide for and regulate the counting of votes for President and Vice-President, and the decision of questions arising thereon, was reconsidered, as the record shows; and the question is on ordering the bill to be engrossed for a third reading.

MR. THURMAN. I do not think any vote was taken on the reconsideration.

MR. EDMUNDS. I move that the Senate take a recess for fifteen minutes and we can look into that.

MR. CONKLING. Was the vote reconsidered?

THE PRESIDENT *pro tempore*. It is so on the record.

MR. CONKLING. Therefore another vote is necessary to pass the bill.

THE PRESIDENT *pro tempore*. The question is on the third reading of the bill. The Senator from Vermont moves to take a recess for fifteen minutes.

The motion was agreed to; and (at two o'clock and twenty five minutes p. m.) the Senate took a recess for fifteen minutes.

THE PRESIDENT *pro tempore*, (at two o'clock and forty minutes p. m.) The recess having expired, the Senate resumes its session.

AUGUST 5, 1876.

COUNTING OF ELECTORAL VOTES.

MR. THURMAN. I ask the unanimous consent of the Senate to take up the bill reported by the Committee on Privileges and Elections in regard to counting the electoral votes. I made a motion to reconsider the vote by which the bill was passed, and I thought that my motion was still pending. The other day when it was called up I was told that the reconsideration had been ordered. I now propose that we take up the bill and act upon it without any debate, in order that it may go to the House of Representatives to see whether an agreement can be arrived at. I therefore ask unanimous consent to proceed to the consideration of Senate bill No. 1.

MR. SARGENT. I suppose it will take but a moment.

MR. WRIGHT. I shall not interpose any objection if my friend from Ohio——

MR. THURMAN. I propose that we just vote upon the bill at once.

MR. WRIGHT. Then I shall not object.

By unanimous consent the Senate resumed the consideration of the bill (S. No. 1) to provide for and regulate the counting of votes for President and Vice-President, and the decision of questions arising thereon.

The bill was ordered to be engrossed for a third reading, and was read the third time.

The PRESIDENT *pro tempore*. The question is on the passage of the bill.

MR. EDMUNDS. On that I ask for the yeas and nays.

MR. THURMAN. The yeas and nays were ordered before, and were taken on the passage of the bill.

MR. EDMUNDS. I know.

MR. THURMAN. If we order the yeas and nays, it may give rise to debate.

MR. EDMUNDS. It need not give rise to any debate, but I do not want the bill to pass without my name appearing voting for or against it on the record, as it is a bill of great importance, and otherwise might appear as if passed by unanimous consent. I therefore, as everybody agreed it ought to be acted upon by yeas and nays before, ask for the yeas and nays again; it will not take any time. I do not propose to debate it at all.

The yeas and nays were ordered.

MR. CHRISTIANCY. I ask that the bill be read.

The Chief Clerk proceeded to read the bill.

MR. MERRIMON. Is the clerk reading the bill as amended?

The PRESIDENT *pro tempore*. One amendment was made to it. The clerk is reading it as it stands on its passage as amended.

The Chief Clerk resumed and concluded the reading of the bill, as follows:

“That the Senate and House of Representatives shall assemble in the hall of the House of Representatives at the hour of one o'clock p. m. on the last Wednesday in January next succeeding the meeting of the electors of President and Vice-President of the United States, and the President of the Senate shall be their presiding officer. Two tellers shall be appointed on the part of the Senate and two on the part of the House of Representatives, to whom shall be handed as they are opened by the President of the Senate the certificates of the electoral votes, which certificates shall be opened, presented, and acted upon in the alphabetical order of the States, beginning with the letter A; and said tellers, having read the same in the presence and hearing of the two houses then assembled, shall make a list of the votes as they shall appear from the said certificates; and the votes having been counted, the result of the same shall be delivered to the President of the Senate, who shall thereupon announce the state of the vote and the names of the persons, if any, elected, which announcement shall be deemed a sufficient declaration of the persons elected President and Vice-President of the United States, and, together with a list of the votes, be entered on the journals of the two houses. If upon the reading of any such certificate by the tellers any question shall arise in regard to counting the votes therein certified, the same having been stated by the Presiding Officer, the Senate shall thereupon withdraw and said question shall be submitted to the body for its decision; and the Speaker of the House of Representatives shall in like manner submit said question to the House of Representatives for its decision; and no electoral vote or votes from any State to the counting of which objections have been made shall be rejected except by the affirmative vote of the two houses. When the two houses have voted they shall immediately re-assemble, and the Presiding Officer shall then announce the decision of the question submitted.

“SEC. 2. That if more than one return shall be received by the President of the Senate from a State, purporting to be the certificates of electoral votes given at the last preceding election for President and Vice-President in such State, all such returns shall be opened by him in the presence of the two houses when assembled to count the votes; and that return and that only from such State shall be counted which the two houses acting separately shall decide to be the true and valid return.

“SEC. 3. That when the two houses separate to decide upon an objection that may have been made to the counting of any electoral vote or votes from any State, each Senator and Representative may speak to such objection or question ten minutes, and not oftener than once: *Provided*, That after such debate has lasted two hours it shall be the duty of each house to put the main question without further debate.

"SEC. 4. At such joint meeting of the two houses, seats shall be provided as follows: For the President of the Senate, the Speaker's chair; for the Speaker, immediately upon his left; the Senators in the body of the hall upon the right of the presiding officer; for the Representatives, in the body of the hall not provided for the Senators; for the tellers, Secretary of the Senate, and Clerk of the house of Representatives, at the Clerk's desk; for the other officers of the two houses, in front of the Clerk's desk and upon each side of the Speaker's platform. Such joint meeting shall not be dissolved until the electoral votes are all counted and the result declared; and no recess shall be taken unless a question shall have arisen in regard to counting any such votes, in which case it shall be competent for either house, acting separately, in the manner hereinbefore provided, to direct a recess of such house not beyond the next day at the hour of ten o'clock in the forenoon."

MR. CHRISTIANCY. I wish to be heard one moment in order to make an inquiry of the Senator from Ohio. I notice that this bill, which it is proposed to make an act of Congress, provides for the length of the time that any Senator or Representative may speak when the Senate is acting separately and the House is acting separately. I wish to know if that is not trenching upon the constitutional power of each house to make its own rules to regulate its own proceedings.

MR. THURMAN. The joint rule heretofore adopted prohibited all debate, and it seems to have been held good. No question was ever made in respect of that rule. If we have the right to legislate upon this subject, as I think we have—and this whole bill goes upon that foundation—then I think we have a right to regulate the mode of procedure so that it shall not be defeated, as it otherwise might be, by the consumption of time in speaking.

MR. EDMUNDS. Then you might pass a law as to all bills.

MR. HAMLIN. Let me ask the Senator from Ohio if this is not the precise condition of things: The Senate makes its own rule; the House make their own rules; when the two bodies are together it is neither the House nor the Senate, but a convention, and this will be a convention agreed upon by both branches.

MR. EDMUNDS. But the bill refers to their action when they are separate. Your answer would be perfect when they acted together.

MR. FRELINGHUYSEN. I suppose the object of the vote is to have this bill referred to a committee of conference. I would suggest to the Senator from Ohio whether it would not be a better plan to reconsider the vote upon the third reading and to make the bill here as we think it ought to be.

MR. THURMAN. I do not object to that.

MR. FRELINGHUYSEN. It seems to me, as I recollect the bill, there is an omission in it. There is no provision made in case two sets of returns come up from the same State. That is left open. There was an amendment to meet that difficulty which I offered myself, which I really think is the best one, not because I offered it, but after hearing the whole discussion. I had offered another which I withdrew and presented this one, which was to provide that in that event the question shall be determined by the President of the Senate, the Speaker of the House, and the Chief Justice of the Supreme Court of the United States. I am perfectly satisfied in my own mind that we cannot meet this exigency better than by adopting that amendment. There is, I think, reported to the Senate a constitutional amendment covering this case; but that of course does not apply to the present year. I am not the manager of the bill and do not propose to make any motion, except merely to suggest that we should reconsider the third reading and adopt some amendment providing for that omission in the present bill.

MR. THURMAN. I have not the least objection to that course; but I suggested that we take the vote on the bill in deference to the opinion of the Senator from Indiana, [Mr. Morton,] the chairman of the committee, who reported the bill, and who thought it had better go to the House and let the House amend it, and then the Senate could agree or disagree to their amendment, and in case of disagreement have a committee of conference; but for my own part I am perfectly indifferent which course may be taken. I think something ought to be done, and as time is so short, I am in favor of that course which is most likely to effect the passage of an act on this subject. I confess that I am a little apprehensive of the result if we merely pass this bill as it is, with the objection which prevails on all this side of the chamber, and which is very weighty with me, which I had great difficulty in overcoming so far as to vote for the bill, that there is no provision made in case of two returns from a State, which was the fatal point in the bill, and which was the cause of nearly every vote on this side of the chamber being cast against it. Should the bill go in that way to the House of Representatives, I am very apprehensive that nothing will be done, and I would be perfectly willing that the vote should be taken on any one of the propositions that have been made to amend the bill to supply the deficiency of the bill in that respect. I will go further and say that if I can get nothing else I will vote for the amendment, if I understand it correctly, proposed by the Senator from New Jersey. There may be some doubt as to whether that is strictly within the spirit of the Constitution; but I am inclined to think that if we have the power to legislate upon the subject at all we have the power to adopt that amendment, and that is the better impression, although I confess that I am not as clear on it as I should like to be. But rather than let matters stand as they are, I would vote for that amendment in the hope that the House might propose even something better, or if they did

not, that it might result in a conference committee that would agree upon something better. If the Senator from New Jersey sees fit to move to reconsider the third reading of the bill I shall make no objection.

Mr. FRELINGHUYSEN. I will test the view of the Senate by making that motion.

The PRESIDENT *pro tempore*. The Senator from New Jersey moves to reconsider the vote by which the bill was ordered to be engrossed for a third reading.

The motion was agreed to.

The PRESIDENT *pro tempore*. The bill is now open to amendment.

Mr. FRELINGHUYSEN. I would suggest to the Senator from Ohio that the bill be passed over for the present, and taken up after I can prepare the amendment.

Mr. THURMAN. I have no objection to that.

Mr. ANTHONY. I hope it will be with the general understanding that when the amendment is prepared the bill shall be taken up.

Mr. THURMAN. I hope so.

The PRESIDENT *pro tempore*. Is there objection? The Chair hears none.

Mr. EDMUNDS. That general understanding must take its chances with everything else.

Mr. HOWE. It is to be taken up at some time when nothing else is pending I suppose.

The PRESIDENT *pro tempore*. The Senator from Rhode Island asked unanimous consent that it be taken up as soon as the amendment was prepared. The Chair heard no objection to that suggestion, and so stated.

Mr. EDMUNDS. I object, not that I shall make the slightest opposition, but in the present stage of the session we cannot foresee what at any particular moment may be the pending urgency.

Mr. ANTHONY. Then let the bill be laid aside informally, subject to be called up at any time.

Mr. MORTON. Is that the understanding of the Senate?

The PRESIDENT *pro tempore*. Is there objection to the suggestion now made by the Senator in Rhode Island? The Chair hears none.

APPENDIX.

SPEECH OF HON. ABRAHAM BALDWIN, OF GEORGIA, IN THE UNITED STATES SENATE, JANUARY 23, 1800.

Mr. BALDWIN, of Georgia, expressed his regret that the mover of this resolution had not thought proper to bring forward a subject so new and important in the form commonly used in parliamentary assemblies, by a single proposition, viz, "That it is expedient that further provision be made respecting disputed votes for President and Vice-President of the United States." It was manifest from the debate that several different questions had been under consideration at the same time, and different gentlemen were in fact directing their remarks to different questions.

The first question was the one he had just mentioned, whether there was so great a defect in the present provisions which exist on this subject as to render further provisions necessary.

The second is, if further provisions are necessary, must they be made by amendment to the Constitution? or,

Thirdly, whether they can be made by law?

He must say for himself that he did not agree that the present provisions on this subject were so defective and absurd as had been represented. His general respect for those who had gone before him in this house, and especially for the venerable assembly of the most experienced statesmen of the country, by whom the Constitution had been formed, forbade him to entertain the belief that this subject, which is the strong feature that characterizes this as an elective government, could have been till now so entirely out of sight and neglected. Gentlemen appeared to him, from their observations, to forget that the Constitution, in directing electors to be appointed throughout the United States equal to the whole number of the Senators and Representatives in Congress, for the express purpose of intrusting this constitutional branch of power to them, had provided for the existence of as respectable a body as Congress, and in whom the Constitution on this business has more confidence than in Congress. Experience had proved that a more venerable selection of characters could not be made in this country than usually composed that electoral body. And what are the questions which can arise on the subject intrusted to them, to which they are incompetent, or to which Congress is so much more competent? The questions which present themselves seem to be:

1. Those which relate to the elections, returns, and qualifications of their own members: shall these be taken away from that body, and submitted to the superior decision and control of Congress, without a particle of authority for it from the Constitution?

2. The legality or constitutionality of the different steps of their own proceedings, as, whether they vote for two persons, both of the same State; whether they receive votes for a person under thirty-five years of age, or one who has not been fourteen years a citizen of the United States, &c. It is true they, as well as any other constitutional branch of this Government, acting under that instrument, may be guilty of taking unconstitutional or corrupt steps, but they do it at their peril. Suppose either of the other branches of the Government—the Executive, or the Judiciary, or even Congress—should be guilty of taking steps which are unconstitutional, to whom is it submitted, or who has control over it, except by impeachment? The Constitution seems to have equal confidence in all the branches on their own proper ground, and for either to arrogate superiority, or a claim to greater confidence, shows them in particular to be unworthy of it, as it is in itself directly unconstitutional.

3. The authentication of their own acts. This would seem to be as complete in them as in either of the other branches of the Government. Their own authentication of their act finishes the business intrusted to them. It is true this must be judged of by the persons who are concerned in carrying it into execution; as in all laws and official acts under this Government, they to whom they are directed, and who are to be bound by them, must judge, and judge at their peril, whether they are duly authenticated or whether they are only a forgery.

If this be the just view of the subject, (and he could see no other which did not involve inextricable difficulties,) it leaves no possible question for the Senators and Representatives, when met together to count the votes agreeably to the Constitution, but to judge of the authen-

tication of the act of the electors, and then to proceed and count the votes as directed. If this body of the electors of all the States had been directed by the Constitution to assemble in one place, instead of being formed into different electoral colleges, he took it for granted none of the questions on which this resolution has been brought forward would have occurred; every one would have acknowledged that they were to be settled in that assembly. It having been deemed more safe by the Constitution to form them into different electoral colleges, to be assembled in the several States, does not at all alter the nature or distinctness of their powers, or subject them any more to the control of the other departments of the Government.

He observed further, on the other points to which gentlemen had spoken, that if such radical and important changes were to be made on this subject as seemed to be in contemplation under this resolution, he thought they must be made by proposing an amendment to the Constitution to that effect; and that they could not be made by law without violating the Constitution. He did not agree with the gentleman from Massachusetts (Mr. Dexter) that the clause at the close of the 8th section of the Constitution, which gives to Congress power to pass all laws necessary and proper to carry into effect the foregoing powers of that section, and all other powers vested by the Constitution in the Government of the United States, or in any department or officer thereof, could be extended to this case. That speaks of the use of the powers vested by the Constitution; this resolution relates to the formation of a competent and essential part of the Government itself. That speaks of the movements of the Government after it is organized; this relates to the organization of the executive branch, and is therefore clearly a constitutional work, and to be done, if at all, in the manner pointed out by the Constitution, by proposing an article of amendment to the Constitution on that subject. His own opinion, however, was what he had before stated, that the provisions on this subject were already sufficient; that all the questions which had been suggested were as safely left to the decision of the assemblies of electors as of any body of men that could be devised; and that the members of the Senate and of the House of Representatives, when met together in one room, should receive the act of the electors as they would the act of any other constitutional branch of the Government, to judge only of its authentication, and then to proceed to count the votes, as directed in the second article of the Constitution.

SPEECH OF HON. CHARLES PINCKNEY, OF SOUTH CAROLINA, IN THE UNITED STATES SENATE, MARCH 25, 1800.

The Senate resumed the consideration of the bill prescribing the mode of deciding disputed elections of President and Vice-President of the United States. Before the question was taken on the passage of the bill, Mr. Pinckney addressed the Chair as follows:

MR. PRESIDENT: The question now before the Senate is on the passage of the bill; it having been understood, as agreed, that we would reserve ourselves on its constitutionality until this period. I have some claim to expect your indulgence while I review not only that subject but the principal features of the bill, while I endeavor to show that it is a serious invasion of some of the most important rights solemnly and explicitly reserved by the Constitution to the State legislatures; that it is a bill more alarming in its consequences than even the alien or sedition law, because, however unfriendly I conceive those to have been in their principles and operation to the liberties of the people, yet after March next we are to hope nothing but the mournful reflection will remain that such laws have ever existed; while the act before you is to continue as a perpetual one, unlimited in its consequences and duration, and is to exist as a check or diminution of those important rights which, by the Constitution, are solely and exclusively vested in the State legislatures, or, under their direction, with the people, and with which Congress have no power to interfere, except in the manner I shall hereafter detail. I am, indeed, more anxious on this subject, as on many important points the majorities in the Senate were small, and as I well know the subject will excite very great public attention. The States and the State legislatures will feel themselves particularly concerned, and I have some reason to suppose that such of those as I represent, and who are of my opinion, will expect from me a defense of what they consider as their just rights.

I will begin my remarks on this subject by asserting that all powers not specifically given to Congress by the Constitution are reserved to the States or the people respectively; that this is the base and principle of the Government; that without any express declaration on the subject, or any amendment to the original instrument, this is the construction we are obliged to give it; but that when we couple with this construction the twelfth amendment, which the jealousy of the States insisted upon, there can be now no question that, in the language of that amendment, the powers not delegated to the United States, nor prohibited by the Constitution to the States, are reserved to the States respectively or to the people.

It is of essential importance in examining this bill to recur to those amendments and the reason of their being adopted. This appears in the caption of the resolution recommending the amendments to the adoption of the States. It is in these words:

"The conventions of a number of States having, at the time of their adopting the Constitution, expressed a desire, in order to prevent misconstruction or abuse of its powers, that

further declaratory and restrictive clauses should be added; and as extending the ground of public confidence in the Government will best insure the beneficial end of its institution, therefore Congress, according to the constitutional mode, recommended to the States to agree to, and their legislatures did adopt, such of the amendments as are now officially directed to be annexed to the Constitution."

By this caption it appears that jealousies and suspicions existed in the States; that they were anxious to have some declaration of the principle of the system to be ascertained on the subjects of religion and the press and the rights of the people and the State legislatures. They knew that parties would arise, and that, as in all governments unprincipled and designing men had existed, they saw no reason to expect that their own would be without them; they therefore determined that an explicit constitutional declaration should be annexed expressly stipulating that the powers not specifically delegated were reserved, and that the prohibitions and reservations mentioned in the amendments should be added in the nature of a bill of rights.

When those amendments became a part of the Constitution, it is astonishing how much it reconciled the States to that measure: they considered themselves as secure in those points on which they were the most jealous; they supposed they had placed the hand of their own authority on the rights of religion and the press, and the sacred right of the States in the election of the President; that they could with safety say to themselves, "On these subjects we are in future secure; we know what they mean and are at present; and such as they now are, such are they to remain until altered by the authority of the people themselves; no inferior power can touch them. In our adorations to our Maker, our right to remark on public men and measures, and the exclusive right of the State legislatures and people to elect the supreme executive, Congress have no authority to interfere. They are not within the ordinary sphere of its legislation." I appeal to any man who dispassionately peruses the Constitution and its amendments, and who recollects the mode and reasons of their adoption, to answer if this was not the construction then understood, and which now ought always to be given to them. It is the one I shall ever contend for, and it is on this ground I shall endeavor to show that Congress have no right to pass the bill before you, or to legislate at all further on the subject than they have done by the act of 1792.

I suppose it will hardly yet be denied that the people are the common fountain of authority to both the Federal and State governments; that the Constitution reposes exclusively in the State legislatures for the formation of a part of the Federal Government, and in the people for another part; and that, in the appointment or formation of their part, the rights of the State legislatures and people are exclusive; that the State governments are the pillars upon which the Federal Government must rest, and that without a cordial and active performance of their duty the latter could not proceed or exist; that, in the formation of the Federal Government, the people found that their safety consisted in giving certain exclusive rights to the State legislatures in the election of Senators and of their President, the first to insure to the State governments their existence as such, and their equality in the second branch, and the other to make their executive completely independent of the national legislature.

In examining these exclusive rights, we will at once perceive that in the mode of voting for Senators no other part of our governments can interfere than our State legislatures. If they neglect or refuse to elect, there is no power to compel them. The only authority to interfere is the Senate of the United States, and their power extends only to the determination whether a Senator is constitutionally qualified or properly commissioned, and in discussing this neither the President nor House of Representatives can interfere.

With respect to the House of Representatives, for important reasons, there is a substantial difference. A right is, in the first instance, given to the State legislatures to establish regulations for their election, and in the same clause a right is given to Congress—not to the House of Representatives, but to Congress—not only to make regulations on the same subject, but to alter such as the State legislatures have made; giving to Congress, in fact, a paramount authority, whenever they please, to regulate the elections of the House of Representatives in any manner they think proper. Let us for a moment compare this with the directions of the Constitution respecting the electors of a President, and then permit me to call your attention to the remarkable difference there is between them, and the reasons for this difference.

By the Constitution, electors of a President are to be chosen in the manner directed by the State legislatures. This is all that is said. In case the State legislatures refuse to make these directions, there is no power to compel them. There is not a single word in the Constitution which can, by the most tortured construction, be extended to give Congress, or any branch or part of our Federal Government, a right to make or alter the State legislatures' directions on this subject. The right to make these directions is complete and conclusive, subject to no control or revision, and placed entirely with them, for the best and most unanswerable reasons. It was intended to give your President the command of your forces, the disposal of all the honors and offices of your Government, the management of your foreign concerns, and the revision of your laws. Invested with these important powers, it was easily to be seen that the honor and interest of your Government required he should execute them with firmness and impartiality; that, to do this, he must be independent of the

legislature; that they must have no control over his election; that the only mode to prevent this was to give the exclusive direction to the State legislatures in the mode of choosing electors, who should be obliged to vote secretly: and that the vote should be taken in such manner, and on the same day, as to make it impossible for the different States to know who the electors are for, or for improper domestic (or) what is of much more consequence, foreign influence and gold to interfere; that, by doing this, the President would really hold his office independent of the legislature; that, instead of being the creature, he would be the man of the people; that he would have to look to them, and to the confidence which he felt his own meritorious actions would inspire, for applause or subsequent appointments.

Instead of this, what is the mode proposed by this bill? That the Senate and House of Representatives of the United States shall each of them elect six members, who, with a chairman, to be appointed by the latter from a nomination of the former, would form a grand committee, who should, sitting with closed doors, have a right to examine all the votes given by the electors in the several States for President and Vice-President, and all the memorials and petitions respecting them, and have power finally to decide respecting them, and to declare what votes of different States shall be rejected and what admitted; and, in short, that this committee, thus chosen, and sitting with closed doors, shall possess complete, uncontrollable, and irrevocable power to decree, without appeal from their decision, who has been returned and who shall be proclaimed President of the United States.

As long and as much as I have been accustomed to examine this bill and consider its contents, I cannot recapitulate its objects and extent without new emotions of surprise. I am astonished that a measure so completely calculated to deprive the State legislatures of their most important and exclusive rights in the election of the Chief Magistrate should be at once brought forward, without paying the way by some milder preparatory measure of the same tendency. It is true, the sedition law, by giving to the Federal courts a power to decide on libels, a right which we contend belongs exclusively to the State courts, and of which we think they cannot constitutionally be divested, and the untenable doctrine, avowed by the Federal judges, that there is a common law, such as is in force in Great Britain, common to the courts of the United States, may be considered as preparative. Had the people quietly acquiesced in these doctrines, and generally expressed no disapprobation of them, there might have been some reason to suppose they had determined silently to submit to everything, and even without a murmur put up with this diminution of the authority of the State legislatures. But when we recollect the unanswerable arguments that have been used throughout every part of the Union against them; when we see not only individuals but legislatures of important States using the mild and constitutional mode of remonstrance and argument; when we have found not only the tables of the State legislatures, but of Congress itself, covered with memorials against them, lamenting in the most affecting language their adoption and execution, I cannot, under these circumstances, suppose that we are authorized to believe the public mind so much under the influence of implicit confidence as to think that a measure which strikes so forcibly at the reserved rights of the States can be received by them without particular emotions. It is my duty, however, to examine it with freedom, and this I shall do with candor and deference to other gentlemen's opinions who differ from me on the subject.

Knowing that it was the intention of the Constitution to make the President completely independent of the Federal legislature, I well remember it was the object, as it is at present not only the spirit but the letter of that instrument, to give to Congress no interference in or control over the election of a President. It is made their duty to count over the votes in a convention of both houses, and for the President of the Senate to declare who has the majority of the votes of the electors so transmitted. It never was intended, nor could it have been safe, in the Constitution, to have given to Congress thus assembled in convention the right to object to any vote, or even to question whether they were constitutionally or properly given. This right of determining on the manner in which the electors shall vote, the inquiry into the qualifications, and the guards necessary to prevent disqualified or improper men voting, and to insure the votes being legally given, rests, and is exclusively vested, in the State legislatures. If it is necessary to have guards against improper elections of electors, and to institute tribunals to inquire into their qualifications, with the State legislatures, and with them alone, rests the power to institute them, and they must exercise it. To give to Congress, even when assembled in convention, a right to reject or admit the votes of States would have been so gross and dangerous an absurdity as the framers of the Constitution never could have been guilty of. How could they expect that, in deciding on the election of a President, particularly where such election was strongly contested, party spirit would not prevail and govern every decision? Did they not know how easy it was to raise objections against the votes of particular elections, and that in determining upon these, it was more than probable the members would recollect their sides, their favorite candidate, and sometimes their own interests? Or must they not have supposed that, in putting the ultimate and final decision of the electors in Congress, who were to decide irrevocably and without appeal, they would render the President their creature, and prevent his assuming and exercising that independence in the performance of his duties upon which the safety and honor of the Government must forever rest?

But it is said, are Congress bound to receive every vote of an elector, whether it is consti-

tulionally given or not? Suppose votes are sent for a person not a citizen or fourteen years a resident of the United States; or under thirty-five years of age; or that the legislature of a State has not authorized by their act the votes of the electors; or that double returns are made, who are then to decide? Or has not Congress, under these circumstances, a power to determine which of the votes shall be received or rejected?

These being the avowed reasons for introducing this bill, I answer them by observing that the Constitution having directed that electors shall be appointed in the manner the legislature of each State shall direct, it is to be taken as granted that the State legislatures will perform their duties, and make such directions as that only qualified men shall be returned as electors. The disqualifications against any citizen being an elector are very few indeed; they are two: the first that no officer of the United States shall be an elector; and the other, that no member of Congress shall; the first, an indispensable one, because every officer of the United States is nominated by the President, and (except judges) removable at his pleasure; the latter, that no member of Congress shall, is a provision which goes unanswerably to prove the solidity of my objections to this bill, and to show how extremely guarded the Constitution is in preventing the members of Congress from having any agency in the election, except merely in counting the votes.

They well knew that to give to the members of Congress a right to give votes in this election, or to decide upon them when given, was to destroy the independence of the Executive, and make him the creature of the legislature. This therefore they have guarded against, and to insure experience and attachment to the country, they have determined that no man who is not a natural-born citizen, or citizen at the adoption of the Constitution, of fourteen years' residence, and thirty-five years of age, shall be eligible. These are all the provisions in the Constitution, and being specifically defined and clearly marked out, where is the necessity of this bill? Is not the Constitution the supreme law of the land, and must not the State legislatures conform their directions in the appointment of electors to the directions of the Constitution? Have they not always determined that persons qualified as the Constitution directs shall be chosen as electors; and, in the three elections which have taken place, has there been a single mistake or error in the vote? Was not the last election as much contested as the ensuing or any one can be, and were not the votes regularly given? Why this anxiety, why these unnecessary efforts to take from the State legislatures their exclusive and most valuable right? Why should we be afraid that our citizens should be so forgetful of their safety as to vote for men holding offices under the United States, or members of Congress; men who were not only disqualified, but who must, from their connections with the Government, be always unsafe depositaries of this trust.

Who, when he reflects on the immense power the President possesses, can suppose that any man, honorably selected by his fellow-citizens as an elector, could for a moment be so lost to a sense of his own and his country's welfare, as to vote for a man as the supreme executive whose citizenship or residence was doubtful, and who was not of sufficient age? Gentlemen who support the bill have confessed they thought it improbable, and that it may not happen once in a century; but still they say it is possible, and ought to be guarded against. I consider both as so extremely improbable, that I am astonished they are mentioned; so far from having any apprehension of this sort, we may be assured that while the office of President is accompanied by so much power and patronage, while it is so honorable to its holder and influential to his friends, there can be no doubt that only such men will ever be spoken of, or even thought of, or nominated as candidates as are the most conspicuous for talents, and whose experience of our public affairs is generally acknowledged. Nor need we ever be afraid that in this country too young men will be brought forward as candidates. There is a jealousy against young men, or men not much advanced in years, which will forever forbid their being nominated for this office with much hope of success. Men do not like to see their juniors, or even those of the same ages, taking the lead or being more conspicuous for talents or knowledge than themselves; they erroneously consider it as a reflection on their own deficiencies; they will therefore invariably unite in preferring a man much advanced in years, whose honors would occasion them no invidious sensations, and whose age and long employment in public life have accustomed them to his elevation; regardless of his errors or capacity to govern, they will more cordially unite in promoting him than one whose rise they will consider as too rapid, and whose political exertions have given them pain. Be assured, sir, there can never be any fear of too young men being promoted to this situation; the danger is entirely on the other side of the question, that none but men too old will be brought forward; men whose minds have lost their energy, and whose age and infirmities render them incapable of sustaining the great and increasing weight of an important and arduous situation.

To prevent, therefore, candidates of doubtful residence or citizenship, or under the requisite age, being elected as President, can never be sufficient reasons with the House for adopting this bill in the face of the Constitution, even if they had the power. I suppose there must be more weight in the other reasons, or they would not agree to it.

These are, that suppose a State legislature should so far forget its duty as not to pass some legislative act or resolution directing the manner in which, within the proper time, electors of a President should be elected, and the people should, notwithstanding, assemble and elect under

a different authority; would the votes of the electors, under these circumstances, be receivable? Or suppose that two different sets of electors should insist that they were constitutionally elected, and that double returns should be transmitted, one certified by the governor of the State and the other not; which are to be received, and who is to have the power to decide to which the preference is to be given?

On this subject, I am to remark that the Constitution supposes a mutual confidence to exist between the Federal and State governments; that not only in its formation, but in the strict and honorable performance of their relative duties, there will be the greatest punctuality and exactness; that neglect, and particularly refusal on the part of either, must endanger the existence of both; and that until the case does actually arise it is extremely impolitic in either to suspect it, and particularly to adopt measures in anticipation on suspicions unsupported by proofs, to meet situations that have never yet occurred, or probably never will; that it ought to be a federal principle and a rule with the Government never to doubt the attachment of the States in the performance of their constitutional duties; that as they have hitherto regularly appointed electors and Senators and members of the other branch, that they will continue to do so, and cheerfully to contribute to the general expenses; that, in return, they will expect from the Government complete and adequate protection in their public and private rights, and a constitutional attention to such as are explicitly reserved to the people and the State legislatures; that they will govern themselves by the Constitution, and suffer no suspicions, jealousies, or unfounded reports to hurry them into acts invading the State right; that as it is so much the interest of the States to exercise their right in the election of a President, it is to be presumed that every State legislature will seek with avidity each returning opportunity of doing so; that whatever they may surmise or threaten, that when the time arrives no few men will dare to oppose numerous and important States expressing their opinion or giving their votes on so interesting an election, particularly where the opinion has been so recently and decidedly expressed on questions of the same political tendency: that there was no doubt of every State fairly and honorably voting, and of every executive constitutionally discharging the duties of his station; that we had no more right to suppose, from what has hitherto happened, that an executive or State government would break the Constitution than they had to think that Congress and the President would do so; that if the General Government went into measures to restrain or control the States in the exercise of their duties, might it not unnecessarily give rise to a spirit of discord, destructive to the harmony which ought ever to exist between them? that in every view in which the subject presents itself, it is certainly most wise to suffer things to remain as they are, and to be content with the regulations of the act of 1792, which go as far, and perhaps, in one or two particulars of no importance, even farther than the Constitutional warrants.

To show the extreme impropriety of adopting this bill, I will, for argument's sake, suppose that there might be some irregularities in the votes of electors, or even in the conduct of the executive of a State on this subject; and ask whether, even under these circumstances, it would not be safer, and less injurious to the interests of the people, that these few irregular votes, if transmitted and certified by an executive, should be received and counted, than that a new and unknown power like this should be created, under whose control not a few, but every vote that is given, must be reviewed, and received or rejected as they decree.

If the bill is not passed, we are to depend, as we have hitherto done, on the attachment of the States, and the good sense and integrity of their executives. We have, particularly on the executive of a State, the strong hold of public opinion. He will recollect that his character is at stake, and that if he suffers party views or private interest or resentment to govern his conduct, that he stands alone, and is individually responsible; that so far as respects his agency in the authentication of the election of the electors, he has no body of men under the cover of whose advice he can shield himself; but that in case of misbehavior, he must alone meet the public censure; that to deserve the confidence of his country, he ought never to submit to temporary expedients, or court the fleeting breath of popular applause; he must recollect what are his constitutional duties, and to those, and those only, he must conform; that this has always been the conduct of the executives of the States, and under that conduct we have been safe; that the Constitution makes this dependence on the States necessary, and as we have never yet been disappointed, we are to hope we never shall. But, surely, its friends never could have considered the extent and danger of giving to this committee, or even to Congress, the right to decide on double returns, or they must immediately have seen the extreme impropriety of attempting it. It is, in short, nothing less than holding out, to the minority in all the States, a temptation to dispute every election, and to always bring forward double returns. In every State where the election is strongly contested, there will of course be a minority. It will be easily known by the measures of Congress to which candidate the majority of that body inclines, and whose friends will compose the committee that are to be thus packed and selected. If a minority in a particular State find that the candidate they have unsuccessfully supported is the favorite one with the majority of Congress or their committee, they will easily discover the means of raising objections to the validity of the returns of the electors insist that they themselves are elected, proceed to the length of meeting and voting, and transmit to Congress a double return.

It will not be difficult for them to accompany their return with plausible reasons, and perhaps with such unfounded assertions, and specious although false documents, as to give to the committee some colorable reason for rejecting the return of the electors, certified by the governor, and admitting the other. Knowing the situation of the Union; how differently some States think from others on political questions; how divided Congress have been for some years on certain great and trying subjects, who that is a friend to harmony and the Constitution, and to that easy, tranquil mode of deciding these elections which has hitherto prevailed, can wish to go into a measure so calculated to produce unceasing disputes, and to throw almost every State into scenes which can never arise but from this bill?

Can there be any one who would thus hazard the reserved rights of the State legislatures and the people, and commit them to a body unknown to and unauthorized by the Constitution? Why should we suppose that the Congresses which have preceded us did not understand this subject as well as we do, or any that may succeed us?

In 1792, being the first time the exercise of this power was necessary, Congress passed a law entitled "An act relative to the election of President and Vice-President," &c., directing how the States should appoint electors for the election, when they should meet and vote; that they should sign three certificates of all the votes given; directing how the votes should be disposed of; detailing the duty of the executive of each State in certifying the lists of electors chosen; of the Secretary of State on the non-receipt of votes; that Congress shall always be in session on the second Wednesday in February in every fourth year, for the purpose of opening and counting the votes, and declaring a President elected agreeably to the Constitution; ascertaining the duties, allowances to, and penalties on persons sent with the votes; and making provision in case of the death of both President and Vice-President, or their refusal to serve, and fixing the time when their service commences.

It is very important, in deciding on the bill before you, to peruse this act with great attention; to recollect by whom, and when, and under what circumstances it was made. This law was passed in 1792, when a number of able and well-informed men, who have been since appointed to some of your most respectable situations at home and abroad, and many who have voluntarily retired with deserved and well-earned honors to private life, filled the seats of both houses of Congress, when the Executive authority was held by General Washington, for whom your whole nation at present mourns; by him who had no rival in the public affection, whose honors no man envied, and whose re-election to office as long as he pleased, he well knew, would always have been without contest—in him was placed the revision of your laws. And here, sir, let me ask, whether from a Congress thus ably formed, and from an Executive thus discerning and independent, as much knowledge of the Constitution, its precise directions, and the agency it intended Congress to have in the counting the votes and declaring the President, were not to have been expected as from the present? Were not the then Executive and a number of the members of both houses members of the convention which framed the Constitution, and if it intended to give to Congress, or to authorize them to delegate to a committee of their body, powers contemplated by this bill, could the Congress or the President of 1792 have been so extremely uninformed, and indeed ignorant of its meaning and of their duty, as not to have known it? I have heard many motions and measures which have been introduced here, termed as intended reflections on the present President, but surely no more severe reflections on the mistakes or ignorance of the Congress and President of that day can be passed than this bill. It will exhibit to the world our decided opinion that they were both ignorant of the powers of their respective departments, and both neglected to declare and assert them. An impartial public will, however, feel themselves interested on this very important occasion to recollect the circumstances under which the act of 1792 was passed, and those under which the present attempt has been made, and, upon comparing them, to examine and decide for themselves. They will find that in that year they possessed as able and independent a Congress as they can ever reasonably expect to see again; that they were then in perfect peace; no treaty had been made with Britain, or alliance dissolved with France; no depredations vexed their commerce; no improper partialities for contending nations divided their councils; respecting and alike respected by the whole family of the civilized world, their country was the residence of peace and industry, and the asylum of the oppressed of every nation. Their Constitution was universally admired; it was drawing to them a great share of wealth, the arts and information of Europe; no rival candidates contended for the chair; it was filled by him who had no opponent, and who was in the succeeding year again unanimously summoned to occupy it. Under circumstances so favorable to the impartial exercise of those legislative duties, will not our citizens be inclined to suppose that the act of 1792 was a proper one, and that there was more probability of its provisions being in a temperate and unbiased conformity to the Constitution than any act which could be passed at this time? a time when no man can say we are at peace, or that our commerce is free from depredations, or that strong contending parties do not divide our councils and citizens, as well with respect to foreign politics as to him who is hereafter to fill the Executive department; a time when it is out of the question not to suppose that each party will use every means to secure their favorite object.

If, after comparing these circumstances, our citizens should carefully peruse the express directions of the Constitution, they will have but little doubt to which act to give the preference as the proper and constitutional one. By viewing the first section of the second arti-

cle of the Constitution, it is to be seen that on the day fixed by law, which is the second Wednesday in February, the President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates, and the votes shall then be counted; the person having the greatest number of votes shall be President, if such number be a majority of the whole number of electors appointed; and if there be more than one who have such majority, and have an equal number of votes, then the House of Representatives shall immediately choose by ballot one of them for President; and if no person have a majority, then, from the five highest on the list, the said House shall in like manner choose the President. From this part of the Constitution it is evident that no power or authority is given to Congress, even when both houses are assembled in convention, further than to open and count the votes, and declare who are the President and Vice-President, if an election has been made; but that, in case no election is made by the electors, or no candidate has a majority, then the House of Representatives are (voting by States) immediately to choose, out of the five highest on the list, the President, &c.

In order that every man may understand what is here meant by the Constitution, and what is its express directions and letter as to this election, let us examine what is the literal meaning of the word immediately, and why it was introduced here. The best and most generally admired expounders of the English language give this explanation of the word immediately. They say it means "instantly"—at the present time—without delay. This is the meaning the framers of the Constitution intended to give it, and it admits of no other. The plain, express, literal direction of that instrument, therefore, is, that in case of no election, the House of Representatives, voting by States, are immediately—that is, instantly, and on the spot, without leaving the house in which they are then assembled, and without adjournment—to choose, out of the five highest candidates that have been voted for by the electors, the one who is to be the Executive.

The reasons for this immediate election are, in my judgment, unanswerable; they show very clearly the foresight and caution of the convention, and, if not strictly attended to, may be productive of the most serious calamities to our country. The reasons are these: that from our rapidly-increasing strength and commerce, from the enterprise of our citizens and our particular maritime situation as it respects the West Indies, South America, and the powers having possessions in both, it was easily to be seen that, in any conflict between these powers, our friendship or hospitality must be of the greatest importance; that they therefore would never cease to interfere in our politics, and endeavor to direct them in the manner most suitable to their own interests; that from the difficulty of influencing so large a body as Congress, and from the immense power of the President, not only over the laws, but foreign connections of the Union, that their principal effort would be always to have one of their own friends chosen; and to effect this no influence would be left untried. To prevent this, therefore, and to make the Executive independent of Congress, the election has been given exclusively to the States, under the direction of the State legislatures. If an election is made by the electors, and subject to no future control or revision on the part of Congress, then the end intended by the Constitution, of preventing the interference of foreign influence, is completely answered; for, elected as they are, and voting as the electors must, the interference of foreign gold or influence is impossible. But it was to be supposed that instances would occur where two candidates, having a majority, may be equal in their number of votes; or where no candidate had a majority of the whole of the electors appointed, and an election must take place by the national Legislature, or a branch of it; the question then arose, How was this election to be guarded to prevent, as far as human prudence could, improper domestic combinations, or, what is infinitely worse, foreign interference? It was a difficult thing, and required much deliberation. The Constitution directs that the electors shall vote by ballot, and seal up and transmit their votes to the President of the Senate. It is expected and required by the Constitution that the votes shall be secret and unknown until opened in the presence of both houses. To suffer them to be known, as heretofore has been the practice, is unconstitutional and dangerous, and goes to defeat in some measure the wise provisions of that instrument in declaring that when the House of Representatives are to elect, that it shall be done immediately. The electors, therefore, ought never to divulge their votes. The votes being thus unknown, it would be impossible in most instances to say who were elected or who had the five highest numbers on the list. The leaders of domestic intrigue and foreign emissaries would be at a loss how to direct their influence, and the election by the House of Representatives taking place immediately after the votes have been opened and counted, that body would go to the election free and uninfluenced, as they ought. And is not this, sir, safer; is it not better than that the smallest delay should take place in determining it? You are to choose, out of the five highest candidates on the list of the electors' votes. It never can be supposed that men thus deliberately chosen as electors would vote for any but the most distinguished among our citizens, or point the attention of the public, or of the House of Representatives, to obscure or improper characters. The five having the highest number of votes will all be such men as that either of them, if chosen, will be well qualified to fill the office; and it will be less dangerous to the public interest that even one who may not be the most qualified of the five should be elected than that Congress should adjourn to deliberate on it, and thus expose themselves, and the best interests of their constituents, to the secret and artful attacks that will be made on their integrity.

It is to be remembered that around the seat of Congress will be placed all the open and accredited ministers, as well as secret emissaries, of foreign powers. Here, too, will be assembled the concealed leaders of domestic faction; all the arts and intrigues that have been used in elective governments in the Old World will soon find their way among us; and if the electors do not conceal their votes until the day appointed by law for opening them, and in case of no election by them an immediate one by the House of Representatives does not take place, we shall soon have the scenes of Polish diets and elections re-acted here, and in not many years the fate of Poland may be that of United America.

Wisely foreseeing this, the Constitution expressly orders that the electors shall vote by ballot; and we all know that to vote by ballot is to vote secretly; that the votes shall be sealed up, and not opened until the day appointed by law; and that, if no election has been made by the electors, an immediate one shall take place by the House of Representatives; that so far from appointing committees to receive memorials or petitions respecting the election, or decide upon it, or so far from having any right to delegate an authority on this subject, that Congress shall not themselves, even when in convention, have the smallest power to decide on a single vote; that they shall not have authority to adjourn for one moment, but shall instantly and on the spot, in case of no election by the electors, proceed to the choice of a President, and not separate until it is determined.

I have intentionally gone into repetitions on this subject, in order to impress on the House the full meaning and intent of the word immediately; and to show how utterly unconstitutional it would be for Congress, either acting in their separate chambers or in convention, to attempt to assume to themselves the power to reject a single vote; and how inadmissible must be the idea that they could delegate it to a small packed committee, chosen by the prevailing majorities in both houses, and sitting with closed doors, authorized irrevocably to decree who shall be proclaimed President; a committee not even to be appointed by lot, as was proposed, in imitation of the election committee of Great Britain, a measure which might have had the appearance of giving to the friends of all the candidates some chance of being on it; not limited, as was afterwards moved, in imitation of that part of the Constitution which respects the making of treaties, to the number of two-thirds being necessary for every decision; but to a committee chosen by the majorities of both houses just as their own political opinions and prejudices shall prompt.

Extraordinary and unconstitutional as this mode of choosing a committee must appear, and new and unknown as are the powers intended to be given to it, perhaps no part of the bill strikes us with more astonishment than that the deliberations on all these great and important questions are to be in secret, and that the committee are to sit with closed doors. We have hitherto been taught to believe that only on executive business or communications deemed by the executive of either branch to be of a secret nature, that our citizens were to be denied the right of being present if they please; but that on all legislative subjects, most particularly on all questions respecting elections, the deliberations of the body who are to have power finally to decide must, from the nature of our Government, be open and uncovered.

I have heard that at a time when upon all other questions the doors of the Senate were shut, yet that when the right of a Senator to keep his seat was discussed, they were ordered to be thrown open. If, then, on a subject in which the rights of a single State legislature were investigated, you deemed it proper the debates and decisions should be in public, how much more important is it that every eye should be entitled to inspect the conduct and every ear to listen to the decisions of a body on whose decree, without appeal, are to depend the rights of every legislature in the Union? Can it be supposed that this extraordinary measure will meet the public approbation? Can we be ignorant of the jealous temper of our citizens, their general information, and their persevering and laudable endeavors to be acquainted with our measures? Do we not suppose that the State legislatures will feel particularly alive on this subject, and that they who, by their perseverance, have formerly unbarred the doors of the Senate, and opened your legislative deliberations to the public view, will scarcely suppose that an investigation, so much more important than any legislative act, should be veiled from a jealous inspection? Will they not remember that in all contested elections of members of either house the debates are in public; and by concealing these will it not be a reason with them to believe you doubt your right to act at all? If upon elections in a State legislature, or the national one, petitioners have a right to be heard openly and by counsel, ought not the same right to exist in an election where all the legislatures and all the people are concerned? It is no answer or no reason for sitting with closed doors, to say that the testimony is to be entered in writing on the journals of the committee, and the members are to enter their reasons and sign them for rejecting a vote. It is not to know the result of their deliberations or what laws they pass that creates the necessity for deliberative bodies in free countries sitting with open doors; it is that the public eye may be constantly upon them; that all their movements may be seen, and all opinions they give on public questions or in debate carefully attended to. When a single member in the House of Representatives may represent the interests of above thirty thousand citizens, and in the Senate upwards of hundreds of thousands, or where a committee of thirteen are to decide on the election of the officer who is to preside over upwards of five millions of people, most surely every opinion and every motion of each member should be strictly scrutinized. If ever

there could be good reasons for opening the deliberations of any assembly of men to the public view, they must apply with redoubled force to this; if ever the opinions or steadiness or integrity of a body should be vigilantly attended to, it must be of one who are to possess full and irrevocable power to reject or receive the votes of the electors as they please, and finally to decide. It is a power too important to be exercised in the dark; it is contrary to what ought to be the practice of every government, whose pride it should be to invite the investigation of their constituents, and instead of retiring from the public eye to wish "that there was a window in its bosom."

It is among the precepts of our religion that we should continually pray not to be led into temptation; to avoid being tempted to do improper things, would be an excellent rule with public bodies, as well as with individuals; many private crimes would be prevented, and many indiscreet and unconstitutional public acts not even thought of. Self interest or revenge are sometimes so powerful incentives that temptations to pursue the one or gratify the other are frequently not to be resisted. To no public body has ever a stronger temptation been held out than this bill offers to the House of Representatives. If the election by the electors can be destroyed by any means, the Constitution gives to that House the election of the President; if, therefore, their favorite candidate has not the majority of votes, but come so near that the rejecting a few of the rival's votes will prevent an election and bring it to their House, how easy is it for them to elect six members whose opinions they have previously known, and that Senator out of the three nominated by the Senate whom they can most depend upon as fitted for their purpose, and with these to destroy the election, and assume to themselves the power of deciding who is to be your supreme Executive? Considering the influence and authority of this officer, how much he will have it in his power to reward such tried friends as these, friends who have proved themselves so valuable to him as to have set aside the election of his opponent, who ought to have been the successful candidate, and placed himself in the chair, I ask, if it is not a temptation too great to offer to any single body like the House of Representatives? and if the Constitution, by the most sacred construction, had ever permitted or intended such an event, whether it would have deserved the eucumiums it has hitherto received? whether, instead of having a really independent Executive, chosen under the direction of the State legislatures, in a manner to prevent the influence of foreign gold or domestic faction, whose election, in order that he may be firm in the exercise of his revisionary power, and honest in the disposition of the public honors, was not to be subject to the control or interference of Congress; one who could be really called the man of the people, and on whom they could depend—whether, instead of having an officer like this, you would not have a fettered, dependent creature of the legislature, the production of their little packed committee, a thing with a chain on his pen, and a curb in his mouth, that could neither write, speak, nor even sign his name, but at the will of his creator? and whether this thing, when presented, however he might be called and obeyed, would deserve to be considered such a President of the United States as the Constitution intended?

I now come to a part of the bill on which, should it become a law, it appears to me that insuperable difficulties would arise, and this is the section which respects testimony. By the thirteenth section it is said that persons petitioning against the votes given by any of the electors of President or Vice-President of the United States, and persons desirous of supporting such contested votes, may respectively obtain testimony in the same manner and under the same rules and regulations which are provided by the act entitled "An act to prescribe the mode of taking evidence in cases of contested elections for members of the House of Representatives of the United States, and to compel the attendance of witnesses." And the rules, regulations, and penalties of the said act are and shall be extended to cases arising under this act, as fully as if the same were herein fully recited and enacted.

By the act to which this alludes, any judge of the courts of the United States or of a State, or, if they cannot be conveniently obtained, two justices of the peace, are, on application of the parties contesting elections, to issue a warrant or summons to witnesses, to attend at some convenient time and place; if they are not at their usual place of residence, service of a copy is sufficient; and for non-attendance the fine is only \$20. The party whose election is opposed is to be served with notice of this intended opposition, and of the time and place when these witnesses are to be examined. If it is said he was not at home, proof of a copy of the notification being left is sufficient, and the judge or justices are to proceed *ex parte* to take the testimony. It does not appear by the most attentive perusal of the act that the officers or persons who are to serve the notice are to depend on the judge or justices or known public officers, but may be any persons the party opposing the election may choose; they may be some of his own particular friends or dependents, or persons he can direct as he pleases.

In examining this act, we must immediately perceive that it is extremely defective, even as it respects the election of members of the House of Representatives; but that should it ever be relied upon in the decision of the election of a President of the United States, and the choice of this important officer, this intended man of the people, was to depend upon the testimony which, under the cover of this act, fraud or force or bribery might produce, the evils to this country would be monstrous indeed.

By this act we are prevented from the *viva voce* examination of witnesses before Congress or the committee; that examination which on the trial of the meanest culprit and for the

smallest offense your just and equitable laws render indispensable; that mode which allow you to look a witness steadily in the face, to view in it the calmness of conscious innocence or the agitation of falsehood and the fear of detection; in the presence of an anxious and inquiring public, to probe his statements to the bottom, and if they are false to confront him with the truth. How far superior, sir, is this to the regulations of the act, where examinations are to be taken by commission, in a manner that must forever open a door for the grossest impositions? If a judge of some superior or inferior court is not to be conveniently found—and in the interior and frontier parts of a number of the States this will frequently be the case—the whole management of this business is to depend upon two justices of the peace, who are to issue the warrant or summons, and examine and reduce the testimony to writing and transmit it to the seat of Government. I trust I shall be believed when I say that few men have, indeed, that no man has, a higher respect or affection for the people of the United States than I have; that I believe them to be the most immaculate and easily governed, and at the same time the best intentioned people in the world. I cannot, therefore, be suspected of the most distant reflection in supposing that in some of the States, where objections may be made to the elections or qualifications of electors, and it may by this bill be necessary to take testimony, that some judge or chancellor or justice of the peace may be found who may not be men of good character or men of sufficient knowledge or technical skill to be intrusted with the taking of the testimony or the cross-examination of witnesses on whose assertions may depend so important an election. Recollecting that there are some thousands of judges, chancellors, and justices of the peace resident in so extensive and populous a country as the United States, it would be wonderful, indeed, if some of them were not men of letters or not sufficiently informed to manage so difficult and delicate an examination as this is with sufficient acuteness and ability, but if we extend the idea and suppose that amidst so numerous a body of men it is possible some of them may be tampered with and made subservient to the purposes of party, to reduce testimony to writing in a mangled or partial manner, to omit or add, as they may be tempted, the alarming consequences that might flow from their misconduct scarcely need to be mentioned. They must strike the most superficial observer. How easy, too, is it under this act for the contesting party to employ dependents of his own, who may so manage the transmission or delivery of the notices as that the elector or person whose qualifications or election is contested may not receive them at all, or receive them so late as to make his appearance in time before the justices impossible! In short, if we view the difficulties that must attend the attempt to obtain testimony on this subject that can be at all depended upon, the door that it will open to bribery and perjury and fraud of every description, it must at once appear that the Constitution could never have contemplated giving Congress any authority on the subject. They knew it was impossible, from the great distance of some of the States, that *viva voce* examinations could take place before that body; that, on this occasion, all others were inadmissible. They therefore determined that the inquiry into the election and qualifications of the electors, and the constitutionality of their votes, should be given to and rest exclusively with the State legislatures, and that the certificate of the executive of a State of the electors appointed, and the votes of such electors regularly transmitted, must be received and counted. If this was not to be the case, and the bill before you was to become law, as you have now determined that the seventh section should be struck out, and that the committee shall have power finally to decide without restrictions, I wish to be informed where are the committee to stop their inquiries. In States where the electors are chosen by a general vote or by districts, and where thousands of voters may ballot for a candidate, are the committee to examine into the return of every elector and into the qualifications of every vote? Or, in others, where the electors are chosen by the legislature, are the committee to inquire into the legality of the return of every member of a State legislature? Or how is it possible for this committee, or for Congress itself, either to have the time or means to make these inquiries, so as to be able to determine with exactness or with justice to the parties?

But let us suppose that this committee, or even Congress itself, are determined to exercise this power, and should receive memorials and petitions and collect testimony, and should be of opinion that one or more electors of a State have not been duly elected, or are not constitutionally qualified, how are Congress then to proceed to find how these unduly or disqualified electors voted, particularly if they should belong to a State having a number of electors? As the Constitution directs they are to vote by ballot, the votes of the election ought to be secret. You have no right to require from an elector how he voted, nor will you be able to know for whom he did vote, particularly if, in the return from that State, different candidates have been voted for. In this dilemma, I ask, what is to be done? You cannot discover for whom this disqualified or improperly returned elector voted; and you would not certainly, in a State having sixteen or twenty-one votes, reject the whole because one or two illegal votes have been supposed to be given.

From the most attentive consideration of this part of the subject, I believe no satisfactory answer can ever be given to the question I ask; that the objection I have stated can never be removed; that if there was no other good reason for supposing the Constitution did not intend to give to Congress any control or examination into the election, this of itself is sufficient, and proves the wisdom of that instrument's vesting it exclusively in the State legislatures.

Another serious objection to this bill, or to the exercise of this power, either by Congress or a committee, is that the executives of the States and the State legislatures are equally bound with Congress, by oath, "to support the Constitution;" it is an oath they all take at the commencement of each new legislature. If therefore a number of the legislatures of the most important States in the Union should be of opinion with me that this is a right exclusively vested in them by the Constitution, which they have solemnly sworn to preserve, and that consistently with their oaths they cannot quietly acquiesce in a diminution of it, or suffer any invasion by a body having no constitutional authority to interfere, might not such sentiments, firmly expressed and adhered to, unnecessarily give rise to a conflict of opinions, at least, that had better always be avoided? We know the force of religious opinions in this country, and how tenaciously oaths are in general adhered to; and surely nothing but some strong and pressing necessity could ever excuse, if anything can excuse, an interference on so delicate a subject. And where, sir, is this necessity at present? Have not the States, and their legislatures and executives, always punctually and faithfully executed every duty the Constitution required of them? Have you any documents before you to prove some of them mean to misbehave, or any proofs to justify your adopting a measure of this kind? Are the opinions of individuals, or, perhaps, unfounded anonymous publications, to precipitate you into differences with the States, at a time when harmony is so essential to our general welfare? Do you recollect the contests that are now prevailing in the Old World on the subject of government and its principles, and how important it is to us to avoid a clashing of opinions between Congress and the States on the subject of their reserved rights at a time when not only this but every constitutional principle should be touched with the greatest delicacy? We should recollect that it is also highly necessary at this time to impress our citizens with the most favorable opinions of the integrity of the Government, particularly as it respects the election of their President. They now know that chosen by electors, elected under the exclusive direction of the State legislatures, within only a short time of the election, and voting on one day throughout the Union, it is impossible for foreign or domestic gold, or factions, to influence the election. As it stands now, corruption must ever keep at a distance. It can never assail your electors or sully the purity of their choice. Give, however, the power of deciding on their votes, and of rejecting or receiving them, as they please, to thirteen men, all of the same political description, all wishing the same men, sitting with closed doors, and whose deliberations are removed from the public eye, and you will find it difficult to avoid just suspicion. Your jealous citizens will remember that secrecy always accompanies corruption, and that even if this committee were to act in the most honorable manner, yet still that the friends of the candidate whose votes have been refused, if such refusal cost him his election, will never cease to suspect that all has not been fair, and that some improper reason had influenced the decision. I could urge a variety of other objections against this bill; but I am afraid I have already too long trespassed on your patience. I will, therefore, here conclude my remarks with entreating the House not to destroy the beautiful harmony and safety which the Constitution at present insures, both to the States and the General Government; a safety which must depend on a strict adherence to its principles, and to the judicious distribution of its authorities; that while the States are wisely prohibited from interfering with those really national powers which can alone be safely exercised by the General Government, for the purposes of national defense and protection, that Government is, in its turn, checked from overstepping the boundaries of the Constitution by the reserved powers to the States and the people, and by their exclusive rights of election, as I have fully stated to you. Instead of injuring, let it be our care to preserve unimpaired this valuable system. I should be sorry that any part of the Government should be chargeable with a wish to violate it; but feeling, as we must always do, a particular affection for that branch of it to which we belong, I should be extremely sorry indeed that this bill should pass the Senate.

Let us remember that the election is intended by the Constitution once in every four years as an appeal to the people for their opinions respecting the preceding Administration. If the conduct of the Executive has been wise, disinterested, and impartial, there can be no doubt that the good sense and virtue of our citizens will continue him in office, or, if he wishes to decline, elect a successor of similar principles. On the contrary, if he has not proved himself able and judicious, and the measures of his Administration do not accord with the public sentiment, they will have an opportunity, mildly and gently, through the force of the elective principle, to remove him, and place in his stead some man of different political conduct and opinions. This appeal, however, can never be fairly and independently made to the people, if Congress are to have the smallest control or revision of the election, because the majority of them must always be intimately connected with the measures of administration. The President can never proceed without the support of Congress; their approbation must sanction all the laws and all the supplies which his views have occasioned; and the people, in expressing by the election their sentiments of the conduct of the Executive, must at the same time necessarily give an opinion on that of the legislature. This is another reason for rejecting the bill; and as it appears, since the seventh section has been struck out, several gentlemen have altered their opinions, I am not without hopes, when the question is taken, we shall find ourselves in a majority, that it will not pass, and that the exclusive rights of the State legislatures will be preserved inviolate.

REPORT OF HON. GEORGE McDUFFIE, OF SOUTH CAROLINA, ON PROPOSED AMENDMENTS TO THE CONSTITUTION.

IN THE HOUSE OF REPRESENTATIVES, *December 5, 1823.*

On motion of Mr. McDuffie, of South Carolina, it was—

Resolved, That a select committee be appointed to inquire into the expediency of recommending to the several States the propriety of amending the Constitution of the United States in such manner that the mode of electing members of the House of Representatives in Congress may be uniform throughout the United States; also, that the mode of choosing electors for President and Vice-President of the United States may be, in like manner, uniform; and also that the election of the said officers may in no event devolve upon the House of Representatives.

Messrs. McDuffie, Alexander Smyth, Reed, Storrs, Buchanan, Wickliffe, and Cary were appointed a committee pursuant to the above resolution.

IN THE HOUSE OF REPRESENTATIVES, *December 22, 1823.*

Mr. McDuffie, from the committee appointed "to inquire into the expediency of recommending to the several States the propriety of amending the Constitution of the United States in such manner that the mode of electing the members of the House of Representatives in Congress may be uniform throughout the United States; also, that the mode of choosing electors of President and Vice-President of the United States may be, in like manner, uniform; and also that the election of the said officers may in no event devolve upon the House of Representatives," made a detailed report, accompanied by a joint resolution, proposing an amendment to the Constitution of the United States in respect to the election of a President and Vice-President of the United States; which resolution was read twice and committed to a Committee of the Whole House on the state of the Union. The report and resolution are as follows:

The committee, profoundly impressed with the importance of the propositions embraced in the resolution under which they have been appointed, have felt a corresponding sense of the magnitude and difficulty of the duty imposed upon them by the order of the House. To devise a plan for the election of members of the House of Representatives, and of the President and Vice-President of the United States, which will correct existing and obviate impending evils, and, at the same time, harmonize the conflicting views of States, variously situated, and variously affected by it, has been the anxious desire and laborious effort of the committee. How far they have been successful in accomplishing these great objects, they submit it to the indulgence and liberality of the House to determine.

The Constitution of the United States provides, that "the times, places, and manner of holding elections for Representatives shall be prescribed, in each State, by the legislature thereof; that Congress may, at any time, by law, make or alter such regulations." It also provides that "each State shall appoint, in such manner as the legislature thereof may direct, a number of electors equal to the whole number of Senators and Representatives to which the State may be entitled in Congress."

The plan submitted by the committee proposes that each State shall be divided into as many districts as will equal the number of Representatives to which the State may be entitled in Congress, and that each of the said districts shall elect one Representative. It also proposes that each of the said districts shall choose one elector of President and Vice-President of the United States; and that the electors thus appointed in each State shall have the two additional electors to which the State is entitled.

From this collated view of the existing provisions and proposed amendments of the Constitution, it will be seen that a fundamental change is contemplated in reference to the mode of choosing members of the House of Representatives and electors of President and Vice-President of the United States. It is a change, however, which counts among its strongest claims to our favorable consideration its absolute efficacy in preventing changes. For it will fix upon uniform principles those creative operations of popular sovereignty which are now liable to be controlled by the diversified and clashing expedients of twenty-four States, mutually independent. Indeed, an attentive consideration of the nature and functions of a written constitution will lead us to the extraordinary but manifest conclusion that, in relation to the mode of choosing the popular branch of the national Legislature and of the Chief Executive Magistrate of the Republic, we have no constitutional provision at all. A fixedness and permanence, not liable to be disturbed by ordinary acts of legislation, are essentially involved in the elementary notion of a constitution. Accordingly, in all governments having any just pretensions to civilization or freedom, it has been a primary object to secure those fundamental canons which give organization and impulse to the political system, against any changes proceeding from an authority less solemn and weighty than the source of sovereignty itself. To secure liberty against the violent tyranny of successive and temporary factions, and also against the more systematic encroach-

ments of ambition, this extraordinary stability of the law, which constitutes the government, has been found, by universal experience, to be an indispensable safeguard. Yet, in direct violation of this primary and essential principle of regulated freedom, the very foundations of the two most important branches of this Government are permitted to fluctuate with the mutable counsels of twenty-four separate legislatures. The committee, therefore, believe that the plan proposed is recommended not less by the consideration that it permanently and uniformly fixes the rule which it introduces, than by the intrinsic superiority of that rule to any other that has been adopted amidst the changes incident to the existing state of constitutional laxity.

Under the existing system, if system that may be called which is without system, the inquiry in the respective States is not which is intrinsically the best mode of choosing Representatives in Congress and electors of President and Vice-President of the United States, but what is the best defensive expedient to counteract the regulations of other States and secure the utmost relative weight in the affairs of the Union. The party which happens to have the ascendancy will thus be furnished with pretexts, at least plausible and imposing, for the adoption of measures calculated to deprive the minority of their just rights, and tending to produce, as they invariably have produced, that acrimonious political excitement which inevitably results from injustice and oppression, however disguised or palliated by motives of public expediency. To prevent majorities from exercising this sort of oppression is one of the primary objects of a written constitution.

With these general preliminary views, the committee will proceed to the separate consideration of the amendments embraced in the plan submitted to the House.

It has been seen that the "times, places, and manner" of electing the members of this House are now liable to be prescribed by the legislatures of the several States, subject to the controlling and superseding power of Congress.

In addition to the remarks already made on the political solecism of placing it in the power of every State government virtually to change the Constitution of the Union, the committee feel bound to examine briefly the nature and tendency of the power thus vested in Congress.

If it should happen to this as it has happened to all other free countries, that the administration of the Republic should fall into the hands of a faction of men who, having acquired power by corrupt combinations, would be disposed to retain it in opposition to the will of the people, and to exert it in opposition to their interests, the power in question would become exceedingly dangerous. It is in such periods that the barriers of the Constitution are most essential, because it is in such periods that those from whose reluctant grasp the scepter of dominion is about to be arrested by an indignant people are exposed to the strongest human temptation to perpetuate their authority by every desperate expedient not absolutely prohibited.

And does not the Constitution almost literally place in their hands precisely such an expedient in the power of regulating the elections of the members of this body? It is susceptible of demonstration that the elections might be so arranged by a party in power that a small minority of the people would elect a majority of the national representatives. The mode of operation would be various, according to varying circumstances. Sometimes the object would be accomplished by changing the district into the general-ticket system; sometimes by an artificial arrangement of districts; and sometimes by a skillful combination of both.

As nothing is too desperate for a faction struggling for existence, let us suppose that they should prescribe, as they would have the unquestionable power to prescribe, that in all those States where a majority of the people were favorable to their purposes the representatives should be elected by a general ticket, thus suppressing the voice of the minority; and that all the States opposed to their domination should be divided into districts in such manner that the minority of the people should elect a majority of representatives. As examples of such high-handed proceedings are already to be found in the history of several of the State governments, the supposition that the General Government, with more powerful inducements to mislead it, will, at some future period, pursue a similar course, cannot be considered extravagant or improbable.

The committee, therefore, feel the deepest conviction that the power now vested in Congress of controlling the election of its own members is utterly inconsistent with every just conception of constitutional liberty, and ought no longer to exist.

Having thus attempted to show the necessity of a plan of such permanence as equally to exclude the disturbing influence, both of the General and State governments, the committee propose to examine the comparative advantages of the general ticket and the district systems of electing the Representatives in Congress.

It will scarcely be denied that a just regard for the relative weight of each State in the affairs of the Union, requires that one or the other of the systems should prevail in all the States. Upon any question of national policy, in relation to which the interests or wishes of two States should stand mutually opposed, it would be obviously unjust that the one should have, by means of a general ticket, an undivided vote in this House; while the other, electing by districts, might be almost neutralized by her divis-

ions. It remains, therefore, only that we inquire which of the two systems is intrinsically the best.

In favor of the general ticket system, it has been urged, with considerable plausibility, that, by extending the sphere of selection, the number of competitors, of competent qualifications, will be proportionally increased, and that the influence of demagogues, who can only operate effectually in a small sphere, will be greatly diminished.

It cannot be denied that it sometimes happens that a particular district might select a representative residing out of its limits, better qualified than any residing within them; but, it is to be remarked, that there is nothing in the system proposed which will prevent a district from electing any resident citizen of the State, without regard to the particular place of his residence. It is true that each district will generally elect one of its own citizens, from obvious considerations justifying the preference. But this, so far from being an objection, would tend to produce a distribution of the talent of the State, in every view desirable; for it has been found that talents, like everything else, will naturally seek the market which promises the most appropriate reward.

That part of the argument under consideration which assumes that the district system is calculated to give to the arts of demagogues an undue ascendancy, is worthy of a more serious consideration. It will be admitted that this system enables the constituent to become better acquainted with his representative than is practicable under the other. Can it be maintained, then, that, in proportion as we increase the opportunities of the people to obtain a knowledge of the character and qualifications of the candidates, we diminish the chances of a judicious selection? Is it true that, in a fair competition before the people, art and hypocrisy will prevail over talent, integrity, and independence? On the contrary, it is confidently believed that truth will ultimately prevail in all competitions before the people, if maintained with an ability and firmness equal to that by which error is supported. This proposition is the basis upon which only a representative democracy can be sustained. If it be not true, it then becomes expedient to devise some scheme which will virtually take from the people the elective power. And the committee are of opinion that the general ticket system is precisely of this description.

In a State of any considerable extent, almost every candidate must, in the nature of things, be unknown to the great body of the people. They, of necessity, vote by faith, and not by knowledge; and the few distinguished politicians who are selected to concentrate the popular opinion, acquire a control over it little short of the power of absolute dictation. Universal experience teaches us that few men are to be found of sufficient firmness and purity to resist the temptation to abuse such power. Cabals and factious combinations, stimulated by selfish views of aggrandizement, are the inevitable consequences.

But it is not to be expected that this sort of dominion will be quietly submitted to by those politicians who have no participation in it. A contest for the dictatorship ensues, agitating the community and destroying the harmony of society, by mere personal and family feuds, when there is no difference of principle between the contending parties.

Nor would the evil effects of this state of things be confined to the State. As the political course of opposing parties is very much determined by feelings of mutual antipathy, it would frequently happen that when one party supported the existing administration of the General Government, the other would stand opposed to it.

Under these circumstances every revolution produced by the alternate successes and defeats of these rival parties might increase or diminish the supporters of the General Government by the whole number of the Representatives of the State in Congress.

Besides the mutability which would be thus communicated to the national councils, the General Government, feeling its power to be identified with the fate of a State party, would be tempted to interfere in the political struggles of that State. And when we consider the effect which might be produced by the judicious distribution of patronage amongst the leaders in such contests, we cannot doubt that the facility and the means of such interference are equal to the temptation.

It may be justly said of the plan of voting by a general ticket, that it is not consistent with the true theory of a popular representation. The popular branch of the national legislature should exhibit a faithful image of the people. When, for example, a State is divided in its interests and opinions, when some districts are agricultural, some manufacturing, and some commercial, and, if you will, when some are republican and some federal, each of those districts of people should have a fair representation in Congress. Because one interest or one party happened to be predominant in a State, it is no adequate reason that the rest should be disfranchised and have no voice in the national councils. This, indeed, would not be a representation of the people, but of the States, giving to this House a federal, instead of a popular origin and character.

A little reflection will convince us that this is not a mere nominal distinction. Upon all the great political questions by which this, like all other free governments, must be often divided into parties, the general-ticket system, by entirely suppressing the voice of the minority, would cause the representation from each State, in Congress,

to be unanimous on one side or the other. Thus would States be arrayed against States on this floor, stimulated by pride, heated by collisions, and estranged by feelings of rivalry, and throwing into the discussions here all the violence of local feelings and local prejudices. By the inevitable tendency of this state of things to produce a geographical formation of parties, we need not the prophetic spirit of Washington to warn us that the harmony of the Union would be destroyed and perhaps its existence endangered.

Everything that tends to strengthen the peculiar and exclusive feelings of State pride and sectional prejudice inevitably weakens the bonds of the Union. We are therefore urged, by all the considerations that attach us to this great palladium of our security and happiness, to adopt such an organization as will break those large masses of political power, whose collisions can never fail to shake our system to its deepest foundation.

It ought never to be forgotten that the citizens of this republic, though subdivided into States for certain essential purposes, are one people in all that relates to the General Government. Born to a common inheritance purchased by the toils, the sacrifices, and the blood of their common ancestors, they should be united not less by the ties of common sympathy and kindred feeling than by those of common interest. With a view to give strength and durability to these essential bonds of union, it is of the utmost consequence that the local minorities in the several States and various geographical divisions of our extensive country should have a fair and full representation in Congress. In periods of deep political excitement nothing is better calculated to allay sectional animosities and subdue the angry spirit of faction than the mediatorial influence of such representatives.

The committee propose now to consider more particularly that part of the resolution committed to their charge, which makes it their duty to inquire into the expediency of establishing a uniform mode of appointing the electors of President and Vice-President of the United States.

Three modes now prevail in the different States. In some the appointment is made by the legislature; in some by the people, voting a general ticket; and in some by the people, voting by districts. By giving each of these modes a separate consideration we shall be the better enabled to ascertain the relative merits of that which is submitted to the House for its adoption.

Pre-existing bodies, sufficiently small and permanent to be exposed to the tampering and seductive arts of intrigue and corruption, ought to have no agency in the election of a President of the United States, upon any ground short of absolute necessity. State legislatures are bodies of this description, and there is no pretense of a necessity for interposing them between the people and the electoral college. According to the true conception of our political system, the people exercise the elective power. When, from considerations of convenience, agents are appointed for this special purpose, it is not, as in the case of a legislative trust, to exercise their own judgments, but simply to execute the popular will. The assumption that the legislatures would make a better choice than the people involves the admission that their choice would be different from that of the people; an admission which, if the foregoing view be correct, furnishes in itself an unanswerable objection to the interposition of such an agency. In proportion, therefore, as the number of intermediate agencies is increased, the chances are multiplied that the will of the people will be defeated in the choice of a Chief Magistrate.

The committee have no confidence in that sort of artificial and complicated machinery, through which some suppose it necessary to filtrate the popular will in order to purify and enlighten it. The stream of elective sovereignty is nowhere so pure as at its source. Every remove from this is an advance in a course inevitably ending in corruption. Indeed it is apparent that the framers of the Constitution, by ordaining that "each State shall appoint, in such manner as the legislature thereof may prescribe," the electors of President and Vice-President, intended to exclude the legislatures from making the appointment themselves.

That this is the true interpretation of the Constitution is abundantly obvious, as well from the fair import of the words of that instrument, as from the profoundest commentary ever written on it. The authors of the *Federalist*, in speaking of the election of the President, use these words: "It was desirable that the sense of the people should operate in the choice of a person to whom so important a trust was to be confided. This end will be answered by committing the right of making it, not to any pre-established body, but to men chosen by the people for the special purpose, and at the particular conjuncture."

Whatever objections may be urged against the appointment of the electors by the people, no one, it is presumed, will allege that corruption will find, in that mode of proceeding, any scope for its operation. Neither have we any just ground to apprehend that intrigue, operating by means less palpable than corruption, and appealing to motives less profligate than venality, will produce any impression upon the vote of ten millions of freemen, scattered over the vast domain, which is their favored inher-

itance. The fact that these principles are, from their very nature, incapable of acting upon multitudes, would prevent them from operating upon the people, even if we had not the higher security furnished by their virtue and patriotism.

But it is frequently objected, that the great mass of the people are not sufficiently intelligent to decide upon the qualifications of so important an officer as the Chief Magistrate of a great republic; and yet that in voting for electors, who are merely the organs of their will, they in fact determine that question. As the history of all nations, of any considerable extent, gives at least a plausible coloring to this objection, it deserves to be deliberately examined. No political principle is more firmly established by the experience of nations, than that the freedom of political institutions cannot rise higher than the intelligence of the people.

All attempts to erect free governments upon any other basis than an intelligent population, have always resulted and must ever result, in reaction and disaster.

If therefore, the committee could believe that the people of the United States are not sufficiently intelligent to perform so essential a function of popular sovereignty as the election of their Chief Magistrate, they could not resist the unwelcome conclusion, that our system of government is but a delusive hope, resting upon unsubstantial foundations, and containing within itself the principles of rapid degeneracy and certain dissolution.

Responsibility to the people, all must admit, is the only adequate security for freedom, the great conservative principle of a representative government. And what would be the value of the responsibility of a public agent to a people not capable of electing him? If therefore, it could be shown, that the people are not competent to elect the President, an argument would result, which it would be difficult to resist, in favor of those political combinations which, under various forms and pretenses, are ever ready to assume the province of dictating to the people, and which can only be regarded, when habitual and permanent, as synonymous with corruption.

Under these circumstances, we have a source of just consolation and pride in the reflection that, in all that relates to the maintenance and enjoyment of a system of practical freedom, history has left no record of a people at all to be compared to the citizens of these United States.

A very brief notice of the prominent circumstances which distinguish our social and political condition from that of the republican nations of antiquity, and of the civilized nations of modern Europe, will furnish at once the evidence and the explanation of this superiority.

No estimate of the comparative condition of this and the ancient republics can be just which does not embrace the invention of the art of printing, and the consequent establishment of a free press. These causes alone have produced a permanent revolution in the political condition of the human race. Societies of freemen have been improved and enlarged to a degree utterly unattainable without these efficient means of diffusing intelligence, and the republican system has consequently received a modification and extension which the wisdom of antiquity would have pronounced impossible. The harangues of their orators, delivered to collected multitudes, were almost the only means of political intelligence enjoyed by the people of the ancient republics. The extent of a republic, or, in other words, of a government, emanating from the people, and responsible to them, is confined by an imperious political necessity to such limits that the proceedings of the central administration may be promptly, certainly, and generally communicated to the extremes of the country.

Adverting, therefore, to the limited means of communicating intelligence possessed by the ancients, the reason is apparent why their republics were so extremely contracted. They were, of necessity, simple democracies; and, in the days of their greatest purity and splendor, the portion of the people which really governed was confined to their chief cities, because that portion alone was within the reach of the only existing sources of political intelligence.

On the contrary, the great body of the people of the United States, dispersed over an immense region, to whose soil they are attached by the strongest ties, receive daily, in the tranquillity of retirement, from books, documents, legislative discussions, and the chronicles of passing events, that knowledge of the affairs of the Republic which the Greeks and Romans received almost entirely from the occasional debates of their orators before the assemblies of the people. It is, therefore, extremely obvious that any inference unfavorable to the political capabilities of the American people, which can be drawn from the history of those republics, must be founded upon loose analogies, calculated rather to delude than to enlighten.

A comparison between the United States and the civilized nations of modern times will lead to results equally flattering.

All the great political societies of modern Europe, having a feudal origin, are constructed upon feudal principles. A permanent inequality of property, maintained by law and consecrated by usage, has naturally produced the extremes of a proud aristocracy and a degraded populace without any intermediate power sufficient to control their irregular tendencies. In such a state of things it is not difficult to conceive that

a popular election of the Chief Executive Magistrate would throw the hostile elements of society into such violent collision as to involve in anarchy and ruin all that is sacred in the institutions of the country. But all the American communities which compose the United States are essentially different, both in their origin and construction, from those of modern Europe. Our ancestors, in the full maturity of reason, with no consecrated errors to embarrass them, reared up, from its simplest elements, a system of practical freedom; and from the first settlement of the country, every successive generation has been accustomed to exercise the functions of self-government in every form and in every variety of combinations. Nor are we less favorably distinguished in the composition of our social system than in its origin.

The abolition of the laws of primogeniture has produced a general equality of property, and this, again, together with the equality of civil and political privileges, has produced a general diffusion of knowledge, of which history furnishes no example. Almost the entire mass of our population corresponds, in character and situation, with what is denominated the middle interest in England, and which is justly considered, by her most enlightened statesmen, as the soundest part of her population.

In extending the elective system in the United States, therefore, beyond all former precedents, we do nothing more than adapt our political to our social system. In fact, so widely different is our situation from that of any other nation, that it may be truly said that the people would be less liable to make an injudicious choice of a Chief Magistrate than of any other important officer of the Government. Such is the admirable distribution and subordination of political powers in our system, and such the variety of practical schools of preparation and trial through which a statesman must pass before he can aspire, with any just or reasonable expectations of success, to the highest office in the Republic, that the qualifications and pretensions of the candidates can always be determined by the wisdom of their past measures and the importance of their past services. As these are the only indications of wisdom upon which it would be safe to rely in the selection of an officer of such vast responsibility and importance, it is satisfactory to reflect that they are indications also of so palpable a kind that they cannot fail to make their just impression, both upon the intelligence and gratitude of an enlightened and patriotic people.

But another objection, of a kindred spirit with that which has been just considered, is frequently urged against the change proposed.

It is said that the appointment of electors by the people would so directly involve the canvass for the Presidency itself, as to produce a degree of popular excitement subversive of the order and peace of society. The remarks already offered, in relation to the dispersion of our population, the peculiar structure of our society, and the general diffusion of intelligence, are sufficient to show that nothing in the experience of other countries can be regarded as a just foundation for such an apprehension. But there are other views of the subject which will lead us to the conclusion that the tendency of the proposed change, upon which this object is founded, is one of its strongest recommendations.

The order of social virtues and social duties in the United States is nearly the reverse of that which existed among the Greeks and Romans. In an ordinary state of things, when no great emergency calls for patriotic sacrifices, the duty which principally engrosses the feelings and the efforts of an American citizen is to make provision for his comfortable subsistence, and to satisfy the claims of his family. Whereas, the first consideration of a Greek or Roman citizen, both in peace and in war, was the glory of his country. Our tendency, therefore, is to give too exclusive an attention to private pursuits, and sink into indifference in relation to the general concerns of the Republic; while the tendency of the Greeks and Romans was to intermeddle perpetually in public affairs to the neglect and detriment of their private concerns.

Our danger, therefore, is too much popular apathy; theirs was too much, popular excitement; and though the state of things existing here is more deeply founded in nature, and furnishes a more substantial basis for a durable and extended system of liberty, it certainly indicates the necessity of such constitutional arrangements as will rouse the attention of the people to so great a national question as the election of a chief magistrate. No stronger evidence need be offered of the existence of such a necessity than the actual state of public opinion on that subject at this moment in many parts of the Union. The people have been so long accustomed to have no practical agency in the election of a President, that the idea is not uncommon that they have nothing to do with it. As the inevitable tendency of this state of popular indifference is to increase the power and influence of political managers and unprincipled combinations, it is of the last importance that it should be corrected, if possible. The committee are of the opinion that the plan submitted will furnish the remedy.

But it yet remains that we inquire whether the people should vote by a general ticket or by districts. The committee will therefore proceed to state the considerations which have induced them to adopt the latter system. It was as evidently the intention of the framers of the Constitution as it is the dictate of sound policy that the President of the United States should be the choice of the people, and not of the States.

It is true they contemplated an infusion of the federal principle into the election in the proportion of the Senators to the Representatives in Congress, and this proportion is retained in the plan proposed by the committee.

But to extend the federal principle to the whole body of electors would be nothing less than sacrificing the rights, the interests, and the power of the people to the false and imaginary idol of State consolidation.

Assuming it as an undeniable position that a majority of the people of the United States have a right to elect the President, and that the will of such majority ought to prevail, it can be demonstrated that the system of voting by a general ticket would render this fundamental principle of our Government the sport of accidental combinations.

Six of the States, for example, if they give a unanimous vote, can elect the President. But if they vote by a general ticket, the candidate who obtains a bare majority of the popular vote receives the unanimous electoral vote of the State; so that, assuming the population of the United States to be eight millions, a little more than two millions of the people might elect the President.

Let us again suppose that there are two States, one containing nine hundred thousand people and entitled to thirty electoral votes, and the other containing eight hundred thousand people, and entitled to twenty-six electoral votes. Let us further suppose that there are two candidates for the Presidency, of whom one is supported by five hundred thousand of the people of the first supposed State, and the other by the remaining four hundred thousand and the entire eight hundred thousand of the other State.

Under these circumstances, the candidate who obtains the support of only five hundred thousand of the people could receive thirty electoral votes, while twelve hundred thousand people could give the opposing candidate only twenty-six. According to this system of false equations, a large minority of the people is precisely equal to no minority at all.

By thus entirely excluding the State minorities from the calculation in making up the general aggregate, the people are literally immolated by hundreds of thousands at the shrine of an artificial and delusive system, which, by making a majority equal to the whole in each State, gives a minority an equal chance for the ascendancy in the Union.

The true popular principle, in the opinion of the committee, is that which prevails in all other popular elections throughout the United States. In the election, for example, of the governor of a State by the people, a candidate does not count the unanimous vote of every county where he happens to obtain a majority, but the respective majorities of the several candidates are added to their respective minorities, and the aggregates thus produced are taken as the true expression of the popular will. If, then, in all that relates to the "common defense and general welfare," the people of the United States are really to be regarded as one people, if all the citizens of the Republic, whether their lot happens to be cast on the one side or the other of an imaginary line, are equally entitled to their vote and their voice in the common concerns and common councils of the Union, if it be wise to exclude from those councils the peculiar and exclusive feelings of States, and if the man who is to preside over the common destinies of all should have peculiar obligations to discharge and peculiar feelings to indulge toward none of the States, we are under the most solemn obligations to reject a plan for electing the President which would array States against States in ambitious conflict for the mastery, and equally sacrifice the inalienable rights of the people and the general harmony of the Union.

But there is another objection to the system of voting by a general ticket which the committee consider unanswerable. It is a practical proposition, conclusively established by the experience of all the States where the experiment has been made, that this system tends by an inevitable necessity to transfer into the hands of a few the power of controlling the entire suffrage of the State. In a State entitled to thirty electors, and composed perhaps of fifty counties, it must be apparent that almost every county would vote for an entire ticket of its own, and that the popular will would be thus exposed to such distraction as completely to endanger its success without some means of giving it concentration. And as the power of the individual selected for this purpose must be co-extensive with the wills which it would be their objects to concentrate, it would follow that they would virtually decide which of the presidential candidates should receive the whole electoral vote of the State. At the first commencement of such a system, when the persons clothed with the authority of uniting the popular will were really its representatives, no great evil would be experienced.

But the slightest attention to the history of ambition, the tendency of power, or the lessons of our own experience will convince us that such combinations change in the natural course of things from temporary expedients to permanent institutions, and that from being the mere organs of the will of the people they assume, under pretexts which ambition is seldom at a loss to devise, the power of dictating to the people. In making these general remarks, the committee feel conscious that they are rather

recording the history of the times in which they live than their own speculations. And it is upon this high authority that they predicate the opinion that if the plan of voting by a general ticket were established, a central power would spring up in almost every State, consisting of the ruling politicians of the day, who would be bound to the people by no ties of regular responsibility, and be in every respect more liable to cabal, intrigue, and corruption than the legislature itself. And when we reflect that the entire electoral vote of a State, upon which the presidential election itself might turn, would frequently depend upon the integrity of a few men, perhaps of a single individual, it is difficult to conceive a state of things in which there would be stronger inducements or greater facilities for intrigue and corruption.

By dividing the States into districts all these evils would be avoided; the will of the people would be fairly expressed; no political combinations would be necessary or practicable. Every district would at least have its own center of operations, upon which corruption would be brought to bear with its inducements vastly diminished, and its consequences proportionably less to be dreaded.

The last branch of the resolution under which the committee are acting remains to be considered. They have found it impracticable absolutely to exclude the possibility of the election of President and Vice-President devolving in any event upon Congress; but they believe under the plan submitted the contingency would not happen once in a century upon which the election would devolve upon that body. They propose, in the event of no person receiving a majority of electoral votes at the first balloting, that the electors shall again meet forthwith in their respective States and vote for the two persons having the highest number of votes in the first instance.

This will almost invariably insure an election by the electors at the second balloting. Indeed, it may be fairly presumed that every candidate who is convinced he cannot be one of the two highest in the first instance will withdraw from the contest, and in this manner the probability of an election at the first balloting will be very much increased. This branch of the amendment is recommended by all the reasons which can be urged against the election of the President by the House of Representatives. And these, in the opinion of the committee, are cogent and conclusive. All history teaches us the melancholy truth that in the election of a chief magistrate of a great republic, intrigue and corruption, under the various and insidious disguises which they are capable of assuming, are the deleterious principles against which the precautions of human wisdom are least capable of providing an effectual resistance. The danger to be apprehended from these principles is in direct proportion to the temptation and the means of rendering them efficient instruments in promoting the views of ambition. And what prize can hold out more attractive temptations to the ambitious than the Presidency of the United States?

In pursuit of what object is even a virtuous mind so much exposed to the blandishing delusions of that wretched casuistry which makes the end sanctify the means? And when we advert to the immense store of patronage which would be placed for distribution in the hands of the successful aspirant, it cannot be disguised that he would have precisely those means of tampering with the members of the House of Representatives, by which the wages of wickedness might be received in the disguise of virtuous recompense, and the wretch who sold his integrity might almost delude himself into the belief that he was serving his country. It is exceedingly unpleasant to indulge the idea that the representatives of a virtuous and enlightened people could ever be swerved from any duty by selfish or sinister views, but we have the authority of more than human wisdom for saying, "Lead us not into temptation." It is, therefore, the deliberate opinion of the committee that the only effectual mode of preserving our Government from the corruptions which have undermined the liberty of so many other nations "is to confide the election of our Chief Executive Magistrate to those who are farthest removed from the influences of his patronage."

As long as the national legislature continues to have so direct an agency in the election of the President, even excluding the supposition of corrupt influence, the most injurious effects must be produced upon the character of its members and the temper of its deliberations. The legislators of the Union will be converted into partisans of the respective candidates for the Presidency. Their mutual animinations will unavoidably distract and embarrass the essential business of the country; and instead of devoting themselves exclusively to the great objects of their legislative trust, their time will be engrossed in holding consultations and projecting devices for the purpose of controlling public opinion on the presidential election, and it would but too certainly result that principles would be sacrificed to men. It may be fairly assumed that until the Constitution is amended the President of the United States will, in general, be elected virtually by Congress in one form or another. Without intending to blend the consideration of temporary questions and passing events with the general views here presented, the committee will be excused for adverting to the fact that the eventual choice of the President by the House of Representatives in a mode which makes a single member from one State equal to thirty-six from another, will always furnish an argument or a pretext for those preliminary combinations which all admit

to be evils in themselves, and only to be excused as the means of avoiding greater evils.

In this manner we are not only exposed to the contingent evil growing out of the Constitution itself, but the certain evil of combinations for the avowed purpose of avoiding it. Congress will not only have the power of choosing a President from the three persons who shall receive the largest number of electoral votes, but will have a plausible argument in favor of nominating a President before the electoral vote has furnished them with any certain indication of popular opinion to direct their choice and limit the extent of their discretion. It cannot be disguised, therefore, that the tendency of the state of things now existing under the Constitution is to convert Congress into a permanent electoral body.

Under these circumstances, the candidates for the Presidency, instead of devoting themselves to the service of the country by measures calculated to promote the welfare and secure the confidence of the people, will be tempted to devote themselves to those arts of conciliation and management by which the members of Congress may be most effectually secured in their interest. The ultimate consequence would be that our Chief Magistrate would be elected by cabals of politicians having views and interests alien from those of the people, and that the country would be governed by a succession of factions, each proscribing the members and destroying the work of the one which preceded it, and communicating to the operations of our system all the unsteadiness of a turbulent democracy, and all the tyranny of a temporary despotism. The committee, therefore, believe that the only effectual mode of rendering the Government efficient and steady in its operations, and at the same time consistent with the security of the general liberty, is to infuse more of the democratic principle into the election of the President; making him in fact, as he is in theory, the choice of the people. Having thus attempted to show, they trust not altogether without success, that the rights and interests of the people imperiously demand that the proposed amendments should be adopted, the committee will offer a few concluding remarks upon the manner in which the States will be relatively affected by it.

It may be justly doubted whether, on such a question as the present, the States, as separate communities, can have any interest different from that of the people of the States considered merely as portions of the common mass of our general population. But, as it is not to be expected that one class of States will surrender, without an equivalent, the relative power secured to them by the Constitution, the committee have endeavored to introduce into their plan such principles of compromise as will be most likely to secure a general acquiescence. The division of all the States into districts will prevent them from moving in consolidated masses, and will diminish the relative power of the large States more than that of the small States; but for this there is an ample and equitable equivalent in the diminished probability that the election of the President will come into Congress, and in the surrender by the small States of their equal power even when that contingency shall happen. This compromise is forcibly recommended by the consideration that the powers given up both by the large and the small States are powers which they ought not in justice to possess, and which are not transferred from one to another, but surrendered by both to the people.

As it is obvious that neither the large nor the small States ever will consent or, perhaps, ever ought to consent to correct the great and increasing evils of our present system without mutual equivalents similar to those provided in the plan submitted by the committee, the question for both to determine is whether they will submit to the existing evils, great as they are, by the admission of all, or magnanimously offer up, on the altar of their common country, powers which are neither consistent with the rights of the people, the purity of the Government, or the harmony of the Union.

Resolved, &c., That the following amendment to the Constitution of the United States be proposed to the legislatures of the several States, which, when ratified by three-fourths thereof, shall be valid to all intents and purposes as a part of the said Constitution:

“For the purpose of choosing a President and Vice-President of the United States, each State shall be divided by the legislature thereof into so many districts as the State shall be entitled to Representatives in Congress, and each district shall be composed of contiguous or coterminous territory, and contain as nearly as may be conveniently the number of persons for whom the State is entitled to a Representative according to the apportionment; which districts, when laid off, may not be altered until after another census shall have been taken.

“The inhabitants of each of the said districts, who shall have the qualifications requisite for electors of the most numerous branch of the State legislature, shall appoint one elector of President and Vice-President, having the same qualifications. The electors appointed shall meet in their respective States and appoint the two other electors to which the State is entitled, and also fill up vacancies, if such there shall be, from death, sickness, inability, or non-attendance of electors appointed by the people. The whole number of electors of each State shall then vote by ballot for the President and Vice-President, one of whom at least shall not be an inhabitant of the same State

with themselves. They shall name in their ballots the person voted for as President, and in distinct ballots the person voted for as Vice-President; and they shall make lists of all persons voted for as President, and of all persons voted for as Vice-President, showing the number of votes given for each, which lists they shall sign and certify, and transmit, sealed up, to the seat of the Government of the United States, directed to the President of the Senate, who, on receiving the same, shall call a joint meeting of the Senate and House of Representatives, in which he shall preside. He shall, in the presence of such joint meeting, open all the certificates, and the votes shall be counted. If any person shall have the votes of a majority of the whole number of electors appointed, he shall be the President; and if no person shall have the votes of such majority, the President of the Senate shall, by proclamation, and by notification to the executive of each State, as also to each of the electors appointed, declare the fact that no person is chosen President, and the names of the persons having the two highest numbers of votes. The electors shall thereupon meet again in their respective States, fill up vacancies in their body, if any shall have occurred from death, sickness, inability, or failure to attend, of any of the electors previously appointed, and shall then proceed to vote for one of the persons as President who at the first meeting had one of the two highest numbers of votes of all the electors. They shall make and transmit, as already prescribed, lists of the persons voted for at the second meeting, which shall be counted in like manner as the votes given at the first meeting; if, on counting the votes given by the electors of such second meeting, it shall appear that one of the persons who had one of the two highest numbers of the votes given at the first meeting has a majority of the votes of all the electors given at the second meeting, he shall be the President; and if no person has such majority, the members of the Senate and House of Representatives, in joint meeting, shall, without separating, voting individually, and not by States, choose the President in manner following: a majority of the whole number of Senators and Representatives present and voting being necessary to a choice; if there be two or more persons, each of whom have the highest number of electoral votes given at the second meeting, each one of them shall be chosen; if there be only one person having the highest number of electoral votes less than a majority, one of the persons who have one of the two highest numbers of votes shall be chosen; whenever more than two persons shall be eligible by the joint meeting and no choice shall be made on the first ballot, the number shall be reduced by dropping those who shall receive the smallest number of votes, until no more than two remain, one of whom shall be chosen; if two persons shall receive an equal number of votes, being each one moiety of the whole number given, he who had the highest number of electoral votes, given at the second meeting, shall be the President; and if they had an equal number of votes at such second meeting, he who had the highest number of electoral votes given at the first meeting shall be the President; and if they had an equal number of electoral votes given at the first meeting also, then the Senators and Representatives shall ballot until one of them is chosen.

"The person having the highest number of votes as Vice-President, given at the first meeting of the electors, shall be the Vice-President, if such number be a majority of the whole number of electors appointed; and if no person have such majority, and a President shall not have been chosen at such first meeting, the same proceedings shall be had for the choice of a Vice-President as are prescribed for the choice of a President; but if at the first meeting of the electors a President shall have been chosen and a Vice-President shall not have been chosen, then, from the persons having the two highest numbers on the list, the Senate shall choose the Vice-President; a quorum for the purpose shall consist of two-thirds of the whole number of Senators, and a majority of the number present and voting shall be necessary to a choice.

"The Congress may by law fix the day for appointing electors for President and Vice-President, and the days for giving their votes the first and second time, which days shall be the same throughout the United States; and the day for giving their votes the first time shall be not less than ten nor more than twenty days from the day fixed for the appointment of electors.

"The legislature of each State shall have power to appoint the places of holding election for the appointment of electors, to prescribe the manner of voting, and to provide for the appointment of proper persons, to conduct such elections, with authority to declare definitively the result thereof; but the Congress may by law make or alter such regulations, and may also lay off into districts, for appointing electors, any State the legislature whereof shall have failed to lay off the same, as herein directed."

Mr. McDUFFIE, from the same committee, also reported a joint resolution proposing an amendment to the Constitution of the United States as respects the election of members of the House of Representatives; which resolution was read twice and committed to the Committee of the Whole House on the state of the Union. The resolution is as follows:

Resolved, &c., That the following amendment to the Constitution of the United States be proposed to the legislatures of the several States, which, when ratified by three-fourths thereof, shall be part of said Constitution:

"For the purpose of electing Representatives in Congress, each State shall be divided by the legislature thereof into as many districts as will equal the number of Representatives to which such State may be entitled in Congress, and each district shall be composed of contiguous or conterminous territory, and contain, as nearly as may be conveniently, the number of persons which entitles the State to a Representative in Congress according to the apportionment; which districts, when laid off, shall not be altered until after another census shall be taken. Each of the said districts shall elect one Representative to Congress, and the times, places, and manner of holding the elections in the said districts shall be prescribed by the legislatures of the States, respectively; but the Congress may at any time by law make or alter such regulations."

Speech of Hon. George McDuffie, of South Carolina, on the proposed constitutional amendment, in the House of Representatives, January 16, 1824.

On motion of Mr. McDuffie, the House went into Committee of the Whole on the state of the Union on the resolution by him reported from a select committee for amending the Constitution of the United States respecting the choice of the electors of President and Vice-President.

Mr. FOSYTH, of Georgia, was desirous that the consideration of this subject should be postponed. He had not had opportunity to prepare himself to discuss it, and he asked it from the courtesy of the mover that the subject should not be pressed at this time. He had a further reason. It was known to all that the Senate was now occupied on the same subject, and he was desirous to wait and first see whether that branch of Congress could not come to some decision in respect to it; and he moved that the committee rise.

Mr. McDUFFIE said that he had given notice of the present discussion three weeks ago, and the notice had been repeated, from time to time, ever since. It was probable the subject would occupy the House more than the present day; and as it had been usual, thus far in the present session, to adjourn over from Friday to Monday, the gentleman from Georgia could have time to prepare himself before any question should be taken on the resolutions; he therefore could not consent to defer the discussion.

The question being taken on the motion to rise, it was decided in the negative.

Mr. McDUFFIE, of South Carolina, commenced by remarking that, entertaining a deep conviction that the harmony of the Union and the purity of the Government were essentially involved in the proposed amendment, he could not but congratulate the committee and the country upon the propitious combination of circumstances under which it would now be investigated. While the current events of our history, said he, furnished a practical and impressive exhibition of the evil tendencies of our system in that department which it had been found most difficult to organize, we shall be shielded from the imputation of acting with a view to personal objects, or under the influence of temporary considerations, by the moral, I may almost say the physical, impossibility of consummating the amendment in time for it to operate in the approaching election for the Presidency.

In bringing forward a proposition so fundamental in its character, and calculated, in my opinion, to exert a lasting influence upon the happiness of future generations, it is a source of sincere gratification to reflect that the measure does not rest upon the recommendation of an individual so humble and inexperienced as myself, but that its leading provisions (subject to some subordinate modifications which, I hope, will be adopted) are approved and sanctioned by many of the most profound and experienced statesmen of the country. This proposition has been for more than eight years before the nation; it was recommended by a majority of the States, and a change has been anxiously desired by a large majority of the American people. When to the imposing weight of these circumstances we add the consideration that the great body of the people are at this moment deeply and justly excited upon the subject, it must be apparent to every member of the committee that this proposition comes before us with a weight of authority which imperatively demands, and will undoubtedly secure for it, the most solemn and dispassionate consideration.

I am not unaware of the difficulty which must be encountered at the very threshold of an investigation having for its object a fundamental change in the Constitution of the country. There is a general indisposition to touch that instrument, proceeding, I believe, from a sort of vague and indefinite apprehension that it may give rise to a spirit of innovation more dangerous than even the acknowledged vices of the system itself. As I know these to be the views of several honorable members, I feel that I am called upon by the occasion to present some general views of what I deem to be the true theory and philosophy of constitutional amendments.

The dread of innovation, by which some gentlemen are restrained from giving their sanction to amendments which they believe to be judicious in themselves, may be traced, said Mr. McD., to the history of simple democracies, or of countries in a revolutionary state. In the ancient republics, for example, where popular oratory exerted an absolute ascendancy over the passions of the multitude, it was necessary to secure

the existing institutions against the fluctuating movements of the popular will by all the barriers of superstition and public opinion.

The history of republican France, recorded in the blood of the various factions which were successively thrown up and destroyed by the universal commotion of the political elements, is a striking illustration of the tendency to perpetual changes while a country is in a state of revolution. But these examples, while they show the dangerous tendency to innovation in certain forms of government and certain conditions of society, indicate at the same time a distinction which will warrant me in the assertion that our tendency is of an opposite kind. Indeed, nothing can be more true in relation to countries in a state of political tranquillity than the proposition contained in the document which proclaimed us a free people, "that mankind are more disposed to suffer while evils are sufferable than to right themselves by throwing off the forms to which they have been accustomed."

But it has often been urged in conversation that, by making amendments of the Constitution, we should impair the popular veneration for that instrument. This may be true, and doubtless is true, of governments founded upon injustice and usurpation, and resting for their security upon the ignorance of the people.

It is unsafe to subject to the scrutiny of reason institutions which cannot stand the test of investigation. But nothing can be more dangerous than the inculcation of this sort of superstitious idolatry in this country. Its inevitable tendency is to confound the vices of our system with the system itself; and, in that way, to convert the best feelings of the community into the means of preventing the correction of imperfections which time must disclose in all human institutions, and of perpetuating abuses from which no government administered by men, has ever been exempted.

We should never forget (what is our proud distinction) that this Government is founded upon the intelligence of the people; and that, in proportion as their veneration and attachment for the Constitution proceed from a discriminating attention to its practical operation, in the same proportion will their liberties be secure and the Government preserved in its purity.

It is indeed one of the most important rights of a free people to make those gradual changes in their political institutions which may be indicated by the changes in the social system, the progress of intelligence, and, above all, by the lights of experience.

It is in this way, and in this way only, that the Constitution of a country can be adapted to the condition and circumstances of the people whose liberty it is intended to secure. No constitutional provision can be wise which has not this peculiar adaptation; and no part of the Constitution evinces the wisdom of the convention more clearly than the provision made for its amendment.

This, said Le, is an age distinguished for improvements in the science of government. Within the last fifty years it has made more signal advances than at any former period of the world. Within that time we have ourselves made a great political experiment, which is destined, I trust, to have a lasting influence on the affairs of mankind. But it cannot be disguised that the executive department of this Government was organized by the convention without any of those benefits of experience which aided them in the establishment of the other departments. Representative assemblies had existed here from the first settlement of the country, to say nothing of the experience of England.

A similar remark may be made of the judicial department. But the world has never witnessed the spectacle of an elective chief magistrate, presiding over so extensive a country, containing millions of freemen, from whom his authority was at least intended to be a direct emanation. And, accordingly, said Mr. McD., we find the provisions for electing the Chief Magistrate of the Republic more imperfect in their actual operation than any contained in the Constitution, though at the time of its adoption those provisions were believed to be the most unexceptionable of all. We must, therefore, make up our minds to examine and expose the vices of the system; and nothing can more clearly show the safety with which this may be done than a particular investigation of the process through which every amendment must pass before it can become a part of the Constitution. To effect any change, the concurrence of two-thirds of both branches of Congress and three-fourths of the State legislatures is indispensably necessary.

Is it possible, then, that any change can be precipitately made under the influence of temporary delusion? I will venture to predict that no amendment will ever be adopted that is not sanctioned by the deliberate sense of a decided majority of the people, long and steadily maintained. This is conclusively demonstrated by the history of the very proposition we are now discussing. It has been more than eight years before the people, and has been constantly gaining ground during the whole of that period. It was originated by the intelligent, patriotic, and unpretending State of North Carolina; a State which is honorably identified with one great era in our political history, and I hope it is her destiny to be associated with another, in my opinion, not much less important. I believe history will accord to her the honor of having first made a declaration in favor of the national independence; and if this amendment

should be adopted, (as it certainly will be at no distant period,) she will have another title to the lasting gratitude of the nation.

Her proposition was sanctioned by a majority of the State legislatures—I believe by nearly three-fourths of them—and, in several instances, by a unanimous vote. It has been repeatedly discussed in Congress, and as repeatedly passed by two-thirds of the Senate; and, in one instance, it wanted but three or four votes of a constitutional majority in the House of Representatives. Now, said Mr. McD., there is no political principle more undeniable than that the deliberate opinion and settled conviction of a majority of the people, in a government recognizing in them the right and the capacity of self-government, ought to prevail over the will of the minority, even in relation to the Constitution. Why, then, it may be asked, does that instrument require, for an amendment, the concurrence of more than a majority? I answer, for the very wisest of purposes: but not, surely, to give the permanent ascendancy to the opinion of the minority. This requirement was intended for no other purpose than to prevent hasty and inconsiderate changes, and to give time for reflection and deliberation.

But when the sense of a decided majority of the community is permanently and unalterably settled down in favor of any amendment the end of this provision is answered, and the minority ought to yield. I will not say that they have not the constitutional right, as well as power, to oppose the will of the majority; but I contend that it is their moral duty, as well as their undoubted interest, to yield under such circumstances. I have said that this Government rested upon the intelligence and discriminating attachment, and not upon the superstitious veneration of the people. I will now add, that nothing can more effectually impair their confidence in our political system than in pertinacious adherence to parts of it which they believe to be vicious and calculated to deprive them of their just rights.

I will now proceed, said Mr. McD., to show, and I flatter myself it can be done to the satisfaction of the committee, that this amendment has none of the characteristics of innovation, and proposes only to reclaim the usurped rights of the people, and to draw back the Government to its true original principles.

The Constitution provides that "each State shall appoint, in such manner as the legislature thereof shall prescribe," the electors of the President. I am not, said he, in the habit of construing a constitution, addressed to the common sense of the great body of the people, with logical refinement or critical nicety. I cannot but remark, however, that it is a very liberal mode of construing the powers of the State legislatures to assume, under the general authority to prescribe the mode of making an appointment, the right of making that appointment themselves. The intention of the convention on this subject is so conclusively shown as to supersede argument by a contemporary exposition of the Constitution, written by three of the most distinguished members of that illustrious body. The *Federalist* contains the following words:

"They [the convention] have not made the appointment of the President to depend upon pre-existing bodies of men, who might be tampered with beforehand to prostitute their votes; but they have referred it, in the first instance, to the immediate act of the people of America, to be exerted in the choice of persons for the temporary and sole purpose of making the appointment."

Such was the exposition made to the American people by the framers of the Constitution while the expediency of its adoption was still a pending question; and there can be no doubt that this exposition operated as a strong inducement with the people to adopt the Constitution. The great improvement which the convention made upon all the federative systems of which history furnishes any record was in the introduction of the provision that the General Government should not operate upon the local governments, or States collectively, but upon the people directly and individually. To complete this great improvement, which constitutes an era in the history of confederated governments, it is indispensable that the people should act upon the Government as directly as the Government acts upon the people. In this manner responsibility is made to be co-extensive with power, the only adequate security for freedom which is to be found in our system.

It would indeed be a strange anomaly if the General Government should be controlled by the State governments, and operate upon the people. It is, said he, an extraordinary notion which some indulge, that the State governments are to be considered as sentinels to guard the people against the encroachments of the General Government; and it is a notion still more extraordinary that they were to be secured in their fidelity by making them instrumental in creating that government. Is there no danger that these sentinels will prove faithless? Is it not a reasonable apprehension that combinations may take place between the two classes of public agents, and that the State governments will, instead of checking, give a morbid impulse to the usurpations of the General Government? It seems to me to be an entire misconception of the true theory of our system to suppose that our freedom is to be secured by this irregular sort of checks and balances. The great and only efficient security is a

practical responsibility to the people themselves—a responsibility which is completely broken by the interposition of the State legislatures.

Mr. McD. said he would next attempt to demonstrate the position assumed in the report of the select committee, that there existed no constitutional provision for the appointment of a President, and, consequently, that the question really to be decided was, whether we should have a Constitution or no Constitution in this important particular. A constitutional provision, said he, is a rule established by the people in their original act of sovereignty, paramount to any legislative act, whether emanating from Congress or the State legislatures. In this sense, I challenge gentlemen to point out any constitutional rule which fixes the mode of electing the President of the United States. To say that each State legislature prescribes its own rule, is a distinct admission that there is no established rule at all, characterized either by permanence or uniformity. In fact, our experience has taught us that the modes of choosing electors are as various as the views of different States, and as changeable as the power and ascendancy of rival parties.

In one State the appointment is made by the legislature; in a second, by a general ticket; and in a third, by districts. In the same State, these various modes are adopted according to the exigency of circumstances, and accordingly as the one or the other may be best calculated to accomplish the views of the ascendant party, or to give the State the greatest possible power in the presidential election. I confidently submit it to the justice of the committee, whether there ought not to be some uniform rule on the subject. Is there a shadow of equity in giving one State the advantage of a consolidated vote, while another is divided into districts, and probably neutralized by the division? No State will submit or ought to submit to such flagrant injustice. A conflict is thus produced in which correctness and expediency are arrayed against each other. The district system is the true system; that to which the people are attached, because it renders their elective franchise efficient, and gives to every portion of the State its legitimate influence. But, as long as some of the States adhere to the general-ticket system, all the rest will be compelled, in self-defense, to adopt it, and in this manner the very worst plan will prevail, from a sort of State necessity, in opposition to the deliberate sentiments of the community. North Carolina has always been attached to the district system, but has finally abandoned it, and justly abandoned it, because other States would not adopt it. The State of Maryland, magnanimously sacrificing her influence to her principles, has, up to this moment, adhered to the district system, and thus neutralized her weight in the election of the President. Her noble example, so worthy of imitation, has not been followed, and if I were a citizen of that State I would no longer submit to the disinterested sacrifice while other States are so little disposed to appreciate it.

From this brief view of the operations of the existing system, said Mr. McD., I think the plan of the select committee will be exempted, at least from the charge of innovation. It proposes to substitute uniformity in the place of variety, permanence in the place of perpetual changes; and the plan evidently intended by the convention for the chaos of clashing expedients, which has sprung up under the influence of State rivalry; and yet we are told of the danger of innovation, and that all reverence for the Constitution will be destroyed by changing it. What, I ask, is meant by the Constitution? Is it the parchment upon which it was written, and the words in which it is expressed? Assuredly not. Properly understood, it means the system of government and the fundamental rules by which it is organized. In this sense of the term, the Constitution may now be changed every month in the year, and almost every day in the month; and it is the tendency of the proposed amendment to prevent these ceaseless changes, originating in the ambitious conflicts of contending parties, and productive of the most violent and acrimonious excitement, that furnishes one of its strongest recommendations.

I have already shown, from the highest authority, that the convention intended that the electors of the President should be chosen by the "immediate act of the people of America." I will now attempt to show that it was equally intended that the people should vote by districts. I believe I may safely assert that, at the time the Constitution was framed, the general-ticket system, by which the whole population of a State gives an aggregate vote, either for representatives or other public agents, was unknown in the political history of the world. I call upon gentlemen, if any such example existed, to produce it. It is an invention of after times, the mere offspring of temporary expediency, and never entered into the conception of the convention. By advert- ing to the proceedings of that body, it will be seen that all the propositions involving a specification of the mode of choosing electors and members of Congress contained a provision for dividing the States into districts. The mode of choosing was finally left to the State legislatures, that they might regulate the details of the election, but in the confidence that they would adopt the only plan of popular election which had ever existed.

The State legislatures have violated the confidence reposed in them, and it is certainly time that the people should reclaim their lost power, and secure themselves in

its exercise by a permanent regulation made by themselves, and not liable to be altered by any set of public agents.

Mr. McD. next proceeded to examine the practical operation of the general-ticket system. He said a system could not be devised more pregnant with danger to the very existence of the republican form of our government.

Reason and experience concur, said he, in demonstrating that where the whole mass of the people of a State votes in common for the whole number of electors, some central power is necessary to nominate the electoral ticket, or to give it a more general expression, to concentrate popular opinion.

Disguise it as we may, the result must be that the elective power of the State will be thrown into the hands of a few political managers. I do not mention this with a view to cast the slightest censure upon those into whose hands this power may happen to fall, but to expose the vices of a system which makes such a dangerous depository of power inevitable. I admit that, as long as the general-ticket system prevails, such a depository, as dangerous as it is, must exist, and ought to exist. New York being the largest State in the Union, will furnish the strongest illustration of the subject. That State is entitled to thirty-six electors, and consists, probably, of forty or fifty counties. Admitting that a vast majority of the people should be united in their preference for a peculiar candidate for the Presidency, would it be practicable for them to agree upon electors to carry their will into effect without some political combination, (I will not characterize it by the odious name of *junto*,) clothed with authority to prescribe the electoral ticket to the people? It is impossible. Thus the elective power would be nominally restored to the people, while, in point of fact, it would be exercised by a few prominent politicians, who might happen to have the ascendancy in the State. Admitting these to be as virtuous as any one may choose to suppose them, is it consistent with wisdom to make a system universal which offers such facilities and holds out such temptations to intrigue and corruption? What would be the case presented under such system? The whole electoral votes of the State, thirty-six in number, and in all probability absolutely decisive of the presidential election, depending upon the influence of a few individuals—perhaps of a single individual!

What, in such a case, is the temptation to use corruption? The Presidency itself. What the means? The whole patronage of the Government. What the security? The virtue of a single individual! Sir, said he, I will not say that such a state of things will inevitably result in corruption; but I will say that, if it does not, the virtue of public men is, under all circumstances, an ample security against their ambition, and that no political check, no tie of responsibility, no constitutional regulation, is necessary to secure the liberties of the people and preserve the purity of the Government. Upon the whole, I am inclined to think that in the course of time the general-ticket system will be found at least as bad in practice as the appointment of electors by the State legislatures.

Another objection, said he, exists against the general-ticket system, which has been explained in the report of the select committee. It deprives the minority of their unquestionable rights in the respective States, and makes it to depend upon accidental combinations, whether a majority or a minority of the whole of the people of the Union should elect the President. In the result the majority, however inconsiderable, gives its own vote, added to that of the minority, although, in point of fact, the vote of the minority is opposed to that of the majority, and ought to be subtracted from it. I am aware that it may be answered that, in voting by districts also, the voice of the minority in each district will be suppressed. This is true, but it only goes to show that the remedy proposed is not perfect.

It will be obvious, on the slightest reflection, that the probability of such combinations as would throw the Government of the country into the hands of a minority, under the general-ticket system, is, to the probability of such combinations under the district system, as two hundred and sixty, the number of districts, is to twenty-four, the number of States. In any given State, for example, the chances are that the minority in one district will counterbalance the minority in another; so that the electoral vote of the State will nearly correspond with the aggregate popular vote, giving the minority its due weight. But, even if it were otherwise, the district minorities, being small masses, will submit to the will of the majority without any violent excitement. On the contrary, the aggregate minority of a whole State, distinctly perceiving their numerical strength, and feeling the injustice, not only of throwing their vote out of the general estimate, but of giving it to the candidate against whom they intended it to operate, would have deep and permanent feelings of discontent. This would be more certainly and more justly the case if the districts which constituted the minority should have, in reference to the great concerns of agriculture, manufactures, or commerce, interests different from those of the majority.

There is another view of the general-ticket system, calculated, I think, to make a deep impression upon every member of the committee who will duly consider it. This system places it in the power of States to form political leagues and secret combinations with each other for the purpose of securing the elevation of a particular individual.

The few politicians into whose hands the whole elective power of the States would be thrown by the operation of this system would be enabled to form alliances, by which States might be brought to co-operate in the presidential election, whose principles and interests were wholly different. Under the district system, such combinations could not take place. It would be utterly impracticable for two hundred and sixty districts, each having its own separate will, and its own center of operation, to be brought to co-operate by all the powers of intrigue and corruption.

Mr. McDUFFIE next invited the attention of the committee to the last branch of the amendment; that which provided that, in the event of there being no election at the first balloting, that the names of the two highest candidates should be sent back to the electors. This, said he, will almost infallibly insure an election by the people.

But I have heard it urged as an argument against this part of the plan of the select committee that the length of time which would elapse between the appointment of the electors and the second balloting would give an opportunity for tampering with them to prostitute their votes. As this is the only argument which, I believe, can be urged against this branch of the amendment, I beg the particular attention of the committee while I attempt its refutation. The only fair mode of reasoning upon this subject is to examine the operation of the whole scheme proposed, in comparison with the existing system. How, then, stands the comparison? As the Constitution now stands, the general-ticket system will universally or, at least, generally prevail. Under that system it is a notorious fact that the electors are nominated from ten to eleven months before their election. I appeal to the honorable members who represent States where the electors are appointed by a general ticket to bear witness to the fact. The general practice has been for the legislatures to nominate the electoral ticket in December or January, and from that time to the period of their election in the succeeding November it is as well known who will be the presidential electors as if they had been actually chosen.

In Virginia, I may almost say the electors are a permanent body, as I understand they are scarcely ever changed; and we had recently seen an electoral ticket formally announced in North Carolina, for the ensuing election in November. Now, what, said he, will be the operation of the proposed amendment? The district system will supersede the necessity of previous nomination, and the time for tampering with the electors will be only from the period of their actual election to the period of their final vote on the second balloting. This will not be more than two months at the utmost. And is it possible that gentlemen can overlook the dangers to which I have just adverted in the present system, and yet indulge a serious apprehension that two hundred and sixty electors, emanating directly from the people, and scattered over the whole Union, will be liable to corruption? Will two months furnish ampler opportunities for intrigues than eleven? It is most obvious that the danger is greater under the present system at the first balloting than it will be under the proposed plan at the second.

Of this part of the amendment, I may safely say, as I have said of the district system, that it has none of the characteristics of an innovation. It introduces no new principle into our system. Its only effect will be to render efficient the primary mode of election established by the convention. Had the framers of the Constitution foreseen that from the multiplication of States, and the increase of local interests, the number of candidates would be so great as to render an election by the House of Representatives an ordinary occurrence, they never would have left the Constitution where it is. They evidently contemplated the devolution of the election upon this body as an extreme contingency, which would scarcely ever occur, but when two candidates should have an equal number of votes. This is apparent from the exclusion of members of Congress from the electoral college, and from the fact that in all the discussions upon the mode of electing the President, scarcely anything was said as to the fitness of the House of Representatives to exercise the electoral function. Even if the objection urged against the second balloting of the electors rested upon more substantial grounds, said Mr. McD., its efficacy in preventing the election from devolving on the House of Representatives would reconcile me to its adoption.

I trust I shall not be considered as speaking disrespectfully of the body of which I am a member, in the general remarks I shall feel it to be my duty to offer to the committee, on this part of the investigation. I can say, with the utmost sincerity, that I have never been associated in the public service with a body for whom I have a higher respect than for this branch of the national legislature. For wisdom and virtue I do not believe they are excelled by any deliberative assembly of the world. But, sir, this part of the discussion must have reference to general principles which are to operate through the long course of future time, and, in this view of the subject, the only concession which I ask as the basis of my argument is, that the House of Representatives will always be composed of *men*. I will grant all the wisdom and virtue which any gentleman may choose to ascribe to them, and I still believe it can be shown that nothing can endanger the purity of our republican system so much as the habitual election of the President by the members of this body.

Sir, said Mr. McD., I believe it is in the power of human wisdom to keep out of temptation, but I do not believe it is always in the power of human virtue to resist it when thrown into the sphere of its fascinations. And if there existed no other evidence of the divinity of our Saviour than the admonition he has left us, to pray for deliverance from this besetting enemy of frail humanity, I should deem that sufficient.

The danger to be apprehended from the election of the President by Congress is not from corruption, in the vulgar acceptance of the term. In a country of so much intelligence and virtue, it would be difficult to find a man so basely treacherous as to sell himself by a palpable act of political prostitution. But it is to be remarked that in Congress will be generally found the ambitious and aspiring men of the country, and that the President will have the dispensation of those offices which are the natural objects of their aspiration. I need not explain the insidious disguise under which ambition may approach a member of Congress, with the whole patronage of the Government in his hands, nor the manner in which self-interest can delude the judgment and convert a man into a factionary without even his being conscious of the transmutation.

These things must be obvious to every one who understands the human heart and the operation of the human passions. The politicians of the country, therefore, are the very last men to whom the election of the President should be confided. They, and they only, are exposed to that sort of temptation from which only any danger is to be apprehended. I solemnly declare, sir, that I would prefer that the college of electors should be composed of the plainest farmers of the country, emanating directly from the people, and having no political expectations, rather than that it should be composed of the most wise and virtuous politicians, engaged in a course even of honorable ambition. Nothing is more to be depreciated in the present system than its tendency to convert Congress into a theater for the presidential canvass. In the course of time that question will infuse itself into the whole legislation of the country and be productive of the most injurious distraction in the national deliberations. Members will be drawn into the vortex, and converted into partisans of the different candidates, equally by the best and the worst of the human passions.

This House is not without some experience on that subject already, nor can it be disguised that discussions of the character to which I have alluded have tended to disgust the people and alienate their confidence. We are sent here for the great purposes of national legislation, and ought not to be distracted by considerations of a different kind.

The duties of legislating for the Republic and electing the Chief Magistrate are incompatible in their nature, and their combination is productive of the greatest embarrassment with the people in the election of members of Congress. These should be elected in reference exclusively to their virtue, talents, and capacity to serve the people. But it frequently happens that members of this description differ with their constituents as to the person who should be elected President. At the approach of every presidential election, therefore, the people will be exposed to the disagreeable alternative of discarding many of their most faithful public servants, or of being misrepresented on the subject of the Presidency.

The division of functions is as important in the constitutional distribution of power as the division of labor in political economy. The qualifications of a member of Congress have not the remotest connection with his opinion of the respective competitors for the Presidency, and yet the people will regard, and ought to regard, the latter consideration as long as Congress shall have so direct an agency in the election of the President. The inevitable result, which will consummate the evils of the existing state of things, if the election of the Chief Magistrate be not removed, both in theory and in practice, from Congress, must be that the country will be governed by a succession of factions. By a faction, I mean a combination of politicians, habitually and systematically acting together, and aiming to wield the Executive Government, not with a view to political principles or the interest of the people, but to the distribution of its patronage. This, sir, is the true source of the morbid violence of party conflicts and the fluctuations of national policy, evils peculiarly to be deprecated in a republic.

When politicians array themselves against each other not as the organs of their constituents, but in pursuit of their own aggrandizement, they often find it necessary to invent sources of collision where none really exist. It becomes a mere contest between those who are in and those who are out of power, and the fact that one party has adopted a particular course of policy is a sufficient reason for the other to oppose it. Hence it will be found that every canvass for the Presidency will involve in jeopardy the great institutions of our national policy. The obvious, and in my opinion the only remedy, is to take the election of President out of the hands of politicians and restore it to the people. Let neither the President be dependent upon Congress nor the members of Congress the instruments of the President. Destroy the connection altogether. No people on earth are more steady in their principles than the people of the United States. They will communicate their own energy and steadiness to the Executive if that department should be made directly responsible to them.

I am warranted by our experience in saying that the people have more spirit to resent injuries, and more fortitude to sustain the burdens and privations incident to their defense and security, than any combination of politicians. The people look only to the good of the country; politicians look to their popularity also—to the means of preserving or gaining power. I recollect with shame the degradation of our national character previous to the late war, and with a just pride the spirit of a brave and patriotic people, by which the country was reclaimed from its fallen condition. That war was emphatically a war of the people; their representatives were literally driven into it, many of them with fear and trembling.

I will now proceed, said Mr. McD., to a very delicate part of this investigation—that which relates to the compromise between the large and the small States, involved in the proposition.

As this will probably have as much influence upon the fate of the amendment as its own intrinsic merits, I beg the particular attention of the committee while I attempt to show that the mutual concessions provided are so obviously just that it is the interest both of the large and small States to make them. The division of the larger States into districts will prevent them from throwing their unbroken and consolidated vote into the presidential contest, and from forming political combinations in reference to that object, and this is the equivalent which they give the small States for the surrender of the equal suffrage to which they are now entitled in the House of Representatives on the contingency of the election devolving upon that body. The powers thus mutually surrendered, both by the large and the small States, are powers, in my opinion, utterly inconsistent with the fundamental principles of a republican government. I have already shown that the general-ticket system would transfer the elective power from the people into the hands of a few, and that it opens the door for corrupt combinations, by which an active and organized minority might govern the Union.

I shall now endeavor to show that the contingent power of the small States proposed to be surrendered is even more dangerous, and that, upon the principles of popular sovereignty, it is absolutely indefensible. Upon what principle can a citizen of Delaware claim to exercise thirty-six times as much of the sovereignty of the country as a citizen of New York? Is there a semblance of justice, or even a plausible ground of expediency, by which such a claim can be sustained? Have the people of the small States any interest in the exercise of such a dangerous power? Let it be remembered that the people do not exercise the power themselves, but that their Representative, whoever he may happen to be, will wield one twenty-fourth part of the elective power of the country. Can it be conceived that the people of a small State are ever desirous of placing such a fearful power in the hands of a single man, when it can have no other effect than to defeat the will of the majority of the people?

There is no political principle more universally admitted in this country than the right of the majority of the people to govern. It is the very essence of a republic. The only security we can have for the virtue and intelligence of public agents is that they are the choice of the majority, and most assuredly this is the only means of securing to the Government the confidence of the people. And have not the small States the same interest with the large States that the Executive Government should be administered by virtue and intelligence, and sustained by the confidence of the people? In such a question, the citizen of Delaware has the same interest with the citizen of Pennsylvania. The interposition of an imaginary line can make none but an imaginary difference between them.

A combination of small States, containing only one-fifth part of the population of the Union, might, under the present system, elect the President. Such an event is not only possible but probable. Indeed, it is a rational presumption that the minority will prevail when the election shall be made by the House of Representatives. Sir, no event could occur more to be deprecated. The man who is elected by such a combination of small States, if he had the purity of an angel, could not command the confidence of the people. A single Representative is more easily secured by political expectations or corrupt bargains than thirty-six. Ambition would be tempted, therefore, to bring all the arts of intrigue to operate upon the Representatives of the smaller States. And how would the people reason upon the subject? They would see the power of the country thrown into the hands of a minority by the votes of a few individuals exposed to the highest human temptation. To say nothing of the actual danger of corruption in such a state of things, it is sufficient to say that the people would generally suspect it. It would excite a deep and dangerous distrust, calculated to alienate their affections from the system itself. I cannot conceive a situation involving a more painful and embarrassing responsibility than that of the Representative of a small State under such circumstances. No degree of virtue could shield him from the imputations against his political integrity. And what would be the predicament of an administration elevated to power by a minority under suspicions of corrupt influence, and, as a natural consequence, opposed by the popular branch of the national legislature? A scene of distraction would be presented which would be little better than anarchy.

Sir, the people of this country will never submit to be governed by a minority. If

we do not amend the Constitution, so as to prevent that calamity, they will change it, and ought to change it, in practice. It is my firm belief that, if we do not adopt an amendment similar to the one proposed, a convention of delegates will be regularly appointed by the people to nominate a President, and that their nomination will be regarded as conclusive. What, then, will the small States gain by pertinaciously refusing to concur in the amendment? They will retain a contingent power, which the large States will never permit them to exercise. This is not all. The large States, by being driven into combinations against the small, will not only govern them, but govern them with the feelings of an adversary party. A notion seems to prevail with some, that, if this amendment is adopted, the small States will be liable to be oppressed by the large States.

There never was a more unfounded apprehension. The small States are the favorites of the Constitution, and, even under the proposed amendments, would be eminently so. A very slight examination will make this apparent. There are seven States in the Union, which, together, contain a population smaller than that of North Carolina. What is their relative power? They have fourteen votes in the Senate, a co-ordinate branch of the legislature, while North Carolina has but two. This, too, is a power of which they can never be deprived. And yet we are told that the small States are in danger of oppression! Their rights and interests can only be infringed by law; and their ascendancy in the Senate is an impassable barrier against any such danger. In point of fact the small States are so distributed among the large, and their interests so variously blended, that there can be no inducement to oppress them. But even if the seven States before mentioned lay adjacent to each other, and constituted a separate local division of the country, having interests different from the rest of the Union, would these interests be less amply secured by their subdivision into small States? Would they consent to be consolidated into one? Most undoubtedly they would not. And even in the presidential election itself, they have a decided advantage over the large States. The seven States to which I have alluded are entitled to twenty-six electoral votes, while North Carolina, with a larger population, is entitled to fifteen only. States having a single Representative are entitled to three electors for a population of forty thousand, whereas the large States are entitled to but little more than one elector for the same population.

There is one general remark, said Mr. McD., applicable to the powers which both the large and the small States surrender by the provisions of this amendment. They are not only powers peculiarly liable to be abused, and, therefore, inconsistent with the purity of the Government; but they are powers in which the people of those States have no sort of interest, however profitable they may be to their politicians. What benefit can the people of a large State derive from concentrating their whole elective power in a few hands, or of a small State, from exercising, through a single Representative, a disproportionate share of the elective power? In either case, a few politicians may derive an advantage from having it in their power to secure such a distribution of executive patronage as they may desire; but the people will derive no solitary advantage, unless exposing their public men to unusual temptations can be so considered.

This, sir, (said Mr. McD.,) is really a contest between the interests of the people and the interests of politicians, and I am gratified to perceive so general a disposition, both among the members from the large and small States, magnanimously to surrender up the powers in question as a sacrifice to the purity of the Government and the harmony of the Union. I confess, sir, I feel an uncommon solicitude upon this subject, more than I have ever felt on any other since I have directed my attention to public affairs. I believe an expectation was very generally indulged previous to the meeting of this Congress that our deliberations would be distracted by discussions having reference to objects of a personal nature, and which would neither reflect credit upon us nor confer any benefit upon the country. Let us disappoint these expectations. Let us evince our devotion to the interests of the country by establishing upon an immutable foundation those great principles of constitutional freedom which will secure to us the gratitude of future generations. For myself, sir, I can say, in a spirit as sincere as it is unambitious, that I would rather go down to posterity even as an humble instrument in effecting this great constitutional reform than to receive all the living honors this Government can confer.

Amendment to the Constitution submitted by Hon. Thomas H. Benton.

IN SENATE, December 11, 1823.

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, (two-thirds of both houses concurring,) That the following amendment to the Constitution of the United States be proposed to the legislatures of the several States, which when ratified by the legislatures of three-fourths of the whole number of States shall be valid to all intents and purposes as part of the said Constitution:

That for the purpose of electing a President and Vice-President of the United

States each State shall be divided by the legislature thereof into a number of districts equal to the whole number of Senators and Representatives to which such State may be entitled in the Congress; each district shall be composed of contiguous territory, and shall contain, as nearly as may be, an equal number of persons entitled by the Constitution to be represented, and on such days as Congress shall determine, which days shall be the same throughout the United States, the citizens of each State who may be qualified to vote for a Representative in Congress, shall meet at such places within their respective districts as the legislature of each State shall appoint, and each, in his proper person, shall vote for President and Vice-President, one of whom, at the least, shall not be an inhabitant of the same State with himself; and separate triplicate lists shall be kept of all the voters and of all the votes given for each person as President and for each as Vice-President. All the votes so given in each district shall be collected forthwith, in such manner as the legislature of the State may direct, at some one convenient place within the district; and the votes given for each candidate shall be added together, and the person having the greatest number of votes for President and the one having the greatest number of votes for Vice-President shall be certified as duly preferred in said district, and shall be entitled to one vote each for the respective offices for which they are candidates; but if two or more persons shall have an equal number of votes in such district election for the same office, then the returning-officers shall decide between them, and certify accordingly. Triplicate certificates of the whole number of votes given for each candidate shall be made out and transmitted, in such manner as Congress may direct, to the seat of Government of the United States, addressed to the Senate. The President of the Senate shall, in presence of the Senate and House of Representatives, open all the certificates, and the votes shall then be counted. The person having the greatest number of votes for President shall be the President, if such number be equal to a majority of the whole number of electoral votes within the United States; and if no person have such majority, then the President shall be chosen by the House of Representatives from the three having the greatest number of votes for President in the manner now prescribed by the Constitution.

The person having the greatest number of votes for Vice-President shall be the Vice-President, if such number be equal to a majority of the whole number of electoral districts; and if no person have such majority, then the Vice-President shall be chosen by the Senate from the two persons having the greatest number of votes for that office in the manner now prescribed by the Constitution.

Speech of Hon. Thomas H. Benton, of Missouri, on his proposed amendment to the Constitution.

IN SENATE, February 3, 1824.

The order of the day being the proposition submitted by Mr. Benton, to amend the Constitution of the United States in regard to the election of President and Vice-President, was again taken up. Mr. Benton resumed, and concluded his remarks on the subject, as given entire, as follows:

Mr. Benton said he would offer no apology for attempting to amend the Constitution. It was his right, and, if sincere in his belief of its necessity, it was his duty to do so. He apprehended no evil from the multitude of amendments proposed, but thought it more probable that beneficial amendments would be rejected than that injurious propositions would be adopted. It was no easy thing now to effect an alteration in the Constitution. The difficulty of carrying an amendment through the process of ratification presented a great obstacle, and the temper of the American people presented another, not less formidable. Though full of law-making, even to superfluity, upon subjects of ordinary policy, the people discover no disposition to make alterations in their fundamental code.

On this point they seemed disposed to answer like the old English Parliaments when preparations were made to change the common law, "*Nolumus leges Anglię mutari.*" Applauding this sentiment, Mr. B. said it behooved him to justify himself to the Senate for having submitted a proposition of amendment. The justification could be readily made. It would be found in the fact that the case had occurred which the framers of the Constitution had foreseen and for which they had provided a remedy by providing the means of amendment. These great men knew that it was one thing to lay down a plan of government upon paper, and another to put that government into practical operation. They knew that the theory might be perfect and the practice vicious; that experience was the only infallible test of good or bad institutions; and, despising the arrogance of an overweening confidence in the perfection of their own work, they not only provided the means of amending the Constitution, but they relied upon this capability of amendment as one of the chief arguments in favor of the adoption of the instrument itself.

Their language was, "experience must guide our labor; time must bring it to perfection; and the feeling of inconvenience must correct the mistakes into which we in-

evitably fall in our first trials and experiments." (Federalist, No. 85.) In this spirit they provided a mode for reforming the Constitution, and gave the power of originating the reform both to the Federal and the State governments, that neither might be dependent upon the other for the exercise of a power on which its own preservation might depend. In fixing upon the manner of making amendments, they flattered themselves that they had hit upon a mode equally remote from that extreme facility which would make the Constitution too mutable, and that extreme difficulty which would give perpetuity to its detected defaults. And if they have erred in this judgment, they have erred upon the safer side, upon the side of difficulty, and not of facility, in changing the principles of our fundamental code.

The amendment submitted applies to that part of the Constitution which relates to the election of President and Vice-President of the United States. Stripped of formal phrases and minute provisions, and it presents four distinct propositions to the consideration of the Senate:

1. To divide the United States into electoral districts.
2. To discontinue the use of intermediate electors.
3. To commit the election to a direct vote of the people.
4. To continue the impirage of the House of Representatives in all cases in which no candidate has received a majority of the whole number of votes.

The *first* of these propositions has often been before the Senate; the *second* and *third* are now considered new, because it is forgotten that they were offered and discussed in the convention which framed the Constitution; and the *fourth* is strictly defensive, intended to sustain a part of the Constitution now in force.

Mr. Benton proceeded to argue the propositions in the order laid down. *First*, to divide the United States into electoral districts.

We are struck with the want of uniformity in the manner of choosing electors in different parts of the Union. Seven States, entitled to seventy electors, choose them by districts; seven others, entitled to seventy-one electors, choose them by a legislative ballot; and the remaining ten, entitled to one hundred and twenty, choose them by a general ticket. In the old monarchies of Europe a want of uniformity in the operation of the government is natural, because they are composed of conquered provinces, badly amalgamated, and each retaining a part of its former laws and customs; but in the United States, composed of sovereignties voluntarily united, and all acting under the same clause of the same Constitution, made by themselves, such deviations are most unnatural, and imply a great fault in the Constitution itself, or in its administration by the State legislatures.

The evil of a want of uniformity in the choice of presidential electors is not limited to its disfiguring effect upon the face of our Government, but goes to endanger the rights of the people, by permitting sudden alterations on the eve of an election, and to annihilate the rights of the small States, by enabling the large ones to combine and throw all their votes into the scale of a particular candidate. These obvious evils make it certain that any uniform rule would be preferable to the present state of things. But in fixing on one, it is the duty of statesmen to select that which is calculated to give every portion of the Union its due share in the choice of the Chief Magistrate, and to every individual citizen a fair opportunity of voting according to his will. This would be effected by adopting the district system. It would divide every State into districts equal to the whole number of votes to be given, and the people of each district would be governed by its own majority, and not by a majority existing in some remote part of the State.

This would be agreeable to the rights of individuals; for, in entering into society, and submitting to be bound by the decision of the majority, each individual retained the right of voting for himself wherever it was practicable, and of being governed by a majority of the vicinage, and not by majorities brought from remote sections to overwhelm him with their accumulated numbers. It would be agreeable to the interests of all parts of the States; for each State may have different interests in different parts. One part may be agricultural, another manufacturing, another commercial; and it would be unjust that the strongest should govern, or that two should combine and sacrifice the third. The district system would be agreeable to the intention of our present Constitution, which, in giving to each elector a separate vote, instead of giving to each State a consolidated vote, composed of all its electoral suffrages, clearly intended that each mass of persons entitled to one elector should have the right of giving one vote, according to their own sense of their own interests.

The general-ticket system now existing in the States was the offspring of policy, and not of any disposition to give fair play to the will of the people. It was adopted by the leading men of those States to enable them to consolidate the vote of the State. It would be easy to prove this by referring to facts of historical notoriety. It contributes to give power and consequence to the leaders who manage the elections; but it is a departure from the intention of the Constitution, violates the rights of the minorities, and is attended with many other evils. The intention of the Constitution is violated, because it was the intention of that instrument to give to each mass of persons

entitled to one elector the power of giving that electoral vote to any candidate they preferred.

The rights of minorities are violated because a majority of one will carry the vote of the whole State. This principle is the same whether the elector is chosen by general ticket or by legislative ballot; a majority of one in either case carries the vote of the whole State. In New York thirty-six electors are chosen; nineteen is a majority, and the candidate receiving this majority is fairly entitled to count nineteen votes; but he counts in reality thirty-six, because the minority of seventeen are added to the majority. These seventeen votes belong to seventeen masses of people, of forty thousand souls each, in all six hundred and eighty thousand people, whose votes are seized upon, taken away, and presented to whom the majority pleases. Extend the calculation to the seventeen States now choosing electors by general ticket or legislative ballot, and it will show that three millions of souls, a population equal to that which carried us through the Revolution, may have their votes taken from them in the same way. To lose their votes is the fate of all minorities, and it is their duty to submit; but this is not a case of votes lost, but of votes taken away, added to those of the majority, and given to a person to whom the minority is opposed.

Mr. B. would be unwilling to use a harsh epithet, but he considered this case as amounting to an impressment of civil rights more dangerous to our liberties than the impressment of our bodies by British ships of war. Free elections are the corner-stones of all our institutions, and our citizens are sufficiently sensible to all attempts to destroy that freedom by violence. The violation of the right of one single vote by a military force would excite the indignation of the whole continent, and the disbandment of our six thousand men would not be enough to relieve us from future apprehension. Yet legislative enactments may be equally fatal, and are, in reality, more dangerous to the United States, because less dreaded.

A further mischief of the general-ticket system is in segregating the States, drawing them up against one another, like hostile ships in battle. Out of this system have sprung the anti-social words of modern invention—"effective votes," "operative votes"—as if the States were contending with Turks or Russians. This alienates the States from each other and fills them with hostile feelings, and the President elected must become the President of the States which choose him, and look with coldness and resentment upon those which oppose him. The choice of electors by legislative ballot is subject to all the objections which apply to the general-ticket system, and to others of the gravest kind. In the first place, it seems to me to be a direct infraction of the Constitution of the United States and an open usurpation of the rights of the people.

The words of the Constitution are: "Each State shall appoint, in such manner as the legislature thereof may direct, a number of electors equal to the whole number of Senators and Representatives to which the State may be entitled in the Congress," &c.

The analysis of this clause shows that two powers are required to act: first, the legislature, which is to direct the manner, and, secondly, the State, which is to appoint the electors.

Are the words "State" and "legislature" synonymous?

The word "state" is a comprehensive term. It takes in all sorts and sizes of government, but always requires three constituent principles, to wit, people, territory, and sovereignty. In the Constitution of the United States it has a precise meaning too obvious to be insisted upon here. It is never confounded with the word "convention" or "legislature." When the "State" is to do a thing, the people of the State are to do it, and a legislative body is not competent to act, because it is not the State but a department of it. The constitutions of all the States declare the legislative body to be a department only. Whenever the Constitution of the United States intended the legislatures of the States to do an act independent of the people, it has expressed its intention in terms wholly unequivocal, as in the appointment of Senators in Congress. "The Senate of the United States shall be composed of two Senators from each State, chosen by the legislature thereof for six years," &c. In the mode of ratifying amendments to the Constitution, the distinctions are again explicit. "The Congress, whenever two-thirds of both houses shall deem it necessary, shall propose amendments to this Constitution, &c., which shall be valid, to all intents and purposes, as part of this Constitution, when ratified by the legislatures of three-fourths of the States, or by conventions in three-fourths thereof." It would be absurd to admit the legislature to be the State, for in that case there would be no State when the legislature was not in session. Certainly it seems to be a loss of time to employ words upon a difference so palpable; but it is necessary to mark it, for the question now to be decided turns upon the distinction between the appointing power of the State and the directorial power of the legislature over the forms of the election.

No argument in favor of this legislative pretension can be bottomed on the word "appoint." Literally, it may refer to the act of any number. In common parlance, it refers to the act of an individual, and that individual a superior, as "The King appoints his ministers." In the Constitution it is used synonymously with *elect* and *choose*. It is so used in an after-clause of this same article, and in reference to this

identical appointment of electors—"Congress may determine the time of choosing the electors, and the day on which they shall give their votes," &c. In fine, the word "appoint" was evidently used to avoid that figure of speech which the rhetoricians call tautophony—that ungraceful repetition of sound which would be produced by saying "elect electors." The word "manner" can imply nothing but form—as the mode of conducting the election, taking the votes, certifying the returns, &c.

The word "direct" is less susceptible of misconstruction than any one in the clause, and, above all others, has been farthest deviated from. It always implies an address to a third party, and never to one's self. It is incapable of being so used. A man may regulate his own conduct, but he directs that of others. A parent directs his child, a tutor directs his pupil, a general directs the operations of his army; a legislative body may direct the people how to go through the forms of an election; but a man cannot direct himself; a legislative body cannot direct itself.

There is not a book in the English language which uses the word in this sense, not one, from the little primer that comes to us in company with the birchen rod, up to the ponderous folios of Johnson. No man acquainted with the power of language would so use it, much less the eminent men who framed the Constitution with so much ability, both as scholars and statesmen, and with such scrupulous regard to the precise meaning of every word admitted into that important instrument. But the legislatures of seven States have so used it, and the question is, not whether they are right or wrong, but whether they have the right to alter the fixed meaning of a plain English word, for the purpose of investing themselves with a power which the Constitution had given to the people of the States?

Mr. B. asserted the obvious meaning of the clause to be the same as if it had been conceived in the following words: "The people of each State shall elect, in such form as the legislature thereof may prescribe, a number of electors equal," &c. Instead of which the legislatures referred to had practiced under it as if written: "The legislature of each State shall elect, in such manner as they and each of them shall severally please, a number of electors equal," &c. Thus, upon the words of the Constitution, it is clear that the people of the States, and not the legislatures of the States, have the right to choose electors of President and Vice-President.

The construction put upon the Constitution, at the time of its adoption, proves the same thing.

Mr. Madison, in the Virginia convention, said, "The people choose the electors."

The *Federalist* says the same thing in twenty places. No. 63 repeats it four times. It describes the electors as "men chosen by the people, for the special purpose" of choosing the President. It describes them as "a small number of persons selected by their fellow-citizens from the general mass." It says the Constitution has "referred the election of the President, in the first instance, to an immediate act of the people of America, to be exerted in the choice of persons for the temporary and sole purpose of making the appointment." And it speaks again of the electors as "a special body of representatives, deputed by the society for the single purpose of making the important choice."

To this list of authorities may be added the legislatures of seventeen States, which have prescribed the forms of choosing electors and left it to the people themselves to make the choice.

Having quoted these constructions of the Constitution to prevent misapprehension, Mr. J. would give his opinion upon the effect which they should have upon the decision of the Senate. He did not admit that any Senator or any other officer whose duty it became to expound the Constitution, was bound by a previous construction. He did not admit that they were in the condition of judges construing a statute, and tied down by respect to their brothers, and the practice of a thousand years, to obey the previous decisions in analogous cases. Their duty depended upon a peculiar obligation to be found in the Constitution itself. All legislators have been anxious to perpetuate their work, and all have had recourse to the security of oaths. Lycurgus swore the Spartans to maintain his laws until his return; then went abroad, died, and had his ashes scattered in the air. The framers of the American Constitution invoked the aid of the same security, but without limitation of time or circumstance. In article 6 they have required that—

"The Senators and Representatives in Congress, the members of the several State legislatures, and all executive and judicial officers, both of the United States and of the several States, shall be bound by oath or affirmation, to support this Constitution."

Upon this oath each person intrusted with the great duty of expounding the Constitution is bound to go back to the words of the instrument itself whenever a question of construction arises. He may and ought to consult the opinions of others in order to enlighten his own. He may quote the opinions of others to give greater weight to his own; but he cannot surrender his own in favor of another, which he believes to be wrong, without disregarding the obligation by which he has bound himself to support this Constitution.

The reasons which induced the convention of 1787 to institute an intermediate

body of electors, the attributes which they were to possess, and the dangers from which they were to be free, will equally show that legislative bodies were not intended to choose the electors, much less to erect themselves into electoral colleges. These reasons, attributes, and apprehended dangers will be found stated in the *Federalist*, No. 68, but, for the sake of brevity and perspicuity, will be presented to the Senate under the heads to which they belong:

1. The electors are to be chosen within thirty-four days before the first Wednesday in December.

2. They are to be chosen for the sole purpose of electing the President and Vice-President.

3. They are to meet on the same day throughout the Union.

4. They are to sit but one day.

5. The electoral colleges are not to be subject to caballing.

6. They are not to be pre-existing bodies.

In bringing the legislative bodies to the test of these reasons and attributes, they will not only be considered in their apparent capacity of electors of electors, but in their real character of the electors of the President of the United States.

First. The electors are to be chosen within thirty-four days before the day of electing the President. The reason for fixing an interval so short is sufficiently obvious. In the first place, it delays the choice of electors until there is full time for all the presidential candidates to be known. In the second place, it allows no time for combinations to be formed between the electors of different States, or for the electors themselves to be bribed or intrigued with, yet the members of the legislatures in the seven States referred to are elected one, two, three, and even four years before the day of electing the President. None of them are chosen for a shorter term than one year, most of them for two, and the senators of several are chosen for four years.

The whole of them are obnoxious to the objections against which the Constitution intended to guard. There is ample time for intrigue, for corruption, and for combinations. The voice of the people has but an indirect operation when the members of the legislature are chosen one year before, and none when they are chosen two, three, or four; for, at that time, that names of the candidates are unknown and the presidential election unthought of by the body of the people.

Secondly. The electors are to be chosen for the sole purpose of electing a President and Vice-President.

The reason of this qualification needs no illustration. It was clearly intended to close the door against the possibility of bartering votes by giving to the electors but one single subject to vote upon.

How will the legislative bodies stand the test of this reason? When chosen within some months or a year before the time of electing the President, they are chosen partly for that purpose and partly for many other purposes. Some knowing ones, some furious partisans, and some equally furious enemies, may surrender all considerations for the single object of getting in a man who will be for or against a particular candidate for the Presidency; but with the body of the people the legislative duties will be the first consideration, and the presidential election nothing but an ingredient, mixing itself in different proportions in the main inquiry. This is the best aspect of the question, and must be confined to elections which take place within some months or within a year before the president is chosen. To those which come on two, three, or four years before, the presidential election is entirely out of view.

So far from being chosen for the sole purpose, the members of the legislature are not even thought of for the purpose of electing the President. Strong as this case is, there is still a more flagrant point of view in which to exhibit it. It is the case of a legislative body elected purely for legislative purposes, and afterward repealing the laws which directed the people how to go through the forms of the election, and seizing into their own hands the whole power of appointing the electors. This is not an imaginary case. It has repeatedly happened. It is sufficient to name one instance, that of New Jersey, in the year 1812, in which the legislature thus invested itself with the power of appointing electors about three days before the people would have exercised it. When met in the legislature innumerable are the opportunities and temptations to barter votes. Judges, generals, governors, and many other state officers are to be elected. Towns are to be laid off, peradventure on some member's land. New counties are to be erected for the benefit of a clerk, a sheriff, and a colonel; peradventure, also, members at the time. Many other local interests are to be accommodated. The members interested in all these domestic questions are laid under violent temptations to exchange votes with the friends of a presidential candidate. Thirdly. The electors are to meet on the same day throughout the Union, and to vote for President and Vice-President. The legislatures meet on the days fixed by the State constitutions, or on the days which they themselves fix by law. In neither case are they governed by the Constitution of the United States. When met, the legislature at any time that it pleases enters upon the business of choosing a President; and when the choice is made a farce is got up to appease the manes of the Constitution. Nomi-

nal electors are chosen and sent to the place where the votes of the State are to be counted.

Instead of going to vote for President, they carry the votes in their pockets, the same which they have received from the legislative body. These votes are shown and counted, and the form of an election is gone through, but no more of the substance than there is of a wedding in the annual marriage of the Doge of Venice with the Adriatic Sea. The real election was held weeks or months before, when the legislative body selected their candidate, and the nominal electors are nothing but messengers, trusted to bring the votes to the place of counting, and without any more power over them than the messenger afterward employed by themselves to take up these same legislative votes and bring them on to the seat of government.

Fourthly. The electoral colleges are to sit but one day. The reason for limiting the electors to this transient existence was to prevent the possibility of intrigues and corrupt practices by denying the time that would be necessary to carry them into effect. But the sittings of the legislative bodies are not under the control of this limitation. They sit as long as they please—usually several months—and during all that time it is beset, like a besieged fortress, by armies of intriguers, cannonaded with books and with pamphlets; bombarded with newspapers; perforated with the rifle-shot of private and confidential letters; and undermined by the silent operations of sappers and miners.

Fifthly. The electoral colleges were not to be subject to *caballing*. The framers of the Constitution sought to protect the presidential election from the influence of that occult management which is the bane of republican councils. They thought they had succeeded when they instituted colleges of electors, composed of few persons selected for their elevated character, brought together suddenly, confined to the discharge of one single duty, and dispersed in the short space of twenty-four hours. But legislative bodies are the reverse of all this. They are the true field for caballing, the theater adapted to the talents of such men as the five cabinet ministers of Charles the Second, to the initials of whose names, combined with their characters, the world is indebted for the political signification of the Hebrew word *cabal*. The legislature of Pennsylvania afforded a signal example in the year 1800. The two houses differed in the choice of a President. They would neither pass a law to direct the people how to hold the election, nor would they vote together. There was a majority of two in the senate, and this lean majority in the leanest branch of the legislature paralyzed the power of the State and forced a compromise with the other branch, by which the elective power of the people, like the spoil of a vanquished enemy, was divided between themselves, each naming one-half of the electors.

Sixthly. The electoral colleges were not *pre-existing* bodies, for the obvious reason that they might not be tampered with beforehand to prostitute their votes. Yet the legislative bodies are pre-existent to the extent of one, two, three, and even four years; and during all this time are subject to the danger from which it was the intention of the Constitution that the electors of the President should be free.

Upon each of these reasons the legislative pretension to choose electors is condemned. But there is one more argument to be brought against them; an argument not invented, but found; not taken from the head, but drawn from the page of American history, from the Journal of the Convention of 1787, from the act of the great men who framed the Constitution; an argument of that conclusive nature which only requires to be stated to silence opposition.

[Here Mr. B. read from the Journal of the Convention, pages 92, 190, 324, 333, to show that it was proposed at one time to have electors chosen by the Congress; at another, to have them appointed by the governors of the States; at another, to vest the power of choosing them in the legislatures of the different States; that this latter proposition was actually adopted at one time, on the 19th of July, and remained in the plan of the Constitution until the 6th day of September following, when it was struck out by a vote of nine States against two. New Hampshire, Massachusetts, Connecticut, New Jersey, Pennsylvania, Delaware, Maryland, Virginia, and Georgia, in favor of striking out; North and South Carolina in favor of retaining the clause.]

Mr. B. believed that all attempts to amplify such an argument as this would only weaken it. He had tried the legislative pretension by the words of the Constitution; by its contemporaneous construction; by all the reasons which led to the institution of electoral colleges, and by the vote of the convention passing upon the identical point in question; and upon every trial the pretension was condemned and stood before the Senate as a direct infraction of the Constitution and an open usurpation of the rights of the people.

Nothing has been said to justify it. On the contrary, the excuses and apologies for the general-ticket and legislative systems have turned upon the admission of their impropriety. The Senator from New York, [Mr. Van Buren,] in that spirit of amity, concession, and mutual deference which cannot be too much admired, has even proposed to surrender both these systems, upon condition, nevertheless, that the small States should surrender their right to an eventual vote for President by *States* in the

House of Representatives. He has called this a compromise, and has certainly urged it upon the Senate with unaffected and becoming seriousness. But the proposition cannot be met. The terms are not equivalent. On the part of the great States it is proposed to relinquish a power usurped from the people in violation of the Constitution; on the part of the small States it is proposed to surrender a constitutional right; the one growing out of ambition and schemes of domination, the other granted to the small States for the preservation and security of their rights. Others place the apology upon different grounds. They run over a list of the States which have adopted these modes, and then say they must adopt the same by way of self-defense, and they will discontinue it when the rest will do so. Thus these States take the attitude of Cæsar and Pompey, each declining to disband his army first. They prefer to violate the Constitution and to outrage the rights of the people, rather than be the first to set an example of justice and moderation.

Two questions of great delicacy now present themselves:

1. If electors are not appointed according to the Constitution, can their votes be counted?

2. If objected to, who shall judge them?

It is the duty of the two houses of Congress to count the votes. Can they count unconstitutional votes? If they cannot, shall they not judge every vote before it is counted?

Mr. B. would not debate these questions. He hoped that the time might never arrive when it should be necessary to debate, much less to decide, them. The country had seen the agitation of 1800, and the still greater agitation of 1820; yet these were nothing but gentle breezes, dead calms, compared to what might be expected if Congress should sit in judgment upon the votes of seven States. Yet, if it shall become their duty, shall they hesitate? Shall they flinch from the defense of the Constitution, which they have sworn to defend, because seven States may stand ready to light up the flames of civil war if not permitted to violate that sacred instrument according to their own will and pleasure? He spoke hypothetically, and with all the respect for the States referred to which was compatible with the undissembled expression of his own opinion. It was not his intention to start a new discussion or to excite feeling, but to have the advantage of a new and powerful consideration in favor of the district system—in favor of some uniform mode of choosing the President; and thus bringing back these States to the path of the Constitution by the gentle means of an amendment, pointing at no one in particular and bearing upon all alike.

Mr. B. proceeded to argue the *second proposition* which he had submitted to the consideration of the Senate, to wit: to discontinue the use of an intermediate body of electors in the choice of President and Vice President of the United States. He read from the Federalist, No. 68, to show the views with which electors were instituted:

"It was equally desirable that the immediate election should be made by men most capable of analyzing the qualities adapted to the station, and acting under circumstances most favorable to deliberation, and to a judicious combination of all the reasons and inducements that were proper to govern their choice. A small number of persons, selected by their fellow-citizens from the general mass, will be most likely to possess the information and discernment requisite in so complicated an investigation."

By the Constitution it was intended that the electoral offices should be one of the first dignity in the Republic. The electors were to be selected; men chosen by the people on account of their superior virtue and intelligence, and left to make choice of a President, according to their own enlightened understandings, without the slightest control from the less-informed multitude. This was the intention, but the plan has wholly failed in the execution. The electors are not independent; they have no superior intelligence; they are not left to their own judgment in the choice of President; they are not above the control of the people; on the contrary, every elector is pledged before he is chosen to give his vote according to the will of those who choose him. He is nothing but an agent, tied down to the execution of a precise trust. Every reason which induced the convention to institute electors has failed. They are no longer of any use, and may be dangerous to the liberties of the people. They are not useful, because they have no power over their own vote, and because the people can vote for a President as easily as they can vote for an elector. They are dangerous to the liberties of the people, because, in the first place, they introduce extraneous considerations into the election of President; and, in the second place, they may sell the vote which is intrusted to their keeping. They introduce extraneous considerations, by bringing their own character and their own exertions into the presidential canvass. Every one sees this. Candidates for electors are now selected, not for the reasons mentioned in the Federalist, but for their devotion to a particular party, for their popular manners, and their talent at electioneering.

The elector may betray the liberties of the people by selling his vote. The operation is easy, because he votes by ballot; detection is impossible, because he does not sign his vote; the restraint is nothing but his own conscience, for there is no legal punishment for his breach of trust. If a swindler defrauds you out of a few dollars in

property or money he is whipped and pilloried, and rendered infamous in the eye of the law; but if an elector should defraud forty thousand people out of their vote, there is no remedy but to abuse him in the newspapers, where the best men in the country may be abused as much as Benedict Arnold or Judas Iscariot. Every reason for instituting electors has failed, and every consideration of prudence requires them to be discontinued. They are nothing but agents, in a case which requires no agent; and no prudent man would or ought to employ an agent to take care of his money, his property, or his liberty when he is equally capable to take care of them himself.

But if the plan of the Constitution had not failed—if we were now deriving from electors all the advantages expected from their institution—I, for one, said Mr. B., would still be in favor of getting rid of them. I should esteem the incorruptibility of the people, their disinterested desire to get the best man for President, to be more than a counterpoise to all the advantages which might be derived from the superior intelligence of a more enlightened but smaller, and therefore more corruptible, body. I should be opposed to the intervention of electors, because the double process of electing a man to elect a man would paralyze the spirit of the people and destroy the life of the election itself.

Doubtless this machinery was introduced into our Constitution for the purpose of softening the action of the democratic element; but it also softens the interest of the people in the result of the election itself. It places them at too great a distance from their first servant. If interposes a body of men between the people and the object of their choice, and gives a false direction to the gratitude of the President elected. He feels himself indebted to the electors who collected the votes of the people, and not to the people; who gave their votes to the electors. It enables a few men to govern many, and, in time, it will transfer the whole power of the election into the hands of a few, leaving to the people the humble occupation of confirming what has been done by superior authority.

Mr. B. referred to historical examples to prove the correctness of his opinions. He mentioned the constitution of the French republic of the year III of French liberty. The people to choose electors; these to choose the councils of five hundred and of ancients; and these, by a further process of filtration, to choose the five directors. The effect was that the people had no concern in the election of their chief magistrates, and felt no interest in their fate. They saw them enter and expel each other from the political theater with the same indifference with which they would see the entrance and the exit of so many players on a stage. It was the same thing in all the subaltern republics of which the French armies were delivered while overturning the thrones of Europe. The constitutions of the Ligurian, Cisalpine, and Parthenopean republics were all duplicates of the mother institution at Paris, and all shared the same fate.

The French consular constitution of the year VIII (the last year of French liberty) preserved all the vices of the electoral system, and from this fact alone that profound observer, Neckar, from the bosom of his retreat in the midst of the Alps, predicted and proclaimed the death of liberty in France. He wrote a book to prove that "*Liberty would be ruined by providing any kind of substitute for popular elections,*" and the result verified his prediction in four years. But the strangest of all arguments against the use of electors, the fact which goes further than all others to prove them to be dangerous to the rights of the people, is that they are continued in France at this time under the charter of Louis XVIII. The people choose electors as under the constitutions of the years III and VIII, and these electors choose the deputies to the legislative body. Heretofore the court party contented itself with a majority, but the signs of liberty shown by the minority in opposing the Spanish war has determined it to have the entire body devoted to the Crown, and the last advices inform us that the chamber would be dissolved to make room for this change, which would be openly effected by bribing the electors.

Mr. B. regretted that the young republic of Colombia had adopted the electoral system, both in the choice of representatives in the Cortes and in the election of the supreme executive. Doubtless they proceeded upon the idea that the people were not sufficiently enlightened for the practice of self-government; but the body of the people are always sincerely devoted to the interest of their country, and their honest mistakes are less dangerous to liberty than may be the artful designs of a small and select body.

He referred to the era of the adoption of the American Constitution to show that many enlightened statesmen were then opposed to the use of electors. From the debates in the Virginia convention, he read several passages from speeches delivered by Mr. Monroe; among others, the following:

"He (the President) is to be elected in a manner perfectly dissatisfactory to my mind. I believe that he will owe his election, in fact, to the State governments, and not to the people at large." "A combination among the electors might easily happen, which would fix on a man every way improper. Contemplate this in all its consequences. Foreign nations, by their intrigues, may have great influence in each State in the election of President. Will not the influence of the President himself have

great weight on his re-election? The variety of the offices at his disposal will acquire him the favor and attachment of those who aspire after them, and of their friends. He will have some connection with the members of the different branches of the Government. They will esteem him, because they will be acquainted with him, live in the same town, and often dine with him. This familiar and frequent intercourse will secure him great influence. I presume, when once he is elected, he may be re-elected forever."

Third proposition: To commit the election of President to a direct vote of the American people.

This is not a new project. It was presented and discussed in the convention of 1787; was twice put to the vote, and supported by the States of Pennsylvania and Delaware, then represented by some of the ablest men that any age or country has produced. These representatives were—

For Pennsylvania.—Benjamin Franklin, Thomas Mifflin, Robert Morris, George Clymer, Thomas Fitzsimmons, Jared Ingersoll, James Wilson, and Gouverneur Morris.

For Delaware.—George Read, Gunning Bedford, John Dickinson, Richard Bassett, and Jacob Broom.

Mr. B. took a pride in reviving the proposition of these great men. He felt himself treading upon safe ground when he could say to the American people, "I am endeavoring to carry into effect the plan of Benjamin Franklin, and of the eminent statesmen whose names have been just read." And, instead of being called upon for an argument in support of a plan so congenial to the principles of our Government, he would suppose that the American people would call for the reasons which prevented its adoption when first proposed. These reasons will be found in the *Federalist*, in No. 68, and reduce themselves to objections growing out of—

1. The extent of the country.
2. The difference of population.
3. Danger of foreign interference.
4. Danger of corruption.
5. Want of intelligence in the people.
6. Danger of tumults and popular commotions.

Without inquiring into the validity of these objections at the time that they were urged, it will be sufficient to consider them now; and to show that with the experience which has been acquired since the adoption of the Constitution, and in the present condition of America, there is not one of them which does not admit of a prompt and satisfactory answer.

First. The extent of the country. This objection would be fatal, if the American citizens, like the Romans, were called from all parts of the republic to vote at the seat of Government. But they will continue to vote where they now do, in their respective counties, wards, and townships; the time only will be fixed by Congress, to make the day of the election the same throughout the Union; but all the forms will be regulated by the State legislatures.

Second. Difference of population. This objection would be fatal if the votes were to be consolidated in one general return. In that case the slaveholding States would lose the three votes in five which they now give for their black population. Doubtless, it would be well for them if they could lose them by getting rid of their black population. The race of whites would take their place, and five would count five, instead of counting three, as it now does. It is the peculiar misfortune of those States that, to all the evils incident to the possession of slaves, is superadded a loss of political weight by this method of counting five persons for three. But the objection would be equally fatal if all the States were non-slaveholding. The qualifications of voters differ in each. In some the right of suffrage is universal; in others it is limited to those who have paid a tax; in others, to those who hold a house, or possess real estate; and in all a residence of greater or less duration is required. In each of these the same mass of population would give different numbers of votes. But this objection is avoided, and the relative weight of the States is preserved, precisely as fixed by the Constitution. Instead of a consolidated vote, the election will be decided by districts. Each district will give one vote, as it now chooses one elector; and the candidate preferred in the district will be entitled to that vote. To the result, it will be wholly immaterial whether the district containing a given number of souls, say 40,000, shall contain one thousand or seven thousand persons, entitled to vote for members in the most numerous branch of the State legislature. It is to persons thus entitled that the privilege of voting for President is proposed to be extended; and it will depend upon the State constitutions, not upon Congress or the Federal Constitution, to restrain or enlarge this privilege.

Third. Danger of foreign interference. That there is reason to apprehend such interference is readily admitted. The histories of all elective governments are full of examples. Our own contains one instance of open and avowed interference—that of Genet's proclamation, in the year 1795. But it is denied that the people are most subject to be influenced by this interference. By what means do foreign nations interfere in elections? First, by troops; secondly, by money. Our local position frees us

from apprehension of the first; and as for money, it must come through the hands of the diplomatic corps, and must be distributed to the persons with whom they congregate. Who are these? American farmers? No. Foreign ministers are not seen in the interior of the States, at the houses of the farmers, offering gold for votes; and if they should ever attempt it they would find many to answer, with the incorruptible George Reed, "The King, your master, is not rich enough to buy me;" and not a few whose answer would stop forever the advance of the minister. No, sir; foreign agents go to small bodies of men—to a Polish diet; to a Germanic college; to a conclave of holy cardinals, and we know how they go. In the time of Francis and Charles they went to the German electors, followed by long trains of mules, packed with bags of gold and silver; but, since the introduction of bills of exchange, the company of the long-eared animals is dispensed with. A scrip of paper is equally efficacious, and avoids the scandal of a public display. If foreign gold shall ever be brought to influence our elections, it will go to the electors or to the legislative bodies, which have usurped the power of choosing the President, and not to the people at large. We have seen the time when tens of millions would have been given by either of the great belligerents of Europe to have elevated a man to the Presidency who would have involved the republic in the war, as one of their allies; and these times may be seen again, when the virtue of public men shall be less stern than it has been. The authors of the *Federalist* were unfortunate, they were absolutely unlucky in the application of this objection. It is an argument for instead of against the people, and recoils with overwhelming force upon a small body of electors.

Fourth. Danger of corrupting the people. This objection is taken from the history of small states, composed of one or two cities; or from the history of great ones, where the political power resided in the inhabitants of the capital. But examples thus derived have no application to the state and condition of the American people. What would be the means of corruption in the United States? They have already been exhibited in the speech of our present Chief Magistrate, delivered in the Virginia convention, in the year 1788, and quoted in the beginning of this argument. Offices, loans, contracts, and entertainments constitute those means. Apply them to the people. Of offices, there would not be one for a thousand; of loans, not one in a hundred thousand would have any money to lend on terms, either good or bad; of contracts, there would not be ten in the thousand who would want them, nor one in the thousand who could get them. The great extent of the Republic and the dispersed situation of the inhabitants would render it impossible to entertain them *en masse*, as Cæsar did the Roman citizens upon his return from Gaul. The twenty-two thousand tables spread by that conqueror for the dregs of a degenerate city could not be stretched from Maine to Florida, from the Atlantic to the Mississippi. But change the direction of these engines of corruption. Address the offices, loans, contracts, and dinners to a college of electors! Do you see this book? said Mr. B. (holding up an octavo volume, bound in blue and gold.) It is the brother to this, (holding up another much less,) and two years younger, but, contrary to the laws of nature, the younger is one-fourth the largest. These books are compiled under a resolution of Congress, and directed to be laid upon our tables on the first day of January of each new Congress. The one which was due on the first day of January last has not yet appeared. I was anxious to have had it, and to have compared it to its elder brethren, for I am much mistaken if the new-born infant, from the moment of its birth, will not exceed all his family in size, and that the increase will be the same in each succeeding member of the family, until, in form and dimensions, a monster shall be produced. This book, the last that has appeared, came forth on the 1st day of January, 1822.

It contains two hundred and fifty-seven pages, every page contains forty names, every name fills an office, and every office draws an annual salary out of the public treasury, varying in all degrees from nine thousand dollars down to a quit. The whole is in the gift of the Executive. It is the book of Executive patronage, the Blue Book of the Republic, the Red and Gold Book of the monarchies of Europe. But this book cannot corrupt the people. The ten thousand offices it contains could effect nothing among ten millions of people. Nine millions nine hundred thousand would remain without offices and uncorrupted. But apply it to an electoral college of two hundred and sixty-one members, or to a small legislative body, and there would be places by dozens for themselves and their friends. The virtue and simplicity of this day must pass away. The time will come when political power will be bought, and when the money of the people will be taken to pay the price.

The time will come when the wifeless and childless bachelor will not look out for a successor to his estate with more anxious solicitude than the incumbent President shall look out for a successor to his presidential power. The time will come when the American President, like the Roman emperors, will select his successor, take him by the hand, exhibit him to the people, place him upon the heights and eminences in the Republic, display him in every amiable, every attractive, point of view, make him the channel of all favor, and draw the whole tribe of parasites and office-hunters to the feet of the favorite. We know it is written that more nations worship the rising than

the setting sun; but let the two suns appear above the horizon at once; let their rays be drawn to a focus upon an electoral college or legislative assembly; yes, let their concentrated rays fall at once upon the double ranks of their united worshipers; let two Blue Books be displayed at once, the actual President paying down his ten thousand offices and the heir apparent giving his note for ten thousand more, due and payable on the 4th day of March then next ensuing! What virtue could stand such trials? The effect must be overwhelming upon a small body of two or three hundred electors; but all these temptations would become insignificant when scattered and dispersed among the millions of people which fill the Republic. The candidate for *their* favor could derive no benefit from his long list of offices. He must come with a list, not of offices to be given, but of services performed in the field or the cabinet. He must come, like the elder Cato, to reform the manners of a degenerate age by an example of simplicity and economy in his own person; like Appian Claudius, to improve and adorn the interior of his country; like Cicero, to crush conspirators by the thunder of his eloquence; like Scipio, to expunge the rival nation from the face of the earth; like Marius, scarred with innumerable wounds, received from the public enemy. He must come, like our own great Washington, not to pillage his country, but to serve her, and to retire from her service through the portals of everlasting fame.

Mr. B. took up the fifth objection—want of sufficient intelligence in the people to enable them to make a judicious choice of President.

He said, this objection had a weight in the year 1787, to which it is not entitled in the year 1824. Our Government was then young, schools and colleges were scarce, political science was then confined to few, and the means of diffusing intelligence were both inadequate and uncertain. The experiment of a popular government was just beginning; the people had been just released from subjection to an hereditary king and were not yet practiced in the art of choosing a temporary chief for themselves. But thirty-six years have reversed this picture. Thirty-six years, which have produced so many wonderful changes in America, have accomplished the work of many centuries upon the intelligence of its inhabitants. Within that period, schools, colleges, and universities have multiplied to an amazing extent. The means of diffusing intelligence have been wonderfully augmented by the establishment of six hundred newspapers and upward of five thousand post-offices. The whole course of an American's life, civil, social, and religious, has become one continued scene of intellectual and of moral improvement. Once in every week more than eleven thousand men, eminent for learning and piety, perform the double task of amending the hearts and enlightening the understandings of more than eleven thousand congregations of people.

Under the benign influence of a free government, both our public institutions and private pursuits, our juries, elections, courts of justice, the liberal professions, and the mechanic arts, have each become a school of political science and of mental improvement. The Federal Legislature, in the annual message of the President, in reports from heads of Departments and committees of Congress, and speeches of members, pours forth a flood of intelligence which carries its waves to the remotest confines of the Republic. In the different States, twenty-four State executives and State legislatures are annually repeating the same process within a more limited sphere. The habit of universal traveling, and the practice of universal interchange of thought, are continually circulating the intelligence of the country, and augmenting its mass. The face of our country itself, its vast extent, its grand and varied features, contribute to expand the human intellect and to magnify its power.

Less than half a century of the enjoyment of liberty has given practical evidence of the great moral truth that, under a free government, the power of the intellect is the only power which rules the affairs of men, and virtue and intelligence the only durable passports to honor and preferment. The conviction of this great truth has created a universal taste for learning and for reading, and has convinced every parent that the endowments of the mind and the virtues of the heart are the only imperishable, the only inestimable riches which he can leave to posterity. I believe the American people, said Mr. B., to be the most enlightened upon earth, and I say this with the full recollection of the ridicule attempted to be cast on the Federal Legislature some ten years ago for an imputed design to decree itself the wisest assembly in the world, which, if it had done, I, for one, should have placed the resolve in the chapter of decrees, true in themselves, but unseasonably proclaimed. I repeat the expression of my belief, with the full knowledge of the fact that, within three years past, it has been tauntingly demanded, "Who, in the four quarters of the globe, reads an American book?" And I know that this supercilious interrogatory was put by the luminaries of the first city of a kingdom, the populace of whose second city, within that period, yes, within two years past, in open day, in the presence of the magistrates, in defiance of the laws, in masses of tens of thousands, rose upon a poor man, their countryman and fellow-townsmen, a maker of paints by trade, and demolished his house, destroyed his property, and were proceeding to put himself to death, when the arrival of dragoons and the blows of sabers released the victim; and all this because this enlightened populace of the second city in the kingdom had taken it into their illuminated heads to believe that the poor

paint-maker compounded his red paints of little children's blood, whom he caught and killed for that purpose!

And now I would ask a question in my turn. I would ask if there is a village in the most obscure part of the Republic in which even a mob of ten-year old boys could have been raised upon such an absurd, vile fabrication? But, I will answer the Edinburgh question. I will tell these reviewers who it is, in the four quarters of the world, that reads an American book; and I will say that wherever liberty exists, in whatsoever clime she has a temple and a votary, on whatsoever portion of the earth the hands of free-men are employed in laying the foundations of a new empire, or in repairing the ruins of an old one, whether it is in Europe or in Asia, in North or in South America, there American books are read, and not only read, but they bear away the palm from all that was ever written by the Lockes and Montesquiers of England and France, by the Platos and Solons of Greece and of Rome.

But whether the objection to the intelligence of the people was well or ill founded in the year 1787, it was at least consistent with the intention of the Constitution at that time. It was the intention of that day that the people should not select the President; that they should limit themselves to the choice of electors, to whose superior information and discernment the election of the Chief Magistrate should be entirely committed. But this intention has failed in practice. The people now select the candidate for the Presidency, and then choose an elector pledged to support their choice. An objection to the intelligence of the people would at this time be both unfounded in fact and inconsistent with established practice. The advocate for the objection would find himself in a dilemma, and I am curious to see upon which horn of it he would choose to hang himself in the face of the American people.

Sixth. Danger of tumults and popular commotions. This objection is taken from the history of the ancient republics; from the tumultuary elections of Rome and Greece. But the justness of the example is denied. There is nothing in the laws of physiology which admits a parallel between the vindictive Italian, the volatile Greek, and the phlegmatic American. There is nothing in the state of the respective countries or in their manner of voting which makes one an example for the other. The Romans voted in mass, at a single voting-place, even when the qualified voters amounted to four millions of persons. They came to the polls armed, and divided into classes and voted, not by heads, but by centuries. In the Grecian republics all the voters were brought together in one great city, and decided the contest in one great struggle. In such assemblages both the inducement to violence and the means of committing it were prepared by the government itself. In the United States all this is different. The voters are assembled in small bodies, at innumerable voting-places, distributed over a vast extent of country. They come to the polls without arms, without odious distinctions, without any temptation to violence, and with every inducement to harmony. If heated during the day of election, they cool off upon returning to their homes and resuming their ordinary occupations. A month afterward, when the result of a presidential election would be known, the body of the people would be too much occupied with their own concerns, and too sensible to the voice of reason, to think of taking up arms in favor of an unsuccessful candidate. The party defeated at an election must fight upon the spot or never. Sleep and dispersion rapidly cool their belligerent passions.

Instead of violence, it is apathy which we have to dread in our presidential elections. There is too much apathy at this time upon the subject of the impending election. The intemperance of some newspapers, the heat of some cities, and the fury of some partisans furnish no criterion for estimating the temper of the continent. The tranquillity of the American people is not affected by these local agitations. Some citizens confine themselves to the inquiry, "Who will you give us for President?" The question implying the humiliating fact that an American citizen has no weight in the choice of the first officer of the Republic. Others are quietly looking out for the best man to administer their affairs, and all agree in holding in the uttermost contempt every effort to impose upon their judgment, whether the fraud shall be exhibited in the shape of poisonous detraction or of fulsome adulation.

But let us admit the truth of the objection. Let us admit that the American people would be as tumultuary at their presidential elections as were the citizens of the ancient republics at the election of their chief magistrates.

What then? Are we thence to infer the inferiority of the officers thus elected, and the consequent degradation of the countries over which they presided? I answer, no. So far from it, that I assert the superiority of these officers over all others ever obtained for the same countries, either by hereditary succession or the most select mode of election. I affirm those periods of history to be the most glorious in arms, the most renowned in arts, the most celebrated in letters, the most useful in practice, and the most happy in the condition of the people, in which the whole body of the citizens voted direct for the chief officer of their country. Take the history of that commonwealth which yet shines as the leading star in the firmament of nations. Of the twenty-five centuries that the Roman state has existed, to what period do we look for

the generals and statesmen, the poets and orators, the philosophers and historians, the sculptors, painters, and architects, whose immortal works have fixed upon their country the admiring eyes of all succeeding ages? Is it to the reigns of the seven first kings? To the reigns of the emperors, proclaimed by the Prætorian bands? To the reigns of the sovereign pontiffs, chosen by a select body of electors in a conclave of most holy cardinals? No, we look to none of these, but to that short interval of four centuries and a half which lies between the expulsion of the Tarquins and the re-establishment of monarchy in the person of Octavius Cæsar. It is to this short period, during which the consuls, tribunes, and prætors were annually elected by a direct vote of the people, to which we look ourselves, and to which we direct the infant minds of our children, for all the works and monuments of Roman greatness; for roads, bridges, and aqueducts constructed; for victories gained, nations vanquished, commerce extended, treasure imported, libraries founded, learning encouraged, the arts flourishing, the city embellished, and the kings of the earth humbly suing to be admitted into the friendships and taken under the protection of the Roman people. It was of this magnificent period that Cicero spoke, when he proclaimed the people of Rome to be the masters of kings and the conquerors and commanders of all the nations of the earth. And, what is wonderful, during the whole period, in a succession of four hundred and fifty annual elections, the people never once preferred a citizen to the consulship who did not carry the prosperity and glory of the republic to a point beyond that at which he had found it.

It is the same with the Grecian republics. Thirty centuries have elapsed since they were founded; yet it is to an ephemeral period of one hundred and fifty years only, the period of popular elections, which intervened between the dispersion of a cloud of petty tyrants and the coming of a great one in the person of Philip, King of Macedon, that we are to look for that galaxy of names which shed so much luster upon their country, and in which we are to find the first cause of that intense sympathy which now burns in our bosoms at the name of Greece.

These short and brilliant periods exhibit the great triumph of popular elections; often tumultuary, often stained with blood, but always ending gloriously for the country. Then the right of suffrage was enjoyed; the sovereignty of the people was no fiction. Then a sublime spectacle was seen when the Roman citizen advanced to the polls and proclaimed, "I vote for Cato to be consul;" the Athenian, "I vote for Aristides to be archon;" the Theban, "I vote for Pelopidas to be bogotarch;" the Lacedæmonian, "I vote for Leonidas to be first of the Ephori." And why cannot an American citizen do the same? Why may not he go up to the poll and proclaim, "I vote for Thomas Jefferson to be President of the United States?" Why is he compelled to put his vote in the hands of another, and to incur all the hazards of an irresponsible agency, when he himself could immediately give his vote for his own chosen candidate, without the slightest assistance from agents or managers?

But, said Mr. B., I have other objections to these intermediate electors. They are the peculiar and favorite institution of aristocratic republics and elective monarchies. I refer the Senate to the late republics of Venice and Genoa; of France, and her litter; to the kingdom of Poland, the empire of Germany, and the pontificate of Rome. On the contrary, a direct vote by the people is the peculiar and favorite institution of democratic republics, as we have just seen in the governments of Rome, Athens, Thebes, and Sparta; to which may be added the principal cities of the Amphyctionic and Achæan leagues, and the renowned republic of Carthage when the rival of Rome.

I have now answered the objections which were brought forward in the year '87. I ask for no judgment upon their validity at that day, but I affirm them to be without force or reason in the year 1824. Time and experience have so decided. Yes, time and experience, the only infallible tests of good or bad institutions, have now shown that the continuance of the electoral system will be both useless and dangerous to the liberties of the people, and that "the only effectual mode of preserving our Government from the corruptions which have undermined the liberty of so many nations is to confide the election of our Chief Magistrate to those who are farthest removed from the influence of his patronage;"* that is to say, to the whole body of American citizens!.

One other objection yet remains to be named and answered, an objection of recent origin, stated for the first time on this floor by the Senator from New York, (Mr. Van Buren.) In substance it is this: that by giving the election to the people in districts, the votes for President would be more apt to scatter among various candidates, less apt to concentrate upon one or two, and thereby the chances of an eventual reference to the House of Representatives would be increased.

The analysis of this objection shows it to be an objection purely and simply to the district system, as the votes would be liable to scatter precisely as much in choosing electors by districts as in voting for President by districts. In either case the majority would lose the power of impressing the minority; and that they ought to lose it has,

* Report of the committee of House of Representatives, by Mr. McDuffie.

in my opinion, been sufficiently shown in the beginning of this argument. But it is not admitted that the result would be as apprehended by the Senator from New York. In the first place, the candidates for the Presidency, be their number what it may in the first stages of the canvass, will always reduce themselves, or be reduced by the force of circumstances, to two or three individuals, before the day of election comes round. In the second place, admitting that the votes of one State may scatter, yet the votes of all the others may scatter likewise; and what is lost by a particular candidate in one State may be gained by him in another.

Fourth. To continue the nupirage in the House of Representatives, in all cases in which no candidate receives a majority of the whole number of votes. This is the last proposition, said Mr. B., which I have had the honor to submit to the consideration of the Senate. In taking it up I have to regret that I shall find myself separating in opinion from those from whom I can never divide without a painful apprehension that I am going into error. My sensibility to this unpleasant sensation is increased upon this occasion because, in dividing from so many whose judgments I reverence, I seem to take the direct road which leads to the interest of my own State. But, notwithstanding the embarrassing effect of this appearance, I will cheerfully throw myself upon the candor of the Senate while I briefly show that the real interest of Missouri, in this question, is directly opposite to what it seems to be.

This infant State is now called small; but she contains all the elements of future greatness. She has sixty thousand square miles of territory, and a soil and climate adapted to the support of the heaviest population. Her mines and salines will give rise to great manufacturing establishments. Her geographical position, in the center of the valley of the Mississippi, will give her great political weight, and in war her force will be disposable, because she, herself, will be inattackable.

The wonderful phenomenon of thirty thousand miles of navigable water, uniting in her center, and flowing, by one channel, to the Gulf of Mexico, will give her commercial advantages unequalled by any other interior part of the globe. On the basis of the ordinary population of old countries, one hundred and fifty to the square mile, she will be able to contain nine millions of souls, equal to the entire white population of the United States at this day. Looking to these facts, and it is clear that the permanent interest of Missouri lies with the powerful, not with the weak States. But, leaving out of view all considerations of this kind, placed on a theater which is elevated far above the atmosphere of local interests, charged with the sacred duty of legislating for the whole American people, I claim for myself no more than I freely grant to every member of the Senate, a sincere desire to perpetuate our republican institutions, and to save that union of the States upon which will depend the happiness and prosperity of our descendants, when we ourselves shall be beyond the reach of any earthly government, either good or bad.

The amendment reported by the committee proposes to take away from the House of Representatives the eventual right of voting by States for President and to vest it in both Houses of Congress, voting by heads. The effect of this amendment would be to give the election of President unconditionally and absolutely to the powerful States.

I am opposed to the principle of this amendment, because it goes to the subversion of the Government under which we live.

The Constitution of '87 reposes upon two principles, one federative, depending upon the States; the other representative, depending upon population. Both are combined throughout the whole frame of the General Government. The most inconsiderable bill cannot become a law of Congress without submitting to the authority of each of these principles; it must receive the double ratification, once by a majority of people in the House of Representatives and once by a majority of States in this chamber. The two principles are absolute in their application to every measure of the Federal Legislature; but in the election of President the federative principle is contingent, and contingent, too, upon the will of those who have the inclination and the power to prevent the contingency from ever happening.

Before the adoption of the Constitution the federative principle alone operated. There was but one house of Congress, each State had but one vote, and the majority of States decided every question. The Constitution itself was formed in the same way in a convention voting by States, and the majority of States deciding every question.

The great difficulty in the convention was to fix upon the mode in which votes should be counted upon national subjects; the large States wishing that a majority of population should prevail, and the small ones that a majority of States should govern. The result was a compromise, by which both principles were brought into operation, each as a check upon the other. The combination was new and happy. No example in any previous confederacy, nor any writer in theory had furnished the hint. The world is indebted for it to the great men who framed the American Constitution, and beyond all doubt it will give a duration to our Government which could not be expected from a simple confederation voting by States, nor from a consolidated republic deciding every question by the majority of numbers. But no human institution is per-

fect, nor are there any two principles upon earth which can precisely balance each other. One must be the weakest from the beginning; and in practice the weak must become weaker and the strong more powerful, until the absolute mastery of one and the absolute subserviency of the other is completely established.

In the plan of our Government the federative is the weak, the representative the strong one. The federative rests upon the States, which are few; the representative upon the people, who are numerous. In time, the most powerful must master the other; and the attack has now begun. The amendment reported by the committee is an attack upon this principle, not in its whole extent, but in one point. What is this point? It is called "an election of President by the House of Representatives." In researches after truth, it is important to use accurate expressions. This phrase is not accurate. The House of Representatives have no power to "elect" a President. They have no elective faculty, no power of choice; they are limited to the humble occupation of preferring one out of three, each of whom may be obnoxious to them. They are nothing but arbitrators, referred to as mutual friends to settle a question of mutual interest. A reference to the House of Representatives is clearly a case of a nomination of three candidates by the people and the acceptance of one by the States. With the important qualification that the people only nominate to the States when they cannot agree among themselves, it is not a case of "election," but a sort of substitute for the gold and silver balls in the choice of a doge of Venice.

Before we examine the objections to the main question we will stop a moment to examine the case of 1800; the example always referred to as the one to be dreaded, and to avoid the repetition of which is one of the main arguments in favor of amending the Constitution. Now, the fact is, the case of 1800 cannot possibly happen again; it was not for want of a majority that the decision then went to the House of Representatives, for two candidates had each a majority, and that majority was the same—73 for Mr. Jefferson and 73 for Mr. Burr. It was not for want of a majority but for want of designation that the question went to the House, and this can never happen again, for the Constitution has been amended, and the votes given for President and Vice-President are now designated in the ballots. The fact of that case can never happen again, nor the excitement which it produced. What was the cause of that excitement, of that indignation and rage which inflamed the country? It was the fact that a man who had not received one vote for President was about to be made President over the man who had received a majority of the people's votes; it was because a candidate, preferred by one party to the second office in the Republic, was taken up by the opposite party, turned upon his old friends, and made the instrument of crushing their success in the moment of enjoyment; it was because the people were to be cheated out of their choice by what they believed to be a fraudulent and treasonable combination against them. If the thirty-six ballotings had been between Mr. Adams and Mr. Jefferson there would have been no talk of a civil war, no menace of marching troops. Both these gentlemen had been voted for as President; the country was nearly divided between them. The defeated party would have taken their defeat tranquilly, because it would have been fair. The case of 1800 can never happen again, neither in point of fact nor in the excitement which it produced, and I protest against it as an argument in favor of altering the Constitution.

Mr. B. then proceeded to the objections brought against the continuance of this power in the House of Representatives. These were of two kinds: one of principle, because it leveled the power of the States; the other of detail, because the House of Representatives is held to be an unfit depository of this principle.

To show the possible operation of this principle, a table has been exhibited in all the newspapers, demonstrating that thirty-one members of Congress, from thirteen of the smallest States, may be able to decide the election. The table is not new; it was exhibited in the convention of '87, and in the Virginia convention which ratified the Constitution, and produced at that time a result still more astounding; for, according to these tables, fifteen members from the seven smallest States were to effect the election. I refer to these old calculations for the purpose of showing that the evil now so much dreaded is not a new discovery, but was perfectly understood before the adoption of the Constitution; and, though urged in its most imposing form, was not sufficient to prevent its adoption in a single State. It was then considered, as it now must be, as the mere calculation of a possible case which can never happen.

So many States, so widely dispersed, (for the table takes in Maine and Louisiana, Delaware and Missouri, Rhode Island and Alabama, and many others equally remote from each other)—so many States, without community of interest or feeling, can never unite in a common object, still less to effect their purpose by the miraculous coincidence of a majority of one in thirteen successive instances; and without this miraculous concurrence of the same majority, the table loses all its imposing effect, and would show thirteen States, having forty-five Representatives, and entitled to seventy-one electoral votes, uniting in one object, and deciding the election. Mr. B. said he would exhibit another table to the Senate, which he believed to be new, and not only possible, but probable.

The whole number of electoral votes at present is 261; of these, 132 are given by six States, which choose their electors either by general ticket or legislative ballot. The same candidate may be taken up by the dominant party in each of these States and may succeed in each by a bare majority, say a majority of one; he will then have 72 voluntary votes, and 60 impressed ones. All the other States may be against him, yet he is elected; elected by six States against the eighteen, by 72 votes against 189; by 2,800,000 people against 7,200,000. Yet this is called an election by the people, an election by the majority, when it is shown that it may be the work of one-fourth part of the States, one-fourth part of the votes, and one-fourth part of the people. But it may be said that this is a mere case of possibility, which can never happen. I answer, to the letter it is not expected to happen, but, in effect, it not only can happen, but is extremely probable.

The six States referred to approximate to each other and can easily combine. They may differ about the individual they would prefer for President, but they are all united in one wish, one design, one interest, in keeping the decision from the States in the House of Representatives. They all have the same horror at the idea of seeing themselves balanced on a final vote by the single Representative from Illinois, Delaware, Mississippi, and Missouri; and there is no knowing to what compromises this community of feeling and this joint horror may lead. Certainly, while the electors continue to be chosen by general ticket and legislative ballot, it is a farce to talk about the will of the people; and, with every disposition to treat the subject candidly, I think the majority of the people have about as good a chance for succeeding in the House of Representatives as they have in a vote by electors thus chosen. I have said that the principle of the amendment reported by the committee goes to the subversion of the Government under which we live. That principle is, that the majority of the people ought to govern. Certainly this is correct in a consolidated republic; but apply it to the equal representation of the States in the Senate Chamber. There are twenty-six Senators from thirteen States, containing a population of two millions; that is, a majority of Senators representing one-fifth of the population. Apply it to the ratification of treaties. Eighteen Senators from nine States, containing a population of one million of inhabitants, may prevent the ratification of a treaty supported by thirty Senators, representing nine millions of people! Apply it to the mode of amending the Constitution, which requires a concurrence of three-fourths, and the result may show you fourteen Senators from seven States, containing six hundred and forty thousand souls, preventing the adoption of an amendment against the vote of thirty-four Senators representing nine and a half millions of people! But, it will be said, there is no danger of any attack upon the Senate. I answer, that thirty years ago there was no visible danger of any attack upon the rights of the States in the eventual vote for President, and twenty years hence the class of small States, now so much the most numerous, will become the smallest number. At present we count eighteen small and six great States; but in this count the estimate turns upon population, which is constantly varying, and not upon the size of the States, which is fixed and permanent.

All the Western States now in existence will be of the largest class. Those to be created will also be of the largest size. They will wish it, to gratify their pride, and it will be granted them, to lessen their relative weight in the Senate. Five new States of the largest class must be admitted within some years. Florida, 48,000 square miles; Arkansas, 60,000, and three more in the Northwest Territory, between the State of Illinois and Lake Superior, averaging 50,000 square miles each. The relative proportions of great and small States will then be reversed, and a proposition which cannot be defended by any one now will then be as popular as is the present attack upon the eventual right of the States to decide a presidential election.

Gentlemen say there is no danger of any attack upon the equal representation of the States in the Senate. But I ask if there are no "private griefs" even now upon this subject? The Holy Scriptures tell us, that out of the fullness of the heart the mouth speaketh; and hath not the mouth spoken and the heart betrayed its fullness upon this very subject within a few short days past?

[Here Mr. Benton read the following extract from Mr. Van Buren's speech in the Senate December 29th:]

"The great departments of the Government were the legislative, executive, and judicial. The latter is organized by the two former, and the influence of the respective States in its organization is of course the same as it is in the other two. In the choice of the Executive and in the popular branch of the legislature each State has a representation proportioned to its representative numbers, with this exception, that in the choice of the Executive an addition of two votes was given to each State, without regard to its numbers or the amount of its contribution to the public Treasury. But in this branch of the legislature the case is widely different. Here, in consequence of the peculiarity of our condition at the time of the adoption of the Constitution, the equitable principle of representation, founded on population and contribution, has been entirely disregarded. Here each State, on the score of its sovereign character, has equal weight. And what, he asked, was the relative importance of this branch in the

Government? He would not say it was that by which all the efficient power of the Government was controlled, but he would say that but a slight consideration of the Constitution was necessary to show that this branch did so more than any other. With the single exception of originating revenue bills, its legislative powers were co-extensive with the popular branch. No law could pass without the assent of the Senate. Almost all the important proceedings of the Executive are subject to its revision. All appointments require its approbation, unless its assent is first obtained to a law providing a different mode.

"The consent of two-thirds of this body is necessary to the validity of all treaties; and it has the sole power to try impeachments of all the high officers of the Government, as well executive as judicial. In a branch of the Government possessing such extensive powers, the small but patriotic State of Illinois, with a population of fifty-five thousand, has a representation equal to that of Pennsylvania, with a population of one million and fifty thousand. The five largest States in the Confederacy, viz, Ohio, Pennsylvania, Virginia, North Carolina, and New York, with a population of four million eight hundred thousand, have a representation but equal to the five smallest States, with a population of three hundred and fifty-three thousand. Nearly one-half the nation, residing in the five largest States, has a representation but equal to the one-twenty-seventh part residing in the five smallest States. About one-half the whole people, residing in five States, are represented here by ten voices, while the other half are represented by thirty-four voices. The disproportion of the relative influence of the several States, having reference to their population as a just basis of representation, cannot fail to strike every mind. The same inequality existed at the adoption of the Constitution, but in a much less degree. Then, taking an average of the population of the States, and considering those as small who do not come up to it, the large States were in a majority; now, by the admission of new States, with assent of the old, they are in a minority. There were at that period eight large and five small States. Now, by the same criterion, there would be found to be but ten large and fourteen small States. Still this was all right; it was according to the compact into which all the States had voluntarily entered; and he fervently hoped, for the peace and happiness of the people of these States, that the day might be far distant when even a desire should be entertained to alter it."

[Mr. B. also read the following extracts from Mr. McDuffie's speech in the House of Representatives, January 16th:]

"Now," said Mr. McDuffie, "there is no political principle more undeniable, than that the deliberate opinion and settled conviction of a majority of the people (in a government recognizing in them the right and the capacity of self-government) ought to prevail over the will of the minority, even in relation to the Constitution. Why, then, it may be asked, does that instrument require, for an amendment, the concurrence of more than a majority? I answer, for the very wisest of purposes; but not surely to give the permanent ascendancy to the opinion of the minority. This requirement was intended for no other purpose than to prevent hasty and inconsiderate changes, and to give time for reflection and deliberation. But when the sense of a decided majority of the community is permanently and unalterably settled down in favor of any amendment, the end of this provision is answered, and the minority ought to yield. I will not say that they have not the constitutional right, as well as power, to oppose the will of the majority; but I contend that it is their moral duty, as well as their undoubted interest, to yield, under such circumstances.

"The small States are the favorites of the Constitution, and even under the proposed amendment would be eminently so. A very slight examination will make this apparent. There are seven States in the Union which, together, contain a population smaller than that of North Carolina. What is their relative power? They have fourteen votes in the Senate, a co-ordinate branch of the legislature, while North Carolina has but two! This, too, is a power of which they can never be deprived. And yet we are told that the small States are in danger of oppression!

"The seven States to which I have alluded are entitled to twenty-six electoral votes, while North Carolina, with a larger population, is entitled to fifteen only. States having but a single Representative are entitled to three electors for a population of forty thousand, whereas the large States are entitled to but little more than one elector for the same population."

Mr. B. did not read these extracts for the purpose of arguing against them. He read them as a solemn warning to the small States, as proof that all their rights were in danger, their equal representation upon this floor, and their existence in the Constitution itself, which it is openly contended ought to be amended by a bare majority of population, without any regard to the sovereignty of the States which composed it. Let it not be said that the Constitution will protect the rights of the small States. The Constitution itself may be amended, not at this moment, while the small States are the majority, but some twenty or thirty years hence, when there shall be eighteen or twenty large States, and no more than eight or ten small ones. The knowledge of this ultimate and approaching danger should warn the small States, at

this moment, to stand together, and to resist this attack upon their rights. They have already lost one-half of the privilege secured to them by the Constitution of 1787. By the Constitution of that day the States in the House of Representatives had the privilege of choosing a President from the five highest on the list of candidates: by the amendment of 1803, they are reduced to a choice out of three. The range of selection is narrowed one-half by this first amendment, and now, by a second amendment, it is proposed to take away the right altogether. It is thus that the federative principle, the weak principle of our Government, is sinking under the attacks of the representative principle, by which it must eventually be overpowered and destroyed. The amendment reported by the committee reposes upon a false principle. It is made to depend upon the present unequal population of the States; and the argument in support of it is, that it is unjust that Missouri, Illinois, Mississippi, Alabama, Louisiana, and Indiana, should have as much weight as New York, Pennsylvania, Virginia, Ohio, North Carolina, and Massachusetts, in the decision of the presidential election.

Now, the six States objected to as small contain 300,000 square miles, while the six referred to as large contain but 245,000. The first six, upon every principle of relative power, will be the most powerful in the lapse of some years. They have the greatest number of square miles; they are capable of sustaining the heaviest population: they are interior States, and their whole force will be disposable in time of war. Admitting them to be correctly classed among small States at present on account of their population, yet this classification is temporary and is altering itself every day, and it is false policy to alter a permanent instrument, the Constitution of the Republic, for a temporary evil which will correct itself in the course of a few years.

The amendment of the committee turns upon a false principle again in assuming as probable what has not yet happened under the Constitution, and in all probability will not happen for an age to come. It turns upon the probability of carrying the presidential election to the House of Representatives for want of a majority of votes in favor of any one candidate. This is a contingency which has not yet happened. The case of Burr and Jefferson, so constantly quoted, is not a case in point. It was not for want of a majority that these gentlemen appeared before the House of Representatives, but for want of discrimination, and that is now provided against by the amendment to the Constitution which requires the electors to vote separately for President and Vice-President. The Constitution has been in force thirty-six years: nine elections have taken place; a majority of electoral votes has always been given to some one candidate; and, in the case of Jefferson and Burr, a majority was given to two candidates. No election has gone to the House of Representatives for want of a majority, and it now depends upon the act of those States, half a dozen in number, which have the *will* and the *power* to prevent it, whether the pending election or any future one shall go there for that cause; and, when we look to the increased sensibilities of these States upon this point, the prospect of such an occurrence becomes a most remote and improbable contingency.

Mr. B. was opposed to the committee's amendment, because it went to unsettle one of the compromises upon which the Constitution reposes. He quoted a part of Mr. Madison's speech in the Virginia convention, to prove the right in question to have been a compromise between the great and small States:

"As to the eventual voting (for President) by States," said Mr. Madison, "it has my approbation. The lesser States and some larger ones will be pleased by that mode. The deputies from the small States argued, and there was some force in their reasoning, that when the people voted the large States evidently had the advantage, and, without varying the mode, the interest of the small States might be neglected or sacrificed. Here is a compromise." Everybody knows that without compromise the Constitution of 1787 could not have been framed; and it is a fair inference that, unless these compromises are preserved inviolate, the Constitution must perish. It was a compromise between the slaveholding and non-slaveholding States to admit a qualified representation of the black population; it was a compromise between the large and small States which produced an equality of representation in the Senate; and it was a compromise between the same large and small States which gave the election of President in the first trial to the people, and if they failed to make a choice, then referred to the States. Destroy either of these compromises, and one of the pillars is taken away which now supports the edifice of the Constitution.

I know that it is the fashion to cry down the House of Representatives, but there are positive advantages in referring the election, upon the second trial, to that House. In the first place, it is necessary to the safety and respectability of the small States that they should stand for something in the presidential election. In a mere vote of numbers, they are lost. No President or candidate for the Presidency would court their good-will, even by doing them justice. Their most meritorious citizens would apply in vain for the humblest appointment. All the executive favors would flow into the great States, in reward of past services, or to induce new exertions. In the second place, it imposes a salutary restraint upon the ambition and violence of the great States. The House of Representatives stands before them *in terrorem*. They are

constantly admonished to act with moderation, good faith, and harmony, by the danger of seeing the election slip out of their hands. It compels the electors, also, to vote in good faith. They are to have but one trial. There is no room for experimental voting; no room for combinations; no room for false runnings upon different candidates. It deranges any scheme of corruption by changing both the electors and the mode of voting. It conforms to the will of the people; for the Representatives in Congress are now chosen with an eye to their contingent faculty of electors of President; and care is taken to elect those only who will obey the wishes of their constituents.

In addition to all these reasons, the House of Representatives is a safer depository of the elective privilege than any other body of equal numbers which either exist at this time or can be created under the Constitution of the United States. Who composes the House of Representatives? Aged men, and men in the meridian of life who have filled the first offices in their own States, or under the General Government, whose integrity has been tested by a long course of public service and of devotion to the people's interest; young men, appearing above the political horizon, their bosoms filled with noble aspiration, looking forward to the first honors of their country, and looked to by their country as the future leaders of the republic. If it is said that there may be some bad material in the House, I will ask for the body of equal numbers in which there is so little. And I will maintain that the House of Representatives has ever been, now is, and while the republic lives it must continue to be, for talent, for integrity, and for elevation of character, the first body of men of equal numbers which either exists in our own or in any other country in the world. To my mind, therefore, there is no place more safe for depositing the right of the States to decide the presidential election than this House is. Still this is a detail. The great principle for which I contend is that after one trial by the people the next shall be by the States. The States may have the benefit of this principle in more ways than one.

Some gentlemen are in favor of remanding the election to the electoral colleges. Much as I am opposed to that mode of proceeding, my objections would be half diminished if, in this second trial, the electors were required to vote by States—the electors of each State giving one vote. Still I would prefer the House of Representatives, for the reasons already mentioned, and for another which had great weight with the framers of our Constitution. It is already seen, by looking to the powers of the Senate, and to the powers of the House of Representatives, how much the former exceed the latter. The Senate have all powers which belong to the House, except the faculty of originating money bills, and of preferring impeachments; but, even in these exceptions, the power of the Senate is still predominant; for the money bill cannot raise a dollar, nor the impeachment remove one delinquent from office, without the consent of the Senate.

Besides a concurrent power in legislation, the Senate is clothed with the extraordinary powers which, in monarchies, belong to the king, or to an hereditary body of nobles. In its power over the ratification of treaties, it controls the legislation of the whole Union. It controls the President in his strong arm, in his power of appointment to office. It presides in some degree over the administration of justice, in its power of appointment and removal of the Federal judges. It is the judge of the President himself—can try him for an imputed misdemeanor, and pronounce the forfeiture of his office. To this accumulation of powers is superadded a duration in office longer than is enjoyed by any other officer of the State or national governments.

The framers of the Constitution foresaw that, in the presence of a body thus constituted, the House of Representatives—the popular branch of the legislature and the peculiar depository of the republican principle—would be in danger of dwindling into comparative insignificance unless armed with some prerogative peculiar to itself. Hence was conferred upon it the right to originate revenue bills, to institute impeachments, and to act as umpire in the last resort between the leading candidates for the presidential chair.

Mr. B. confirmed this view by reading a part of the sixty-seventh number of the *Federalist*, in which it is stated expressly that, as a counterpoise to the extraordinary powers of the Senate and to secure the equilibrium of the House of Representatives, the three prerogatives enumerated were conferred upon it, and the last particularly relied upon:

"The House of Representatives will be the umpire in all elections of the President which do not unite the suffrages of a majority of the whole number of electors—a case which it cannot be doubted will sometimes, if not frequently, happen. The constant possibility of the thing must be a fruitful source of influence to that body. The more it is contemplated, the more important will appear this ultimate, this contingent power, of deciding the competitions of the most illustrious citizens of the Union for the first office in it. It would not, perhaps, be rash to predict that, as a mean of influence, it will be found to outweigh all the peculiar attributes of the Senate."

Upon this exposition, Mr. B. submitted it to the Senate to say whether it was not highly objectionable to strip the House of Representatives of a power given to it as a

counterpoise to the Senate, and particularly so for the Senate itself to commence this work of spoliation?

It has been seen that every argument that can be urged in favor of taking from the small States their eventual chance to act a part in the presidential election, may be carried forward and urged with great force in favor of depriving them of their equal representation in the Senate. Let it be supposed, then, that the present attempt has succeeded; what next? Why, an open attack upon the constitution of the Senate. Speakers of portentous ability, like the Senator from New York, [Mr. Van Buren,] and the Representative from South Carolina, [Mr. McDuffie,] whose sentiments have been already quoted, will display the enormity of the principle which gives to the eighty thousand inhabitants of Rhode Island as many Senators as belong to the million and a half of New York. Hundreds of presses and a thousand subaltern orators will repeat, that in a republic the majority ought to govern. All the powerful States will adopt this principle, and eventually the representation of the Senate will be bottomed upon population and not upon States. What, then, will be the condition of the republic? Consolidation!

It is in vain to say that the States will still have their territorial limits, their governors and local legislatures. Russia, and even Turkey, have their provinces, their governors, and provincial governments. Our Federal Government will be changed from a federation of States into a republic "one and indivisible," in which the majority of numbers will decide every question. The two houses of Congress, like the council of five hundred and the council of two hundred and fifty, will rest upon numbers, and the Representatives from the most populous sections of the Union, being a majority in both houses, will decide all questions to suit the interest of their own section. Could the United States stand this? All the books answer, no. The framers of the Constitution said, no. The experience of thirty-six years answers, no. The Missouri question gives the same answer. And what would be the result if the tariff, now depending, could be regulated by either of the three great interests of agriculture, commerce, or manufactures? We all profess an abhorrence of consolidation, but we disagree in the definition. In my opinion the consolidation of our Federal Government would be complete when a majority of members shall govern in both branches of the legislature.

The powerful States, the populous sections, the predominating interests, would then prevail; the weak States, the less populous divisions, the inferior interests, would be sacrificed. In opposing this state of things I am not pleading for myself, for my own State, nor for the section from which I come. I belong to the valley of the Mississippi; great in extent, indivisible in policy, capable of sustaining a hundred millions of people. Sectionally, I have nothing to fear from a consolidation of the Federal power; as a lover of the Union, I fear everything. I fear for the small States, and, in their fate, for the Union itself. Not for the small States of the West, for they will be great, but for the small States of the Atlantic board, part of the old thirteen, to whose heroic efforts in the war of the Revolution—to whose confiding spirit in the convention of 1787, we are indebted for the privilege of sitting this day in consultation upon their rights. Which are these small States? They are Massachusetts, with 8,000 square miles; New Hampshire, 10,000; Vermont, 10,000; Rhode Island, 1,360; Connecticut, 4,600; New Jersey, 7,000; Delaware, 2,000; Maryland, 11,000; Maine, 30,000; South Carolina, 30,000. Let not these two last object to this classification.

They have but half the superficial content of the States of the first magnitude. They are border States, and will have no disposable force in time of war. In spite of their noble spirit, their intellectual and moral worth, they are condemned by the inexorable voice of their boundary-lines to take their permanent place in the class of the small States. These are the States which are to suffer by yielding the election of President to the populous States, by giving to all the States a representation according to population in the Senate; in fine, by carrying into effect the principle that in the Federal Government the majority of numbers shall decide every question. Under the operation of that principle the confederation of the States would degenerate into an alliance between the weak and the strong, without any check in favor of the weak; a sort of alliance which, in all ages and all countries, has been nothing but the realities of the fabled alliance between the giant and the dwarf. Look to the Amphictyonic League, composed of thirty members, yet only three known to history: Thebes, Sparta, and Athens, each predominating by turns, and governing and chastising the weaker cities as they pleased. The Germanic Confederation, consisting of three hundred members; yet the whole power usurped by nine electors, the small states summoned before the imperial diet, placed under the ban of the empire, and their territories given up to pillage and military occupation. The seven United Provinces, in which the province of Holland alone decided upon peace and war, loans and taxes, and dragooned the inferior provinces into acquiescence. The Swiss Confederacy, the large cantons making war upon the small ones on account of their religion, and calling in the dukes of Savoy to assist in the chastisement. The framers of the Constitution had these examples before their eyes, and we have had another, a real history of the giant and the dwarfs—the Confederation of the Rhine, in which the petty princes of Germany, uniting with Napoleon

the Great, to get their heads broken in every corner of Enrope and to see their Lilliputian territories ravaged by strange men from the confines of Asia. The principle that the majority ought to govern, so correct when applied to the government of the respective States, is false and ruinous when applied to the Federal Government of the United States. The Union could not have been formed on that principle, nor could it now exist under it if introduced. The federative principle yielded all that can be yielded in the convention of 1787. To attack that principle now is, in my opinion, to attack the existence of the small States and the continuance of the Union. For one, I should deem it my sacred duty to resist these attacks in any situation, but more especially in this chamber, instituted for the express purpose of preserving to the small States the remnants of sovereignty which were left to them by the convention of 1787.

The peculiar faculty of the American Senate is conservatism. It is formed upon the principle of the Roman tribunate, to preserve, not plebians against patricians, but the weak against the powerful States. Yes, Senators; you are the tribunates of the States. You are the barrier between the weak—the adamantine wall behind which the most feeble States shall repose in safety, before which the most powerful shall beat in vain. And will you act contrary to the principle of your institution? Will you begin with surrendering that which you are created to defend? Will you set the example of destroying that which you were instituted to preserve? Will you subtract from the strength of the weak and add to the power of the powerful; and this, too, in the face of the fact that these powerful States refused to adopt the district system, because it will lessen their capacity to dominate over their feeble neighbors? I trust that the Senate will not act thus, and I think that the great States ought not to ask it. They should remember that this Constitution was formed by States, each giving one vote; that a congress of States was then in existence, under the Articles of Confederation, deciding every question by *States*, each giving *one* vote. They should consider how much was surrendered by the small States when they voluntarily relinquished this condition of equality and submitted to have all their rights and interests controlled by the superior population of the great States in the House of Representatives, and to have the National Executive subject to be elected by the same population as often as half a dozen powerful States could agree among themselves.

In addition to these sacrifices upon the altar of compromise, they should consider how much more has been taken by the natural tendency of the strong to encroach upon the weak; and they should ask themselves if it is right to unsettle the compromises of the year 1787; to attack the privileges then left to the small States; to assert a principle which goes to the subversion of the Federal Government, and to promote that system of consolidation which is wrapped up in the doctrine of giving the power of the Federal Government to those sections of the Union which have the majority of population? I can well conceive that it would be mortifying to Virginia, New York, and Pennsylvania to see themselves balanced on a final vote for President by Missouri, Illinois, and Mississippi; but they should reflect that the sting of their mortification would be transitory, while the benefit of the Constitution is permanent. Missouri, Illinois, and Mississippi—and I may add Indiana, Alabama, and Louisiana—are rapidly advancing to a point where it will be no disparagement to the greatest States to admit their equality.

In the mean time it would be impertinent in me, a Senator from the youngest State in the Union, to offer advice to those which are old and powerful, but it may be useful to remind them of the counsel given to them by the most eminent of their own citizens, at a time when the good will of the small States was of more account than it seems to be at present:

"A common government, with powers equal to its objects, is called for by the voice, and still more loudly by the political situation of America. A government founded on principles more consonant to the wishes of the larger States, is not likely to be obtained from the smaller States. The only option, then, for the former lies between the proposed government and a government still more objectionable. Under this alternative, the advice of prudence must be to embrace the lesser evil, and, instead of indulging a fruitless anticipation of the possible evils which may ensue, to contemplate rather the advantageous consequences which may qualify the sacrifice."—*Federalist*, No. 62.

Mr. B. concluded with an expression of his extreme gratitude for the indulgent attention with which he had been heard by the Senate. He would not trespass longer upon their patience by delivering anything in the form of recapitulation. He limited himself to saying, that until the contrary should be shown, he held the four propositions, with which he sat out, to be completely established.

DEBATE ON THE RULE TO SIT WITH CLOSED DOORS DURING THE BALLOT FOR PRESIDENT BY THE HOUSE.

IN THE HOUSE OF REPRESENTATIVES, *January 26, 1825.*

Mr. WRIGHT, from the select committee appointed to prepare rules to be observed in case the election of President and Vice-President shall devolve on this House, made the following report :

The committee appointed "to prepare and report such rules as, in their opinion, may be proper to be observed by this House, in the choice of the President of the United States, whose term of service is to commence on the 4th day of March next, if, on counting the votes given in the several States, in the manner prescribed in the Constitution of the United States, it shall appear that no person has received a majority of the votes of all the electors of President and Vice-President, appointed in the several States," report that the following rules be observed by the House in the choice of a President of the United States, whose term is to commence on the 4th day of March, 1825, if the choice shall constitutionally devolve upon the House :

1. In the event of its appearing, on opening all the certificates and counting the votes given by the electors of the several States for President, that no person has a majority of the votes of the whole number of electors appointed, and the result shall have been declared, the same shall be entered on the Journals of this House.

2. The roll of the House shall then be called, and on its appearing that a member or members from two-thirds of the States are present, the House shall immediately proceed, by ballot, to choose a President from the persons having the highest numbers, not exceeding three, on the list of those voted for as President ; and in case neither of those persons shall receive the votes of a majority of all the States on the first ballot, the House shall continue to ballot for a President without interruption by other business until a President be chosen.

3. The doors of the hall shall be closed during the balloting, except against members of the Senate and the officers of the House ; and the galleries shall be cleared on request of the delegation of any one State.

4. From the commencement of the balloting until an election is made, no proposition to adjourn shall be received, unless on the motion of one State, seconded by another State ; and the question shall be decided by States. The same rule shall be observed in regard to any motion to change the usual hour for the meeting of the House.

5. In balloting, the following mode shall be observed, to wit :

The Representatives of each State shall be arranged and seated together, beginning with the seats at the right hand of the Speaker's chair, with the members of the State of Maine, thence proceeding with the members from the States in the order the States are usually named for receiving petitions, around the hall of the House, until all are seated ;

A ballot-box shall be provided for each State ;

The Representatives of each State shall, in the first instance, ballot among themselves, in order to ascertain the vote of their State, and they may, if necessary, appoint tellers of their ballots ;

After the vote of each State is ascertained, duplicates thereof shall be made out, and in case any one of the persons from whom the choice is to be made, shall receive a majority of the votes given, on any one balloting, by the Representatives of a State, the name of that person shall be written on each of the duplicates ; and, in case the votes so given shall be divided, so that neither of said persons shall have a majority of the whole number of votes given by such State on any one balloting, then the word *divided* shall be written on each duplicate ;

After the delegation from each State shall have ascertained the vote of their State, the Clerk shall name the States in the order they are usually named for receiving petitions ; and, as the name of each State is called, the Sergeant-at-Arms shall present to the delegation of each, two ballot-boxes, in each of which shall be deposited, by some Representative of the State, one of the duplicates made as aforesaid of the vote of said State, in the presence and subject to the examination of all the members from said State then present ; and, where there is more than one Representative from a State, the duplicates shall not be deposited by the same person ;

When the votes of the States are thus all taken in, the Sergeant-at-Arms shall carry one of the said ballot-boxes to one table, and the other to a separate and distinct table ;

One person from each State represented in the balloting shall be appointed by its Representatives to tell off said ballots, but in case the Representatives fail to appoint a teller, the Speaker shall appoint ;

That said tellers shall divide into two sets as nearly equal in number as can be, and one of the said sets of tellers shall proceed to count the votes in one of said boxes, and the other set the votes in the other.

When the votes are counted by the different sets of tellers the result shall be re-

ported to the House, and if the reports agree, the same shall be accepted as the true votes of States; but if the reports disagree, the States shall proceed in the same manner as before to a new ballot.

6. All questions arising after the balloting commences requiring the decisions of the House, which shall be decided by the House voting *per capita*, to be incidental to the power of choosing a President, shall be decided by the States without debate, and in case of an equal division of the votes of States the question shall be lost.

7. When either of the persons from whom the choice is to be made shall have received a majority of all the States, the Speaker shall declare the same, and that that person is elected President of the United States.

8. The result shall be immediately communicated to the Senate by message, and a committee of three persons shall be appointed to inform the President of the United States and inform the President-elect of said election.

The report was read and ordered to lie on the table.

WEDNESDAY, February 2, 1825.

On motion of Mr. WRIGHT, of Ohio, the House then resolved itself into a Committee of the Whole on the state of the Union, and took up the report of the select committee appointed to prepare rules to be observed by the House in choosing a President of the United States.

The report was read through, and then

The rules were read and considered separately. On the first rule some conversation took place between Mr. Bassett, of Virginia, and Mr. Wright, the chairman of the select committee. No alteration, however, was made in the rule.

The second rule was then read, and no objections were made to it.

The third rule was read, as follows:

3. The doors of the hall shall be closed during the balloting, except against members of the Senate and the officers of the House; and the galleries shall be cleared on the request of the delegation of any one State.

Mr. INGRAM, of Pennsylvania, moved to amend this rule by striking out the last clause, viz, "*and the galleries shall be cleared on the request of the delegation of any one State.*" Mr. Ingram stated that, as a member of the select committee who had made the present report, he had, when this rule was brought forward in the committee, objected to that part of it which he now moved to strike out; and he had objected then, as he did now, to the clause in question because he apprehended that there was no good reason for putting it in the power of the delegation of a single State (consisting, in some instances, of a single individual) to clear the galleries of this House. He could not conceive that there was any need to go into conclave in order to conduct the approaching election. It was not a measure involving our relations with foreign nations, but a matter of a purely domestic character. Yet this rule enforces secrecy in regard to the transaction, if required even by a single individual, and that in the most obnoxious form. He had rather have the rule made absolute at once, and say that the galleries, as well as the doors of the House, shall be closed, than to give authority to the delegation of one State to have them cleared. He was at a loss to account for such a proposition. He supposed that there must be some special reason for granting such a power, but he could not conceive what it was. Was any distrust entertained of the personal safety of members of this House? Surely the power of the Speaker over the galleries would be as great on the contemplated occasion as at the present moment; and the existing rules of the House clothed him with full authority to have the galleries cleared in case of disorder. Believing that no good reason existed for the clause in question, he hoped it would be stricken out.

Mr. McLANE, of Delaware, said that when the honorable member from Pennsylvania rose he had been about to offer an amendment to the rule in conformity with the opinion he had expressed when in committee, and he should now acquiesce in the amendment which that gentleman had offered, provided the principle on which he himself wished to go was adopted by the House. He was for clearing the galleries altogether, without leaving it to the delegation of any State to require that it should be done. In giving his reasons in favor of this course, he wished it to be distinctly understood that any remarks he might make had no reference whatever to the peculiar state of things existing at the present moment. He thought the question ought to be treated as involving an important precedent, and ought to be considered on principles that were to govern on this occasion and all others, not only now, but hereafter. He felt himself called on by his duty to state these principles. He felt very fully the responsibility of his situation, and wished to assert the rights which he conceived to pertain to the members of this House at the present moment, while the nation was in a state of calmness and quiet—a time peculiarly favorable for the adoption of rules calculated to provide for a season of great party excitement.

Mr. McLANE asked: Why ought the galleries to be open? Why must this balloting be conducted in public? In electing a President, the members of the House were

called to act, not as Representatives of the people, but as umpires; to do that which the people have tried to do and have not been able to accomplish. The people have tried to elect a President; they have failed to do so. The House of Representatives are then empowered to choose one for them. This power is not delegated to them by their constituents, but by the Constitution; and in exercising it they have no peculiar relation to their constituents, and are not responsible to them further than every honest man is responsible to his conscience and his country for his public acts. He should consider the question now presented as a new one, and should put wholly aside what had at any time been done respecting it. Who, asked Mr. McLane, has a right to inspect my decision between conflicting claims to the Presidency? In ordinary cases he granted that the people had a right to look to the acts of their Representatives and exercise a sort of inspection over them. Yet, even this was not always permitted to them by the Constitution. It provides that, in certain cases, the public eye shall be excluded, either when the subject of deliberation is of such a nature that an important public measure must be frustrated if prematurely disclosed, or when, from the excited state of public feeling, an improper influence is apprehended as endangering the freedom of debate. No such state of feeling existed now; but it not only might exist, and that in an alarming degree, but to such a degree as to become wholly irresistible. If the principle shall once be established that the Representatives of this people, standing on this floor to vote or to debate are improperly to be controlled, it is in those galleries that the object is to be effected. If ever popular tumult and a general excitement of national feeling are to jeopardize the freedom and endanger the purity of this body, it is in those galleries that they will show their power.

For his own part, Mr. McLane said, he thought that in so important an act as the choice of the Chief Magistrate of this nation, it was fitting and becoming that members should be left to act from the cool dictates of their judgment, and that they alone were the judges how they ought to act. With them the Constitution had intrusted the duty, and there it might be safely trusted. Mr. McLane said that he made these remarks from the fullest conviction of their truth. He thought that now, in a time of public tranquillity, a precedent might be set that would prove valuable hereafter. He felt great deference, also, for the precedent that had been already established in this respect. At the election of a President in 1801, this subject had been intrusted to able hands, and, after full deliberation, they had thought it expedient to admit no person as a spectator of the election but members of the Senate and officers of this House, and the election was so conducted.

Mr. BUCHANAN said he rose with diffidence to express his opinion upon this subject. Like his friend from Delaware, [Mr. McLane,] he disclaimed the intention of making any remark which might have an allusion to the peculiar situation of members of this House in regard to the approaching election. He considered the present to be a question of great importance, and that its decision would establish a precedent which, in future times, might have a powerful influence upon the interests of this country. He was sorry to say he had arrived at a conclusion in direct opposition to that of his friend from Delaware, [Mr. McLane.] The reasons which had led him to that result he would state to the House.

The American people, said Mr. Buchanan, have a right to be present and inspect all the proceedings of their representatives, unless their own interest forbids it. In relation to our concerns with foreign governments, it may become necessary to close our galleries. Our designs, in such cases, might be frustrated, if secrecy were not, for a time, preserved. Whenever there shall be disorder in the gallery, we have also a right to clear it, and are not bound to suffer our proceedings to be interrupted. Except in these cases, he at present could recollect none which would justify the House in excluding the people.

In electing a President of the United States, said Mr. Buchanan, we are, in my opinion, peculiarly the representatives of the people. On that important occasion we shall, emphatically, represent their majesty. We do not make a President for ourselves only, but also for the whole people of the United States. They have a right to insist that it shall be done in public. He, therefore, protested against going into a secret conclave when the House should decide this all-important question. He said that the doctrine of the gentleman from Delaware [Mr. McLane] was altogether new to his mind. That gentleman has alleged that we are called upon to elect a President, not as the representatives of the people, but by virtue of the Constitution. Sir, said Mr. Buchanan, who created the Constitution? Was it not the people of the United States? And did they not, by this very instrument, delegate to us, as representatives, the power of electing a President for them? It is by virtue of this instrument we hold our seats here. And, if there be any case in which we are bound to obey their will, this is peculiarly that one. To them we must be answerable for the proper exercise of this duty.

What are the consequences, said Mr. Buchanan, which will result from closing the doors of the gallery? We shall impart to the election an air of mystery. We shall give exercise to the imaginations of the multitude, in conjecturing what scenes are

acting within this hall. Busy Rumor, with her hundred tongues, will circulate reports of wicked combinations, and of corruption, which have no existence. Let the people see what we are doing; let them know that it is neither more nor less than putting our ballots into the boxes, and they will soon become satisfied with the spectacle and retire.

The gentleman from Delaware [Mr. McLane] has urged upon us the precedent which now exists on this subject. Mr. Buchanan said he revered the men of former days, by whom this precedent was established. He had good reason, however, to believe that the intense excitement which existed at that time among the people, at the seat of Government, was occasioned, in a considerable degree, by their exclusion from the gallery. They came in crowds into the House, but were prohibited from entering the hall. Currents and counter-currents of feeling kept them continually agitated. New conjectures of what was doing within were constantly spreading among them. Mystery always gives birth to suspicion. If those people had been permitted to enter, much of the excitement which then prevailed would never have existed.

It has been said that there might, and probably would, be disorder if we admitted the people into the gallery. Mr. Buchanan could scarcely believe this possible. He had too high an opinion of the American people to suffer himself to entertain such an apprehension. Should we, however, be mistaken, where is the power of the Speaker? Where that of the House? We can then turn them out, and we shall then have a sufficient apology for doing so. But to declare, in the first instance, that they shall be excluded, upon the request of any one out of twenty-four States, would be a libel both upon the people of the United States and the members of this House. Mr. Buchanan asked pardon for this expression, if it were considered too harsh.

Mr. Buchanan said he well knew his friend from Delaware was willing that all his conduct in regard to the presidential question should be exhibited before the public; and that it was principle, and principle alone, which had suggested his remarks.

That which gives this subject its chief importance, Mr. Buchanan said, is the precedent. He was anxious that it should be settled on sure foundations. If the rule in its present form should be adopted, it may, and probably will, be dangerous in future times. At present our Republic is in its infancy. At this time he entertained no fear of corruption. In the approaching election it can, therefore, make but little difference whether the galleries shall be opened or closed. But the days of darkness may, and, unless we shall escape the fate of all other republics, will come upon us. Corruption may yet stalk abroad over our happy land. When she aims a blow at the liberties of the people, it will be done in secret. Such deeds always shun the light of day. They can be perpetrated with a much greater chance of success in the secrecy of an electoral conclave than when the proceedings of the House are fully exposed to the public view. Let us then establish a precedent which will have a strong tendency to prevent corrupt practices hereafter.

Mr. Buchanan concluded by observing that, whether we regard the precedent to be set, the nature of our Government, our own character, or that of the people whom we represent, they all conspire to induce us to adopt the amendment.

Mr. LIVERMORE, of New Hampshire, thought there was no necessity for any further rule in relation to the galleries than that which now existed. Provision was already made for clearing the galleries whenever the House thought proper. This was sufficient. Why should a majority of all the members surrender this power to the delegation of a single State? He saw no reason. Why, asked Mr. Livermore, are gentlemen so much alarmed? He was persuaded that no more disorder was to be apprehended from the gallery in conducting an election of President of the United States than in choosing a sergeant-at-arms for this House. For himself, he hated all mystery. He considered it a characteristic attendant of tyrannical governments, and he thought that the proposal to conduct this election in secret was a proof that we were not yet quite divested of certain old notions which our ancestors brought with them from the other side of the Atlantic. He hoped that all that would be done on this occasion would be done in a plain, manly, simple, republican manner.

Mr. Webster, of Massachusetts, would say a few words on the question, premising that more importance seemed to be attached to it than he thought belonged to it. He presumed no practical inconvenience would arise whether the motion prevailed or not; and yet, perhaps, it might be well to consider the subject duly, as hereafter, possibly, the question might be of consequence. He did not see any particular benefit arising from providing that the galleries should, at all events, be open. There could be no debate when the House was proceeding in the election; and the voting must be by ballot. There was nothing to be done or said, but to give the ballots and count them. Something had been said of the superintendence which the people might exercise on this occasion if the galleries were open. That was what he did not exactly understand. The people of the United States would hardly be in the gallery. Some hundred or two of the inhabitants of this city, those who should get up earliest and get seats first, would be accommodated in the gallery, and others could not get in. He believed that he himself, finding some difference of opinion in the committee upon the

former rule, had suggested this modification. He was entirely willing the galleries should be open; and yet he was entirely willing to have them closed if any State desired it. And particularly, as it would be very inconvenient to discuss and settle these questions after the House had begun to act as States, it seemed to him reasonable to make provision beforehand for this, as for other cases. He regretted both that the gentleman from Pennsylvania wished to expunge the rule altogether, and that the gentleman from Delaware wished to shut the galleries altogether. He thought the rule would do very well as it stood. It should be considered that, in some cases, very many persons were to express the voice of a State; in other cases a single individual. Now, if either a numerous delegation, or a single individual representing a State, expressed a wish that spectators should not be admitted to the gallery, he was willing to indulge that request; so much the rule provided, and no more. He repeated, however, that he thought a very unsuitable and disproportionate importance might be given to this question, which he should much regret.

Mr. WRIGHT, of Ohio, said that, individually, he had no objection to the amendment. If it were required to give publicity to the proceedings of the House upon this subject, he should certainly favor it, because he was generally of opinion the affairs of the Government should be conducted openly in the face of the world, as he considered the Government as resting on the will and information of the people. But, Mr. Wright said, in the discharge of the duties now to be undertaken, we ought to look to a future time, when the country shall be in a state of excitement, that shall reach and affect those in the galleries, and thence operate on the House. It will be recollected that the only time at which this House had heretofore exercised the power of electing a President it had been solemnly decided the doors should be closed, except as to members of the Senate. That determination was not made without deliberation, but upon solemn debate, and by a vote of yeas and nays. Mr. Wright said he felt, in some measure, the influence of that precedent, and had never heard any objection to the *mode of conducting the ballotings* on that occasion.

In reply to those who seemed to suppose it impossible that any disturbance should take place in the galleries, Mr. Wright said he had an exalted opinion of the virtue and intelligence of the people; but we need not shut our eyes upon the evidence before us, and we need not go further back than one year for a most glaring instance of excitement and disorder in the gallery of a legislative hall of one of the States of this Union, while the legislature were transacting business relating to the very election the determination of which is now devolved on us by the Constitution; and perhaps, he said, it would not be going too far to say that excitement might be feared now. Gentlemen seemed to suppose that, by closing the doors, an injunction of secrecy was imposed on the members and officers of the House in regard to the proceedings, and that the whole were to remain secret. That, Mr. Wright said, was not the case—the rule proposed no such thing; publicity could easily be given for everything done. The journals were free for inspection, and it was surely safer to rely on them than reports from the galleries. It had been well observed by the gentleman from Massachusetts [Mr. Webster] that all the proceedings relating to the election were to be without debate; that, besides the ballotings, all were conducted by motion, second, and decision. This being the case, the results were all that could be communicated to the people in the galleries, and they would be as well communicated at the doors of the House. All that those in the galleries could *see* or *hear*, in addition to the results, would be the mechanical operation of dropping the ballots into the boxes and lifting them out again. I, said Mr. Wright, would vote as readily against the imposition of an injunction of secrecy on the proceedings relating to the election as the gentleman from Pennsylvania, [Mr. Ingham,] or any other gentleman on this floor; but I cannot admit that any such proposition is embraced in this rule as it stands.

Sir, said Mr. Wright, it is not the people of the United States, the sober, thinking people, that will be found in your galleries on such occasions. No; they are at home, attending to their farms, their merchandise, their various other avocations; they will not assemble in the galleries, or be hereafter affected by the precedent you establish. It will be the artful, intriguing, designing politicians from various parts of the country, to witness, and, if it can be, to exert an improper influence over your proceedings, and these I am not very solicitous to accommodate.

I hope, sir, the amendment will not prevail, and that we shall not, against the wish of any one State, keep the galleries open for the exertion of undue influence, or to place members in a situation where any can suppose they are unduly operated on.

Mr. Ross, of Ohio, observed that, according to his understanding of the proposed rule, if it was adopted, the proceedings of the House would remain, at least for the time, completely in the dark. The demand of a single State, not even seconded by another State, was to be of itself enough to compel the House to clear the galleries. Why was this rule to be adopted? The only reasons he had heard advanced were, that the House must go into this conclave from a fear of interruption—interruption, not from themselves, but from the people in the gallery; that the people of the United States were not expected to be present here, and that those who attended in the gal-

lery would be such as were not entitled to any consideration. This, according to his understanding, was the sum and substance of the reasons adduced in favor of the rule. But, for himself, he believed that the people of this country understood the rules of decorum as well now as they did when the Constitution was formed, and that there was no more danger of disturbance now than then.

Whether gentlemen sat here as umpires and arbitrators, or as the representatives and organs of the people, was a question on which he certainly had an opinion, but which he did not consider it necessary at present to discuss. But, whether acting in one or the other capacity, he could not see why the gallery should be closed. The House had the power already to remove from it disturbers of the peace, and if gentlemen meant so to conduct as to meet the approbation of their own consciences, they had no reason to fear those who would be in the gallery. And if they were not afraid to have their conduct judged, why close the doors? All seemed to agree that no dangerous excitement existed at present. Was it, then, to be got up in two or three days, and to such a height as to threaten the safety or independence of the House? For himself, he could wish not only to have the people present, but that the votes of all the members were to be given *viva voce*. He regretted that there was any *ballot* at all on the question, and was utterly opposed to all closing of doors.

Mr. Hamilton, of South Carolina, observed that he felt desirous of detaining the committee a few moments in offering a remark or two on the subject before them. It seems to be a well-settled conviction that it is a great public misfortune that the election of a Chief Magistrate should devolve on this House; and he would go further, and say that, in so devolving, it was perhaps a still greater misfortune that the choice should be made by secret balloting in the several and separate States, which, by its nature, precluded the public knowledge, which the people ought to have, of the votes of their representatives, on a question so vitally interesting to them, and under sanctions so solemn and imposing. For one, he was free to confess, as the people were precluded, by the very form of election, from this species of knowledge, he was disposed to let them in as spectators to whatever might pass in relation to the exercise of this great trust; and in making this remark he concurred cordially with the gentleman from Ohio in wishing that, in spreading all our acts and doings before the public eye during the approaching contest, we could likewise subject each delegate to the direct responsibility of a *viva-voce* suffrage. This being impossible, he was disposed to consider the assembly of such citizens as thought proper to come into our galleries as curing, in a slight degree, the defect of which he had spoken in the mode of election. They would have a contemporary opportunity of witnessing the vote of each State, and thus information, which it was right and proper that the people should have, would be promptly disseminated, in a form, he thought, better to keep the public mind quiet than those thousand rumors and suspicions which naturally belong to mystery and concealment.

The gentleman from Delaware, however, meets this subject at its threshold by asking "what right any man has to go into the galleries to see what is doing in regard to the election of a President." I answer, because that man happens to be one of the people for whom we are acting and for whom we are choosing a Chief Magistrate, and because he has precisely as much right to witness the election as any act of ordinary legislation; and, according to the theory of this democracy, it is infinitely more expedient that he should witness the one ceremony than the other. Mr. Hamilton said that he thought the popular eye would have a salutary influence in repressing any indecorum and violence to which, in moments of peculiar agitation, the House, constituted as it was, was perhaps even more liable than the spectators in our galleries. They are fortunately exempt from many of those strong biases of favor and antipathy which may lamentably exert an influence within this bar.

The gentleman from Delaware does not affirm that there is any danger at this time in admitting our fellow-citizens into the galleries, but he contends that at a future period this House might be subject to intimidation from the violence of a mob who would assemble to witness the scene to which we are shortly to be summoned. Sir, when that day of profligate violence arrives, the atrocity of which cannot be put down by the force of public opinion—when a corps of such desperadoes are permitted, for an instant to exercise such an influence, all spirit will have departed from this House and all purity and moral worth from the people, and the forms we may cherish here will be but a solemn mockery. When a few hundred persons, scarcely equal to our own numbers convened in those seats, can successfully exercise acts of intimidation on the representatives of ten or twenty million people to an absolute reversal of their sovereign will, it may be well imagined that the energy of the Government and public virtue are buried in a common grave. The argument, if it is worth anything, could be urged to show that it is expedient that we should even legislate in the conclave of a Turkish divan. The truth is, that many subjects of ordinary discussion and common legislation are better calculated to produce popular excitement than the election of a President by this House. During the former, popular prejudices and, I may say, the feelings of public vengeance may be addressed by the arts and electricity of popular

eloquence. In the latter, our business is confined to one act, that is, in placing for ourselves, or having it placed for us, a small strip of paper on which the name of an individual shall be written. The ceremony precludes the possibility of debate, and almost the only motion which can be put is one that will have relation to the period when the act of balloting is to be renewed on the contingency of continued failures to elect. It is impossible to conceive, in the forms of the transaction itself, fewer circumstances calculated to provoke popular violence and commotion.

Besides, said Mr. Hamilton, I think the very habits of our people forbid any apprehensions, either present or future; and, however little consoling it may be to the pride of some, he thought there was as much honesty outside of the walls of our House as there was within them. He supposed that the individuals who would at present, and in times to come, occupy the seats in our gallery, would, a majority of them, be citizens of this District, who, he believed, were as exempt from the character of corrupt intriguers and noisy brawlers as the people of any section of our country, although the gentleman from Ohio [Mr. Wright] seemed to think that our spectators, whenever we have a President to elect, must consist of the very worst and most abandoned species of our population. For myself, said Mr. Hamilton, satisfied that no precedent we shall now establish will be binding, and that posterity will have the same right that we have to take care of themselves, and being equally satisfied that the ordinary power possessed by the Speaker to clear the galleries in the event of occasional disorder, meets all the exigencies of the present crisis, I hope that every citizen of this land, let him come from where he will, may be allowed to witness an event in which he has precisely as great an interest as we have ourselves, more particularly when presence can in no degree impair a sound, efficient exercise of the agency we have to exert.

Mr. Hamilton said he would, before he took his seat, notice one or two remarks which fell from the gentleman from Delaware, [Mr. McLane.] This gentleman, in a very manly declaration of the course which he intended to pursue in the approaching election, has thought proper, as furnishing the best illustration of the principles which should govern him in that course, to affirm that he does not feel himself bound by the wishes, either expressed or implied, of the people whom he represents on this floor, and that he was in no greater degree responsible to them than to the rest of the country for the selection which he should make of the person for whom he should vote to fill the Presidency. It is not my business, said Mr. Hamilton, to quarrel with the principles or the opinions of the gentleman from Delaware, for whom I have personally great respect, but, nevertheless, I hope I may be pardoned for venturing to express my own. The first obligation which a human being owes is to his own conscience. If this monitor tells us that a candidate for office is dishonest and unworthy, no human power ought to compel us to vote for him. But, while I lay down this primary principle thus broadly, I am as equally satisfied that, in the present election, which belongs peculiarly to the people, which has come to us on a forlorn and disastrous contingency, if we have no moral objections to the person who, among the candidates, is preferred by the particular people we represent here, we are bound to surrender our mere personal preferences and prejudices, and to endeavor to carry into effect their honest, reasonable wishes. This position harmonizes with the whole theory of our representative democracy; and to suppose that an agent of the people is absolved from all deference (and he might almost say obedience) to their obvious wishes, by the mere circumstance of our being organized into States for this exclusive purpose, is at once to sap those great foundations of responsibility and control on which our entire system rests. In a word, he thought the true rule was in a very narrow circle, which was, that after satisfying our own consciences, the next best thing was to gratify the reasonable and honest purposes of those who send us here.

Mr. Hamilton said that the gentleman from Delaware, in urging the House to adopt the rule for the exclusion of spectators from the gallery during the election, had relied, with no ordinary emphasis, on the precedent which had been established by the Congress of 1801, in the celebrated, he could not say nefarious, contest between Mr. Jefferson and Mr. Burr. As this part of the gentleman's argument he puts on the ground of authority, and not reason, he would venture to hint that he [Mr. Hamilton] had some serious misgivings that people would not look to those times as furnishing the instructive examples of public freedom; for, he believed, it would be susceptible of proof, by referring to the Journals, that most of those who voted then for the proposed exclusion from the galleries were those who had most strenuously supported the alien and sedition law. He did not make this allusion for the purpose of throwing a firebrand into the House, but he appealed to it as an historical fact.

In conclusion, Mr. Hamilton said that he really hoped that no groundless apprehensions would induce the House to retain a rule which, by the mystery which would be incident to its enforcement, would beget a thousand times more excitement than if our galleries were thrown open to the whole world.

Mr. McLANE again rose, not for the purpose of entering at large into the debate, but merely to correct some misapprehensions which appeared to exist in relation to the

remarks which he had first submitted. It was certainly far from his intention either to stir up old embers, or to brighten any existing flame. Far less was it his intention to advocate any rule which had for its object the concealment of his own course of conduct in regard to the election of President. He neither had nor could have any concealment on that point. His opinions, at all times, and in all circumstances, had been openly known, and he meant that they always should be. If he even desired concealment, he could not effect it—he stood here with no colleagues. The vote he was about to give must be publicly known, and, whenever it was given, it should be given with a single eye to the interests of our common country. Could there, indeed, be any concealment in the matter? Did not every member of this House know how his own colleagues intended to vote? And would he not disclose that knowledge? But to whom? To the people in the gallery? Could they discover, while the act of balloting was going forward, for whom those ballots were given? Certainly not. He could not, for his part, denounce the arrangement made by the Constitution on this subject. *Viva voce* might be a very good mode of voting for President, but, whether good or bad, was not now the question. It was not the mode which the Constitution had prescribed. He again repeated that his object was not to effect any concealment, for himself or for others. The course which each member would pursue would be known to this House, and it would be known to the country in time to correct it, if erroneous. But his object, Mr. McLane said, was to prevent the exertion of an influence which, at some period hereafter, might operate to warp and swerve members from the conscientious discharge of their duty.

It was wholly on the ground of precedent that Mr. McLane was desirous to record his vote in favor of this rule. Surely no gentleman who knew anything of history could need any arguments to convince him how tremendous such influence as that which he deprecated might easily become. Nor was it hard to say how it might be got up. A county meeting is held; votes are passed approving or disapproving the anticipated conduct of a Representative in the House, and directing him what course to pursue. And if the affair stopped here there would be no danger. But it might go further; constituents may be brought to the scene of action with the intent of intimidating and overawing the members of this House. The time might come when this would happen, though it may not now; and if the gentleman from South Carolina shall then live and cast his eyes on such a scene, Mr. McLane was persuaded that he would do justice to himself and to his motives on this occasion. That gentleman says that the people have a right to know what is done in this House. Sir, said Mr. McLane, I agree with him that they have. He says, further, that he cannot go with me in the doctrine that our constituents have no right to control us in the vote we are about to give for President. But, for myself, I am free to say that however I respect the opinions of my constituents in all cases of ordinary legislation, in this case I do not know them; I act as a judge and as an umpire. I know perfectly that great respect is due to public opinion when fairly expressed. But even public opinion, if, in my conscientious belief, it has run wild or gone astray, shall not govern me.

The Constitution has imposed it on us as a duty to choose a President when the election by the people fails. Now, if my constituents have a right to instruct me in this respect, the constituents of the gentleman from South Carolina have an equal right to instruct him, and so have the constituents of each member of this House. And, if gentlemen are bound to obey, and the country remains divided, the result will be that this House cannot choose a President any more than the people can. The last remedy provided by the Constitution fails, and all those evils rush upon the country at once which are the obvious result of such failure. It is expressly to guard against this that the Constitution provides, in the resort to this House, a tribunal which shall be perfectly independent and above popular control.

When up before, Mr. McLane said he had referred to the precedent of 1801 as bearing upon the present case. In answer to the argument drawn from it, the gentleman from South Carolina had denied any weight to the precedent, because it was derived from the administration of the Government by the federal party. Mr. McLane expressed his regret that anything should have fallen from that gentleman which might have a tendency to revive animosities which, for the happiness of the country, ought never to be disturbed. But, he said, if this subject was to be introduced, he was willing to meet the gentleman from South Carolina. The precedent he had referred to was a precedent set in party times, and of the federal party. But, said Mr. McLane, it does not, because it is a precedent of the federal party, come to me with less title to respect. Is this the only precedent of that party? It is the precedent of a party, says the gentleman, capable of enacting the alien and sedition laws. True, it is; and it is the precedent of a party which organized this Government—which put it in motion after building it up, and established the policy which, wisely cherished; had made this nation, at this day, prosperous at home and respected abroad. It is a precedent of the same party that established the judiciary, built up the navy, created an army, and laid the foundations of the system of national defense which has afforded to us security at home and protection abroad. After copying from that party all these

measures of national glory and prosperity, why will not the honorable gentleman receive from it also this precedent, which has the same motives and the same great objects in view? In all other cases the federal party consulted the true interests of the country; and their measures were calculated to subserve them, or it has been folly to adopt them. In the case now brought into precedent they had the same objects in view, and the gentleman will find, if he adopt their policy in this respect also, he will reap the fruits of this as he has done of other precedents set by them.

Mr. FLOYD, of Virginia, said he had no disposition to say much on this subject, but, holding the opinion which he did of the most deliberate character, that, not only on this subject but on all others, there should be no secrecy whatever in the proceedings of the Government, he was not disposed to vote on this question now without saying a few words. He was not disposed to set a precedent now to be governed by hereafter in a state of excitement. Is there any excitement now? The opinion of every member of the House in regard to the presidential election is made up decidedly and distinctly, and can be expressed in open sitting as well, and no doubt as honestly, as if our doors were closed, and I was sorry to hear the gentleman from Delaware say that the presence of persons in the galleries could have no effect on his vote, for I am sure there is not a man in the United States who would suppose such a declaration from him necessary.

In reply to the argument that but a few persons, who were industrious enough to get up soon, would be able to obtain admission into the gallery, Mr. Floyd asked, if so, why should any gentleman wish to close the gallery? Let them indulge their curiosity in this particular; he saw no objection to it. Nor could he agree with the gentleman from Ohio that intriguers would be always up *in the galleries*—for *that* was not the place for them. The gentleman had also reference to a late occasion, not more than a year ago, growing out of this very election, in which there were some symptoms of dissatisfaction in the galleries. [Mr. Floyd here was going to remark on this illustration, supposing it had reference to the meeting at the Capitol on the night of the 14th of February last, but Mr. Wright intimated that that was not the incident to which he referred.] Mr. Floyd continued: Poor King Caucus having been so much abused and spoken of, sir, I thought the gentleman might have referred to that occasion, where I was myself present—for, sir, I was one of that respectable body, and I am yet proud of it. If, however, he meant not to refer to that case, I will refer to a case, the excitement of which, probably, in this House, and in the galleries, and out of the House, never was, and never can be, exceeded. I allude to the Missouri question—during the arduous and protracted discussions of which no disturbance proceeded from the galleries. I am not, therefore, for setting a precedent now, in anticipation of what has never yet happened. If, sir, the Representatives of the people, in their capacity of individuals, or acting by States, are capable of being operated upon by disorders in the galleries, it is high time for us to go home. But I apprehend no disturbance. In all the trying circumstances of the Missouri question, as respectful conduct, at least, was exhibited by the galleries as by the House itself. A year or two ago we were three or four days balloting for a Speaker of this House. Was the election of President more important than the election of a Speaker of this House? For himself, since the amendment of the Constitution, he thought the office of Speaker second in the Government. If we can elect a Speaker without any trouble from the galleries, can we not also elect a President? I would not suffer the belief to go abroad among the people, from overprecautions, that we cannot. It has been sometimes said, in reference to the movements of this Government, that the eye of Europe is upon us.

Now, Mr. Floyd said, he would not, in the eye of this people, or of Europe, have this House look like the Conclave of Cardinals, the Council of Ten at Venice, or even the Star Chamber of England. He would have the election of a President as public as possible, and let all the people and all the world see all that is done. There would not, perhaps, be much to see; the ballot-box would be placed on the Clerk's table, he presumed, and the States would deposit their votes in it as called over. That was the mode of proceeding in the caucus last winter, and a more respectable and honorable body of men, he must say, he had never known, and he had no objection to the whole world being spectators of the ceremony. It seemed that it was what happened on a late occasion at New York that the gentleman from Ohio had referred to. Of that State Mr. Floyd said—for she was a great State—he would avoid saying anything; but, if what happened there had happened in Virginia, he should have said as little as possible of it; for the occurrence of the disturbance in the galleries of the legislative body argued as little in favor of the body which did not suppress and punish the authors of it, as of those who disgraced themselves by making it. As he could not see any reason for secrecy in conducting the affairs of Government generally, he was not willing to sanction it in this instance. If the Government was, as the gentleman from Delaware has suggested, strong enough for the purpose of security at home and protection abroad, it had nothing to apprehend from disorder in the galleries of this House, its power being sufficient to enforce due respect to it.

Mr. Floyd said he was rather sorry, for several reasons, that the gentleman from

South Carolina should have alluded to the old federal party. He had no doubt that in everything the federal party had done, not involving its construction of the Constitution, things were as well done as they are now. The error of that party was in not apportioning its legislation and expenditure to the true condition of the country. As to the elder John Adams and Timothy Pickering, he did not at all approve their constitutional opinions, and no one had been more decidedly opposed to them, but a state of things might occur, and he did not know but it had occurred, in which he believed he would take the old ones in preference to it. If the doctrines of the old federal party were obnoxious he did not see that those of the present day were any better. They undertook to do everything under the clause of the Constitution to provide for the general welfare; and so, said Mr. Floyd, do we at the present day.

One thing Mr. Floyd thought his friend from Delaware had overlooked. He had said the federal party built a navy. So they did, said Mr. Floyd, and they sold it, too—at least they provided for the sale of it. The next administration carried the provision into effect, for they were a law-abiding people. I cannot say as much for the present; for I read in the paper of to-day that there is a seventy-four-gun ship, built under an act expressly providing for such vessels, which is pierced to carry *a hundred and two guns*—the same which the President and a number of other persons have been lately on a trip of some seventy miles to look at and admire. On another point, also, the gentleman from Delaware was somewhat defective in his statement; the federal administration did raise an army; but they also disbanded it. If that administration was to be reproached for anything beyond an erroneous construction of the Constitution, it was merely for the extent of their expenditure, &c., and in that extent the latter days of this halcyon administration were as far in advance of the federal administration as that administration was in advance of public opinion. Mr. Floyd concluded by saying that, as he was against secrecy of every description in the affairs of Government, he should vote in favor of this amendment.

Mr. HAMILTON again rose, and said that he felt it due to himself to make a very brief reply to the gentleman from Delaware, if it was merely for the purpose of assuring him that, in the allusion which he had made to the alien and sedition law, that it was neither his intention or desire to arouse from their moldering ashes those embers of party distractions which, he thanked God, had long since passed by. Much less was it his object to fling imputations on a party (among whom had been embraced some of the most valued and cherished friends he had on earth) which on a variety of occasions had rendered services of signal and inestimable value to the country. But he would put it to the candor of the gentleman himself to say, when he urged a measure for our adoption, on the mere ground of *authority*, whether it was not admissible for him to show that authority, according to the popular *understanding* of the country, came in a rather questionable shape.

Mr. Hamilton said that he could not deny (for it would be unjust for him to do so) that the federal party (the very party which passed the alien and sedition law) had contributed to the formation of those great and valuable institutions to which the gentleman had referred. But he believed that they were, most of them, the work of joint counsels, and a confederate patriotism, when parties scarcely had a controlling influence on public measures; and while he admitted that several distinguished members of the federal party had left a large debt on our gratitude, he could not be unmindful of what such men as Jefferson, Madison, and Gallatin had done, in giving efficiency and popularity to the form of our Government, by fixing the principles of a wise, economical, and prudent administration. He thought it, however, not a little caustic and unkind in the gentleman from Delaware to appropriate all that had been done for the country as the trophies of his party; if, however, these were consolations furnished after the loss of power, he surely would not deprive his friend of their enjoyment. But, after all, he had risen merely and distinctly to disclaim any intention to wound the feelings of a single gentleman on that floor, by an allusion which he thought had laid fairly in his view.

Mr. MERCER, of Virginia, then observed that he was very happy that the gentleman from South Carolina had made the explanation he had just given; and he expressed a hope that all party divisions and party feeling would be banished on the present occasion. He thought that the observations of the gentleman from Delaware, himself, had shown that no great injury was likely to result from the admission of spectators. If it was really true, that the sentiments of members were not concealed from each other, the mere closing of the gallery would not operate to conceal them from the public, or materially prevent any influence from out-of-doors. Members were not under any injunction of secrecy, and whatever was done within would almost immediately be known without. There was then no end to be accomplished by the rule, but solely the prevention of disorder; and the only question to be settled was, whether the rule was necessary for this purpose. Mr. Mercer believed it was not; he could conceive no reason to apprehend the smallest danger of it. He thought that, under the protection which they enjoyed on all other days, the House would be as free from disturbance on this as on any other occasion. As to the precedent which had been referred to, Mr.

Mercer made some remarks, which, from his position in the House, the reporter had but imperfectly heard.

Mr. WEBSTER said he was afraid that an observation by the honorable member from Ohio, apparently made in allusion to his remarks, might lead to misapprehension. He had not intimated that the gallery might be filled by persons not entitled to consideration; no such thing. He only spoke of its size, and then only in consequence of the argument that the people of the United States might from the galleries superintend the votes of their Representatives. Superintend, he believed, was the word. His honorable friend from Virginia [Mr. Floyd] seemed, in like manner, to have misapprehended him in this particular.

Even if the galleries should be cleared during the proceedings at the request of a State, there would still be no propriety in speaking of the proceeding as done in conclave or as kept secret from the people. The Journal would be published daily, as usual. There would be no injunction of secrecy. It was a mere question about the orderly and decorous proceedings—the police, as it were—of the House. As to the supposition that any gentleman wished to conceal his vote, or to act secretly, there was no one who supposed such a wish to exist anywhere. He was willing, every member was willing, that his vote should be known to everybody. He had known questions which he thought as important as this. He might again. The occasion, however, might attract a multitude, and the object was to secure order and freedom from restraint.

The gentleman from Virginia had objected to voting on questions of adjournment, &c., by States. But it would be seen at once that as the election was to be made by States every question fairly and really incident to the choice ought to be decided also by States. The Constitution said the House should *immediately* elect a President. On the former occasion the rule was that the House should proceed, without interruption from other business and without adjournment, to choose a President. But the latter part of the rule was found impracticable in fact, and avoided afterward, by voting on one day that the next balloting should not take place till the next day; so that all the members were, in fact, quietly sleeping in their beds while the House, according to the Journal and the rule, was all the time sitting. The vote to postpone the balloting from time to time was on that occasion taken by States. The committee had thought proper on this occasion to recommend that the House might adjourn on a vote of a majority of the States.

He again hoped that too much importance might not be attached to this question. He had no fear of any great inconvenience either way. He saw no question of principle in it. It was a question of expediency; and he remained of opinion that the rule prescribed a fit course, upon the whole, to be followed. He certainly was not likely to request the gallery to be cleared; but if any gentleman or gentlemen representing another State should make such a request, he thought it ought to be granted, and therefore he approved the rule in its present state. He would state again, and would particularly request the House to consider it, that there might be inconveniences and embarrassments if this question were to be decided, and should arise, after the House had commenced the proceeding, when it must act by States and without debate. To prevent such possible inconvenience and embarrassment was one object of the rule.

Mr. WRIGHT said that before the question was taken he wished to correct the misapprehension of the gentleman from South Carolina [Mr. Hamilton] as to the remarks he formerly made in relation to the kind of people that would crowd the galleries on occasions like the one contemplated. If I understand him right, (said Mr. Wright,) he supposed me to assert that none but the profligate and worthless people of this District would be found in the galleries, and that I considered none of them worthy a place there. Sir, I am not aware that I said anything of the people of this District or city; and if I did, I never could have uttered sentiments so entirely foreign from my feelings as those imputed. I did say, however, that those who crowded the galleries on such occasions would be the unprincipled and profligate politicians of the country, ready for the exertion of any influence, however improper and desperate, to effect their object. In this, sir, the people of this city or District were in no way implicated, and I protest against the gentleman's carrying these declarations into an account against them. Among my acquaintances in the city and District I am proud to rank many for whom I entertain a respect not surpassed by any felt by the gentleman himself for them or any other person whatever.

The gentleman from Virginia [Mr. Floyd] has said, in allusion to what fell from me, that the intriguers will not make the galleries the theater of their operations. No, sir, not altogether. I concur with the gentleman in part; but when they have exerted their influence out-of-doors, and accomplished all within their power there, they will then take possession of the galleries, to observe its effect and operation here.

A word, sir, as to the motion. It is to take from the delegation of a State the power to clear the galleries. In ordinary cases the Speaker or any member of the House can do it. When we assemble to ballot for President, we lose our individual character, and proceed as the representatives of States, acting only as States; and I can see

no danger in giving to the representatives of one sovereignty the power to clear the galleries. It is but a mark of respect to him, and, in my opinion, it is peculiarly fit and proper that he should have the power to exercise if the occasion called for it.

Mr. McDUFFIE, of South Carolina, observed that as, in the course of the debate, principles had been advanced against which he must protest, and against which he intended to vote, he was desirous of giving the subject some discussion, which the lateness of the hour would not at present admit him to do. He therefore moved that the committee rise.

The question on rising was put accordingly, and carried—yeas 89, nays 71. So the committee rose, and obtained leave to sit again.

IN HOUSE OF REPRESENTATIVES,

February 3, 1825.

On motion of Mr. WRIGHT, the House went into Committee of the Whole on the state of the Union, and again took up the report of the committee appointed to prepare rules to be observed by the House in the election of a President of the United States. The question recurring from yesterday on the motion of Mr. Ingham to strike out the last clause of the third rule, which directs that the galleries shall be cleared on the demand of the delegation of any one State—

Mr. DUFFIE rose and addressed the House as follows:

Mr. Speaker, if I could agree with the honorable member from Massachusetts [Mr. Webster] that this is a proposition of inconsiderable importance, I certainly should not ask the committee to bestow any portion of its attention upon any remarks of mine. It is true that the proposition immediately under consideration is apparently of but little moment; but when we advert to the principles involved in it and the consequences which may flow from it, I consider it a subject of very great importance. We have been correctly told by the gentleman from Delaware [Mr. McLane] that this question derives its importance principally from the consideration that our decision will constitute a precedent for future times; we are distinctly called upon to adopt the proposition *now*, not in reference to existing circumstances—not with a view to obviate any anticipated disturbances in the gallery during the approaching election, but for the disinterested purpose of providing a precedent for the security of those who are to come after us.

A little consideration, I think, will satisfy the committee that the strongest objection to this measure grows out of the fact that it will be regarded as a precedent. If, indeed, it be a matter of small importance; if we have no cause to apprehend immediate danger; if no fears are entertained that our proceedings will be disturbed or overawed by any injudicious exhibition of excitement or violence on the part of those who may behold them from the galleries, why should we adopt the proposition? Whence this extraordinary providence for the security of our successors? Why should we thus gratuitously provide for dangers that may never occur? Will not those who shall occupy our places in future time be capable of providing for the tranquillity and safety of their own deliberations? If in any future emergency there should be indications that our successors will not be permitted to exercise the most unbiased freedom of deliberation in performing the important function of electing a President, will the precedent we are called upon to establish be necessary to enable them to guard against the danger? Will not they have the same power then that we have now?

But let us look at the other side of the question. What will be the effect of the adoption of this rule? Sir, we can be at no loss for an answer to this question. What will be the effect of the adoption of this rule? It is one of those propositions which can only be correctly appreciated by taking into consideration principles which may seem to be remotely and almost imperceptibly connected with it. What, then, are those principles? Sir, we can be at no loss for an answer to this question. The honorable member from Delaware, with that candor and independence which always characterize his deportment here, comes out boldly and manfully with a distinct avowal of the principles upon which he rests the defense of the proposition to clear the galleries. We are told by that gentleman that the people have no right to inspect our conduct here in regard to this great subject, the election of a President of the United States; that we owe them no responsibility for our conduct in the discharge of that duty, and they have no right to.

[Mr. McLANE here rose, by leave, to explain. If, said he, I understand the gentleman as referring to any remark made by me, he has certainly misapprehended my argument. I disclaim any intention of withholding from the people of the United States a knowledge of our proceedings here. The people have a right to know, and they shall know. The argument for which I contended was this: that the immediate constituents of a member of Congress have no right to instruct him in relation to his vote in the election of a President; that he is wholly independent of his constituents in giving that vote, further than the responsibility which a high-minded and conscientious man feels in discharging a solemn duty devolved upon him, and his ultimate responsibility. I freely admitted that the will of the majority of the people of the

United States was entitled to great respect, not to be easily put by, but not of imperative authority, on this question.]

Mr. McDUFFIE resumed. I gave way, with great pleasure, to allow the gentleman from Delaware an opportunity of explaining, but I do not see that his explanation has materially varied the doctrines I have ascribed to him. It is certain, however, that I have not misrepresented the argument used by that gentleman yesterday, for I have before me his very words, taken down as he uttered them, to which I now call the attention of the committee. "We are called upon," said he, "to act here, on voting for a President, not as the representatives of the people." "We are not responsible to the people;" and he asked, "Who has a right to come here and superintend or inspect our proceedings?" These are the precise words used by the gentleman from Delaware; and, construe them as he may, they convey doctrines against which I feel bound to enter my protest. This rule, supported by these arguments, involves the idea that, in the election of Chief Magistrate of the nation, we act here wholly independent of the people, and under no obligation to regard their will, however solemnly expressed and certainly ascertained. What would be the impression carried down to future times by the adoption of this rule under the existing circumstances? If the question had been taken without argument, and the rule adopted, various opinions would be hereafter entertained as to its principles and its objects. It might be regarded as a mere matter of police. But, after what has occurred, if it were now to be adopted without some protest against the principles upon which it has been vindicated, what would be the consequence? It would become a precedent for times less pure, perhaps, than the present, and would be expounded by the argument of the gentleman from Delaware.

We should thus contribute to consecrate principles which I am sure this body would never intentionally sanction. Are we not bound, therefore, by the highest considerations not only to reject the rule, but to set the seal of our solemn reprobation upon the arguments by which we have been urged to adopt it? But let us for a moment inquire into the pernicious uses to which this rule may be applied as a precedent; the only view in which its advocates regard it as of any importance. Whatever confidence I may have in the purity of the present House of Representatives, I cannot close my eyes upon the probability that its members will not always be elevated above the reach of corruption. Suppose, then, that some future House of Representatives should resolve to elect a President from corrupt motives, such as would certainly expose them to the execrations of an indignant people, how would they proceed? Their first step would be to close the galleries, and to exclude the public eye from an immediate view of their proceedings. But would they stop here? No, sir; they would have it in their power to cover their conduct with a veil of impenetrable and eternal mystery, by laying upon the House an injunction of secrecy. Nor would the temptation to adopt such a measure be greater than the facility of its adoption. By the rules reported, the House acts by States on all questions incidental to the election. There are six or seven States represented here, upon an average, by a little more than a member each, and thirty or forty members, representing a majority of States, could, by co-operation, decide any question. And thus would you place it in the power of a small and corrupt minority to screen their conduct forever from the view of those to whom they are responsible. If, as we have been told, we are to establish a precedent for times less pure than the present, let us not put an instrument into the hands of the unprincipled and ambitious by which they can most effectually consummate their corrupt and nefarious purposes.

Let me now solicit the serious attention of the committee to the extraordinary doctrine avowed by the gentleman from Delaware. Are we, indeed, independent of the people of the United States, in the exercise of the high trust of electing a President? Do we cease to be their Representatives when we resolve ourselves into an electoral body to perform that function? Are we to make a selection without reference to their will, however solemnly and constitutionally expressed? Are we to assume the character of independent judges, acting for ourselves and not for the people? I will attempt to establish the negative of these questions. There are many of our public men who stand high in the estimation of the country, and who have made a distinguished figure in the service of the Republic, who maintain that even in our legislative capacity we are bound to yield implicit obedience to the known will of our constituents, however ascertained. A signal instance of the practical recognition of this principle was exhibited some six or eight years ago, in relation to the celebrated compensation law. That measure, by which the members of Congress provided for the increase of their own pay, produced a degree of popular excitement and dissatisfaction which no question of the same apparent magnitude had ever produced before. And what was the consequence? The same Congress at the very next session, almost before the members were warm in their seats, took steps to repeal the obnoxious law; and a majority of those who voted for its repeal avowedly did so against their own deliberate convictions, because it was the known wish of their constituents. But, sir, there is a plain and striking distinction between the relation we bear to our constitu-

ents in discharging the ordinary functions of legislation and that which we bear to them in performing the extraordinary electoral function of choosing a President.

My own opinion has been (and I shall be unworthy the seat I occupy if, entertaining that opinion, I were now to conceal or suppress it) that, in matters of general legislation, the representative is not absolutely bound by the will of his constituents, because he is bound by the still higher and paramount obligation of the Constitution itself. By that instrument "all legislative power is vested in Congress." Now what is the legislative power? What does the term "legislation" necessarily involve? Inquiry, investigation, argument, deliberation, are its essential elements. The delegation, therefore, of the power to legislate is, from the very nature of the function, the delegation of a discretionary power. If we are sent here to inquire, to investigate, to argue, and to deliberate, the laws we pass should, of course, be the result of these mental operations. But what is the nature of the trust we are about to perform with closed doors, under the idea that we are under no responsibility at all to the people for the manner in which we discharge it? Is it a power which, like that of legislation, the Constitution supposes the people to be incapable of performing? Precisely the reverse, sir. The Constitution of the United States, both in theory and practice, distinctly involves the idea that the people of the United States are *not* capable of making laws, but that they *are* capable of making a President. That Constitution provides that the President shall be elected, if possible, by the people. The primary effort to make a choice is made by the people.

This, then, is obviously the favorite mode of the Constitution for the election of President. As, therefore, the Constitution assumes that the people are capable of making this election, and prescribes a mode in which their will shall be expressed, their preference, whatever it may be, and to the extent at least that it is indicated by the electoral vote, reaches us through a regular channel ordained by the Constitution, and is not, as must generally be the case with instructions on matters of legislation, the mere ebullition of popular meetings roused into action by some temporary excitement. So that the will of the people on this subject comes to us consecrated and enforced by the Constitution itself. What, then, is the argument of the advocates of the proposed rule? That we are bound by instructions on matters of legislation, which the Constitution supposes the people to be incapable of performing; and yet, in the performance of an act which the Constitution supposes, and justly supposes, the people to be more capable, because more worthy, of performing than ourselves, and which devolves upon us by an unavoidable contingency only, we are under no obligation to regard their opinion, nor subject to any responsibility for the manner in which we treat it.

Never was there a more paradoxical argument advanced in a grave deliberation. What does it amount to? Neither more nor less than that the people know how to make laws better than we do; and that we are more worthy of the trust of making a President than the people. This is palpably inverting the principles of the Constitution. Upon what principle is it that the people of the United States have retained in their own hands the power of electing a President, and have not retained a single vestige of the power of legislation on the general concerns of the republic? A single glance at the subject will satisfy any one who comprehends the terms of the proposition that acts of legislation cannot, in the nature of things, be performed by a multitude of people, dispersed over a vast territory like that of the United States.

If every citizen were a statesman, still would they be incapable of legislation; because they could not have those preliminary consultations and that mutual interchange of ideas which must necessarily precede every intelligent act of general legislation. They have, therefore, delegated that power entirely and exclusively to Congress. But have they the same obstacles to surmount in electing a President? Are any preliminary consultations and interchanges of ideas necessary to enable them to perform the act? On the contrary, every citizen gives his suffrage with more coolness, deliberation, and wisdom in the ballot-box of his own vicinity than he would if all the people of the United States were collected together. The people, therefore, have retained the power of electing the President, under the idea that they are a safer depository of that power than any which human wisdom could possibly devise. This, sir, is the principle of the Constitution, and it is the principle of eternal truth. All experience has sanctioned and confirmed it. The history of every people capable of freedom demonstrates that, in selecting officers, even of the highest grade, they are fully competent to form a correct judgment of the peculiar qualifications demanded by any emergency or required for any office. Look into the history of those republics that have gone before us. Where do you find, illustrating either the civil or military departments of the nation, statesmen or generals of more elevated characters and splendid endowments than those that are elected even by the mild democracy of Athens or the conflicting compound of aristocracy and democracy that swayed the destinies of Rome? All the distinguished patriots and statesmen who reflected so much glory upon those ages and left such noble examples to re-animate the slumbering genius of succeeding generations were elevated to office by the choice of the people.

Sir, if there be any function which, in the organic operations of civil society, the

people are peculiarly qualified to perform, it is, by a sort of instinctive perception, which seems almost to rise above reason, the selection of men best calculated to represent them in important political stations. If public men are distinguished by the ascendancy of their talents, the elevation of their characters, or by disinterested devotion to their country, my life upon it, these exalted qualities will neither escape the attention of the people nor fail to make the appropriate corresponding impression. They have no selfish purposes, no ambitious aspirations, no secret and sinister designs to prevent or pervert the free and impartial exercise of their judgments. It is in the nature of things impossible that they should have. All their feelings are essentially patriotic. They rejoice only in the glory and prosperity of the republic, and are proud of the opportunity of elevating to power those who are best qualified to promote these great ends. Sir, the glory and prosperity of the country is their glory and prosperity; and what other possible object can they have in electing a President? After all, the quality most essential in the election of that great officer, wielding, as he does, the vast patronage of a great and growing country, is an *honest purpose*. This you will always find in the people, but man is *not* man if you always find it anywhere else.

But, sir, there is another ground which distinguishes the election of President by this House from an act of legislation, and shows that the obligation which the popular will imposes upon the representative should be much stronger in the former case than in the latter. In the ordinary case of legislation, we are, in most instances, called upon to act in emergencies of sudden and unexpected occurrence. The current of events is in a perpetual fluctuation, circumstances are continually presenting themselves in new combinations, which no one could anticipate, and which must, nevertheless, constitute the basis of legislation. For example, before we came here none of us knew that we should be called upon to give a vote respecting the Cumberland Road, the Delaware and Chesapeake Canal, or the suppression of piracy. Topics like these are continually springing up, which we must decide, before they have even been a subject of deliberation among the people. But what is the nature of that question which we shall be called upon to decide on Wednesday next? And what are the circumstances under which we shall decide it? It is a question which has been distinctly presented to the people, for consideration, *by the Constitution*; and has been, for the last four years, fully and freely discussed before the people, with an immediate view to the exercise of the highest power and most sacred privilege they possess—the actual choice of the man who is to preside over their destinies. It is a question, therefore, which, from the very mode of its recurrence, must always be presented to us, after it has undergone the deliberate examination, and, to a certain extent, the decision of the people.

But there is another view of the Constitution on this subject, which leads us still more clearly to the conclusion that, in the selection of a President from the candidates presented to us by the people, we are bound to regard their will as our rule of conduct. I will illustrate it by putting a case, to which I request the particular attention of the gentleman from Delaware, that he may obviate the inference which I shall deduce from it, if he can. Suppose that one of the candidates should receive one hundred and thirty electoral votes; the majority requisite to a choice being one hundred and thirty-one—is that candidate chosen President? You say assuredly not. Why is he not chosen? Because he has not conclusive evidence that a majority of the people of the United States prefer him to any other candidate. Even the largest plurality, short of a majority, does not complete the election. For what purpose, then, is it sent here? That we may elect a man who unites only a small minority of the people of the United States in his favor? This would be absurd. The *reason* why the election devolves upon us demonstrates the object for which it is sent here. It devolves upon us, simply because the Constitution will not place the scepter of power in the hands of any man who is *not* preferred to another, by a majority of the people; and therefore, I infer, as a necessary consequence, that the three highest candidates are sent to us in order that we may select the one who is preferred by a majority of the people.

The doctrine of the gentleman from Delaware, therefore, is in direct violation of the very principle of the Constitution which imposes upon us the duty of electing a President. There is yet another reason which operates with great force on my mind, in favor of considering the members of this House the mere organs of the popular will on this question. It is this: If, in the discharge of our legislative duty, we pass a law which is unwise, and in its operation injurious to the country, the remedy is easy and obvious. The people raise their voices against it, they discard the offending representatives, and the obnoxious law is repealed. But if it should happen, on this or any future occasion, that this House should elect a President from selfish and corrupt motives, where is the remedy? There is none. The deed is done. It is irreclaimable. Even the perpetrators may repent in sackcloth and ashes, but there is no power that can do away with the iniquity. It is evident, therefore, that if we do not recognize the right of the people to control our votes by instructions, we act wholly without responsibility. It is in vain that they have the right to dismiss the unfaithful representatives from their service. Though the example might operate as a terror to future transgressors, yet the work of corruption would still remain, and the administration,

though detested and execrated by an indignant people, would maintain its odious and distracted rule during the whole of the constitutional period. The very circumstance that the act is in its nature irrevocable, makes the denial of the right of instruction equivalent to an absolute denial of all responsibility whatever on the part of the representative.

There is another view of the subject, involving considerations of great delicacy, to which I feel bound by a sense of duty to call the attention of the committee. What, sir, is the peculiar nature of the power we are about to exercise, as it respects our own honor and reputation? When I am called upon to give my opinion upon any measure of general policy, or to co-operate in the passage of a law in which my constituents and myself are equally interested; if I discharge that duty according to my own best ability and judgment, though my conduct should expose me to disapprobation and censure, yet I can elevate my head, not only with a consciousness of my own purity, but with the still prouder consciousness that no man *suspects* me of dishonor. But what must be the feelings of every high-minded and honorable man, when called upon to perform that duty which will soon (and I trust in God for the last time) devolve upon this House? Though his heart might be as pure as the principles of our holy religion, and his conduct as disinterested as patriotism itself, yet should he act in opposition to the will of his constituents, to what ungenerous imputations must he not unavoidably subject himself! Acting as he does in the midst of temptations, which even the most virtuous find it more easy to avoid than to resist, how many will be ready to point at him the finger of scorn, exclaiming as he passes, "There goes the man who abandoned his constituents, and sold his country!" In vain does his conscience acquit him; in vain does he seek for consolation in the consciousness of his own integrity.

To a mind of nice sensibility there is something both mortifying and degrading in the idea of being the object even of unmerited suspicion. When called upon to act under such embarrassing circumstances, should we not, therefore, anxiously adopt for the regulation of our conduct a sound and steady principle, upon which our honor may securely repose, free from the breath of suspicion? If we take the will of our constituents as our guide, we shall come to the discharge of the important trust in question with our powers of attorney in our pockets and our principles inscribed on our foreheads. No speculations will then be indulged as to the motives of our preference, and we shall act under the cheering and consolatory conviction that even malignity cannot insinuate that any secret hope or latent expectation of reward has induced us to disregard the will and sacrifice the interests of our constituents. Sir, I do solemnly declare, in the presence of my God, that if the election of a President were a duty of frequent recurrence, and I were called upon to discharge it upon the principles or under circumstances that would expose me to such imputations, I would resign my seat and abandon public life forever, rather than put it in the power of malice to assail my reputation by charges so plausible.

I will call the attention of the gentleman from Delaware to a view of this question, which I request him to consider as (what I know him to be) a judicious and practical statesman. We have thus far looked at the theory and philosophy of the Constitution; let us now advert, for a moment, to the practical operation of the Government.

The gentleman has told us that we should select the man whom our own judgment—"our *independent judgment*"—shall indicate as best qualified to fill the presidential office without respect to the opinions or wishes of the people. Sir, the first qualification of the chief magistrate of a republic is the *confidence of the people*; and no man who has not that confidence can be either entitled or qualified to exercise the powers of that exalted station. Suppose we were perfectly certain that the man whom our independent judgment would select as best qualified would be opposed by the deliberate will of four-fifths of the people. Would we have a right to elect him? O, yes, says the gentleman; "the Constitution gives us the right." I know we have the physical and, if you will, the constitutional power; but that is not the question. Have we the moral right? Is it consistent with our duty, as representatives of the people? Gentlemen may talk as much as they please about our prerogative as "independent judges," and utter specious and imposing dissertations upon the rights of conscience; but if we elect a President in direct contradiction to the known will of the people, what will be the inevitable consequence? You clothe him with the emblems of power, without the substance; you impose upon him the highest of all responsibilities, without the power of fulfilling the obligations growing out of the responsibility. In a word, sir, you put the scepter into his hand, and, in the very act of placing it there, you paralyze the arm that is to wield it.

Let us look a little more minutely into the nature and operation of public opinion as connected with this subject.

If the people of the United States had never been called upon to examine this question and express their will in relation to it; if it were a principle of the Constitution that the Chief Magistrate should be elevated by lot, and if chance were to cast the office upon a man who was not their choice, and who had not their confidence, I believe they would patiently acquiesce, although their will should be defeated. But when the

Constitution has made it their right and their duty to examine the question and express their will upon it, and when they see that will defeated by human agency, the agency too of their own representatives, is it in the nature of things that they should not feel deeply indignant at the authors of so glaring an outrage upon their most sacred rights? Is it to be expected that they would calmly and quietly submit when their constitutional will has been contemned by their representatives? Are they, indeed, the mere stocks and stones which such insensibility would imply? Sir, I sincerely hope, as I confidently believe, they are not. It would be a fearful omen if they were. It would go far to prove what the arguments of the gentleman from Delaware seem to imply, that they are incapable of exercising this high attribute of self-government. But the supposition is a libel upon the people. If you were to elect a President upon the principles and under the circumstances I have supposed, you would elevate him only to be a more conspicuous object of public reprobation; a miserable effigy of power; a common target, at which a high-minded people would level their just indignation. Sir, a lofty and generous ambition would disdain to accept power under such circumstances.

I presume I shall not expose myself to the imputation of flattering the people of the United States (and God knows I have never been a flatterer, either of the people or their rulers) when I ascribe to them as much virtue and intelligence as has ever fallen to the lot of any people on earth; nor shall I be considered as advancing an extraordinary proposition when I affirm that our Government is constructed, and ought to be administered, with as much regard to the will of the people as that of Great Britain; or, to put a clear case, that of France in the days of the Emperor Napoleon. Yet, in neither of these governments were the principles of the gentleman from Delaware ever carried into effect. They never were carried into practical operation by any civilized government, holding jurisdiction over an intelligent population, nor, until the nature of man is changed, will they ever be. As respects Great Britain, where time and experience have adjusted the operation of the political system, certain principles recognizing the controlling influence of popular opinion have been so long settled by the practice of the executive government that they are now considered fundamental. No administration ever thinks of retaining power with a majority of the people against them. How often have we seen the King, in obedience to the voice of the nation, discard from his service ministers in whom he still reposed the most undiminished confidence, and select others, not in conformity with the dictates of his own "independent judgment," but in compliance with the will of the people! Their confidence, and not his, is the point upon which the existence of an administration depends.

Sir, there has never been a minister in England, not excepting the late Lord Castlereagh, who would have nerve enough to take the seals of office upon the principles maintained by the gentleman from Delaware. If, then, in a country where the authority of the executive government, in addition to its mighty patronage, is invested with the sanctity which naturally results from its hereditary character it is practically demonstrated by the experience of a century that no administration can maintain itself against the will of the nation, how desperate would be the experiment of electing the President against the popular will in this country, where the people are more generally intelligent, the Government more popular in its organization, and the executive department destitute of the adventitious influence which belongs to a hereditary monarchy! Even Bonaparte himself, when supported by two hundred thousand bayonets and wielding the whole military power of France, was compelled at all times to acknowledge the supremacy of the national will. Such was his own declaration after he had fallen from power, when reviving the retrospect of his eventful life with the eye rather of a philosopher than a monarch. If this mighty sovereign was compelled to admit the omnipotence of public opinion, what a wretched spectacle of debility and distraction should we have if it should be disregarded in the election of a republican President! Sir, a President elected upon such principles would be an object rather to be despised than dreaded; for he would soon find that he had very little power either for good or evil.

I will now say a few words in answer to an imposing, but, in my opinion, deceptive argument urged by the gentleman from Delaware. He asks, if we are bound to obey the will of our constituents, how can we ever make an election, since that obligation would constrain the friends of each candidate to adhere to him throughout the contest? Now, there may be many difficulties connected with a doctrine or a duty which neither destroys the truth of the one nor absolves from the obligations of the other. If the mere existence of such difficulties would absolve us from any duty, there would be an end of the obligation of almost every duty. I see a very easy and obvious mode of surmounting the difficulty suggested by the gentleman, but before I state it I will take the liberty of asking him how he can get over the very same difficulty upon his own principles? The principle of preference, whatever it is, that induces a member here to vote for a particular candidate, imposes upon him a moral obligation to vote for that candidate. I say we should vote in conformity with the will of our constituents.

The gentleman says he should vote in conformity with the dictates of conscience.

There is my principle, and here is his. They are of equal obligation. Is it not evident, therefore, that both would equally produce the difficulty under consideration? If we adhere, without departure, to the candidate selected upon either principle, there can be no election. But, sir, the difficulty is imaginary. The plain and practical rule is to endeavor, if possible, to carry into effect the will of our constituents.

We must make this effort honestly, without any skulking behind pretexts or forms. If it be found that their favorite cannot prevail; that the candidate who received their electoral vote unites but a small minority of the people of the United States in his favor, and that the two others are more prominent, we must then choose between them, still conforming to the will of our constituents in making that choice, if their will be known to us. If we cannot succeed in electing their first choice, we should endeavor to elect the person next in their confidence. By this process the final control will be found where it ought to be, in the general voice of the people of the United States.

I find myself called upon to do—what? Not to elect a President, but to complete an election which the people have left in an inchoate state, merely because they cannot meet together to complete it themselves. The framers of the Constitution supposed that the popular branch of Congress would be the best means of concentrating the national will and thereby consummating the work commenced by the people. The *principles* in which it originated are not changed by the accidental circumstances which have cast upon us the duty of adding the finishing stroke to it. All agree that it is a misfortune that a majority of the people have not united in favor of one man, and that it was the very end of the Constitution, the “consummation most devoutly to be wished,” that such majority should have been obtained in the first instance. Why, then, is it not equally desirable now? What is it that has suddenly produced this magical change in the principles which regulate this great national operation of choosing a President? Sir, these principles are eternal, and circumstances do not affect them. If, as it must be admitted, it was the primary object of the Constitution to elevate to the executive chair the man who should be the choice of a majority of the people, that does not cease to be the object of the Constitution when the election devolves upon this House. The election of a President must be regarded as a continued operation, carried on upon the same principles throughout. It would be a miserable and incongruous piece of patchwork to commence with one set of principles and end with another.

But, says the gentleman from Delaware, the power we exercise in electing a President is not conferred upon us by the people, but by the Constitution. Were I to take this proposition simply in the terms in which he has expressed it, I should regard it as either absurd or unintelligible. But I know the gentleman's meaning, and I will not affect to misunderstand him. His proposition is, that the election does not devolve upon this House by any act of the people expressive of their wish that it should come here, but by a mere contingency, for which, as it must unavoidably occur sometimes, the Constitution has made provision. But how does this strengthen the gentleman's argument? Are we to be told that, because it is the “necessity and not the will” of the people that “consents” to our having anything to do with this question, we are, therefore, absolved from all responsibility? The very reverse should be the inference.

Sir, I will now suppose a case, suggested by this argument of the gentleman from Delaware, which, from its peculiar application to myself, is better calculated than anything I could select to illustrate the sincerity of my attachment to the principles I have avowed. The Constitution, providing for another contingency, declares that if this House fails to elect a President, the duties and powers of that office shall devolve upon the Vice-President. Now if individual preference, without regard to the public will, were to decide this question, I need scarcely declare, in this place, that there is no man in this country whom I would prefer to the individual designated by the people for the office of Vice-President.

But, sir, if, under the influence of this feeling, I were to give my vote in this House for the indirect purpose of defeating the election and throwing upon the Vice-President elect powers which the people never intended to confer, though my vote and my motive should be concealed from every human eye, I should never be able to make peace with my conscience. I should regard myself as guilty of the most infamous dereliction of duty, and every honorable feeling of my nature would rise up to reproach me. In passing this sentence of deep reprobation upon my own supposed conduct, I trust I shall not be understood as speaking harshly of the possible conduct of others; the sentence I should pass upon myself would result from my own peculiar notions of duty; other gentlemen, entertaining different views of this subject, might pursue the course I should condemn in myself without incurring the reproach of their own consciences or deserving the reproach of others. I now invite the attention of the committee for a few moments to a topic which has been drawn into this debate—whether fortunately or unfortunately it is not for me to determine. We are told that we have a precedent on this subject, set by Congress in 1801, and we are called upon to yield to that precedent the deference due to the acts of our predecessors. For my own part,

sir, I wish it to be distinctly understood that I do not consider that precedent entitled to the slightest possible consideration upon this question. With me it has not the weight of a feather. And why do I reject it? Not because it is a federal precedent, for mere words have no weight with me; but because it was established by men who had deliberately resolved to violate their duty to their constituents and to the Constitution by attempting an act of usurpation which, for boldness and desperation, would not have discredited a Cromwell or a Bonaparte. They knew perfectly well that what they had in contemplation would excite the indignation of the people, and this rule was, consequently, provided to veil their proceedings from the public eye.

But, sir, I absolve the federal party from the sin of that transaction. God forbid that the weight of that sin should rest upon any party now in existence. It was the deed, to be sure, of federalists; but the federal party—I mean the people of the United States known by that denomination—never gave it their sanction. What, then, was it that doomed to political infamy and proscription Aaron Burr and his associates? Looking at the strict constitutional power of the House, that pretender was as fairly entitled to be chosen by it as Mr. Jefferson. He had an equal number of electoral votes, making no discrimination. Whence, then, the popular odium incurred by those who voted for Burr? Simply, sir, from the attempt to carry into practical effect the principle that this House has a right to elect a President without regard to the popular will. This was the sin, sir. “The very head and front of their offending had this extent, no more.”

A combination of politicians, some fifty or sixty in number, who had been accustomed to wield the political power of the country, seeing the scepter about to pass from their hands, screwed up their courage to the sticking-point and boldly set at defiance the will of the nation, by attempting to elect a man President who was known not to be the choice of the people. Under the influence—the maddening influence—of party feelings, they attempted, as a party, what none of them would have attempted, and perhaps none of them approved, as individuals. They were actuated by a principle similar to that which stimulates and sustains a mob in the commission of depredations which every individual composing it, when left to himself, would shudder to contemplate. They confirmed the wavering and quieted the apprehensions of the timid by crying out, “The party will sustain us! The party will sustain us!”

Sir, it was a fatal delusion. It was the last act of their political life. It put a final end to the ascendancy of the federal party. I agree with the gentleman from Delaware that the policy pursued by the federal party, with the exception of two or three measures which nobody now attempts to justify, was a wise policy.

They organized the Executive Government and a system of national defense; they erected many monuments of their wisdom. But, in this closing scene of their power, what did they do? An act which alienated the confidence of the country, struck down the fabric of their power, and, by the reaction produced, swept away all the memorials of their glory, of which the gentleman from Delaware has spoken. Measures were confounded with men, and both involved in one common prostration. And hence the feeble and debilitating policy pursued by the republican party during the first years of its ascendancy. Without pretending to question, therefore, the general wisdom of the Congress of 1801, I must protest against yielding to their precedent on the subject before us.

There are some other topics which I intended to touch, but which I will waive, as I have too long trespassed upon the attention of the committee already. There is a single remark, however, which I must be permitted to make before I sit down. We are called upon to close the galleries, and upon what grounds? Have we any evidence that they will be disturbed? Have we any reason to believe that they will be more disorderly than they are now? Our tongues will be silent on the approaching occasion, and it would be a reflection upon the people of the United States to suppose they could be spectators of such a scene and not be hushed into silent attention by the moral grandeur of so simple and sublime a spectacle. Sir, who are they that will fill the galleries? They will be an epitome of the people of the United States, respectable and intelligent gentlemen from a distance who, for aught I know, may be as capable of deciding this great question with a view to the tranquillity of the Union (I say it without intending to derogate from the dignity of the House) as our honorable selves.

Mr. MANGUM, of North Carolina, then rose and said that he felt great repugnance to obtrude his remarks upon the notice of the House at any time—a repugnance which, upon this occasion, was certainly not diminished by the state of indisposition in which he found himself. That he felt it his duty to make a few remarks in reply to those he had just heard, not so much with the view of affording either interest or instruction to the House as with a view of publicly avowing those principles which he deemed sound, and by which he determined that his conduct on the approaching occasion should be regulated.

The question, said Mr. Mangum, immediately under consideration is intrinsically of but slight and trivial import; but it derives much consequence from other and more important questions that have been drawn into discussion. What, asked Mr. Mangum,

is the nature of the question before the House? It is one exclusively of police. But, from the manner in which it had been treated, he should have inferred, but for the gentleman's disclaimer, that his object was not so much to discuss *this* question as to issue a sort of manifesto to the people of the United States to justify those who yield to a strong current and to dam those who resist it. It is a question not of open galleries or closed galleries. Gentlemen had, therefore, been engaged in combating shadows; and much of what had been said had been addressed to a motion which no one had made.

The question, as he understood it, was simply this: Whether the galleries should be thrown open subject to be closed at the motion of the Speaker, or whether they should be thrown open subject to be closed at the request of the delegation from any one State? For his own part, he should have thought that the latter arrangement would have been conceded, as a matter of courtesy, to those gentlemen who stand singly and unsustained by colleagues as representatives from the weaker States. For himself, he had not the remotest idea that those galleries, let them be occupied by whom they might, were about to overawe the House, or exert any improper influence upon it whatever. His reliance was placed upon the deep moral feeling that pervades this nation. On this he relied to sustain gentlemen in the discharge of their duty, and on this he relied more than on all the bayonets and cannon that military despotism ever wielded.

This is a mere question of order. The admission of strangers was an act of courtesy, granted, as such acts are always understood to be, upon an implied obligation of good behavior. It was not to be presumed beforehand that those who were admitted would violate the laws of decorum; but if they did, there could be doubt that the Speaker was competent to exclude them, and as little doubt that he would do it at the suggestion of the delegation from any one State that a free exercise of their rights required their exclusion.

He would again repeat that he felt no fears from any attempt to overawe the House, and still less had he fears of the intriguers who had been spoken of, whether posted in the galleries or operating in the hall. His position was peculiar; it was that of an armed neutrality; he had but little to hope and nothing to fear.

He knew that he stood upon a narrow isthmus, lashed upon either side by the most angry surges, from which neither numbers nor denunciations should be able to drive him. Calling to his aid the little lights of his understanding, and with a heart bent upon the best interests of the country, he should firmly and fearlessly endeavor to perform his duty.

He should not, however, have troubled the House at this time with a single remark but for the principles he had heard advanced, and against which he felt it his duty to enter his solemn protest. He had always listened to the gentleman from South Carolina with great pleasure, and he must confess that he heard him on this occasion with the more pleasure because he thought he had perceived that his talent, his ingenuity, and his fertility of resource had proved insufficient to sustain him under the weight of the cause he advocated. Whom, asked Mr. Mangum, are we bound to obey in giving our votes on the approaching occasion? We, I mean, who are in the minority? If I understand the gentleman, we are bound to obey the will of those whose candidate shall have the highest number of votes. I would be glad to know whether we are bound to do this by moral obligation, or only by reason of the *philosophy* of the Constitution, to which the gentleman alluded. If by moral obligation, that obligation addresses itself to every honest mind with the force of a perfect obligation; it must be obeyed; and why then has the Constitution been so silly as to allow us a choice between three candidates when we are *morally* and of course *perfectly* bound to elect the candidate who has the largest number of votes in the electoral college?

Here Mr. Mangum yielded the floor to Mr. McDuffie, who wished to explain. He had not said that gentlemen were bound to elect the candidate who had the highest number of votes; on the contrary, he had said distinctly that a plurality of votes did not make an election.

Mr. MANGUM resumed:

He was then to understand the gentleman that we are not constitutionally, but only morally, bound, or, in other words, that we have no right to disregard the will of the people as expressed in a plurality of votes in the electoral colleges. But, if so, was not the argument the same—the conclusion the same? Was not that obligation as binding as an obligation emanating immediately from the Constitution? Must not every honest man regard it in that light? And must not every man, who was not base enough to barter away his birthright for a mess of pottage, to sell himself for loaves and fishes, feel its binding power? If the obligation was a moral one, it was a perfect one, and as such commanded perfect obedience. He must, therefore, most emphatically repeat that it was extreme folly, if not worse, in the framers of the Constitution to give to this House the power of selection between three candidates when, at the same time, the hands of the members were tied up from the exercise of that power by

the strongest obligations. The Constitution, then, holds out to us bread and gives us a stone.

But this never was the design of the framers of the Constitution; and the very fact that they have given us the power to choose is enough to prove that the principle, as stated, does not furnish the rule by which we are to be governed.

If, then, we are bound by the gentleman's *moral obligations* to elect that candidate who happens to have a plurality of votes in the electoral college, what is the rule by which we are to be governed? Is it by the vote of our respective States? That cannot be the rule, for the Constitution has not prescribed any uniform mode for the election of electors, but has left that power in the legislatures of the States; and it may happen, in those States in which they elect electors by districts, that there may be a tie; that the votes for the two contending candidates may be equal. How will gentlemen extricate themselves from this dilemma—the dilemma of a tie? Will they resort to their *principle*? It will fail them. It is not principle; it is, in my humble judgment, absurdity. The gentleman from South Carolina has asked the gentleman from Delaware, with a sort of triumph, to answer the case which he puts, to wit, that if one hundred and thirty votes shall be given for one candidate, falling one vote short of the number required for an election, whether that gentleman would *dare* to resist such a majority? I would answer that great respect is due to the opinions of the people; that it would be great impolicy in ordinary cases to resist so full an expression of public will. But reasons might exist which would render it the imperious duty of the Representative, as an honest man, to resist it. There is no *principle* concerned, as I trust I have shown. It is mere matter of expediency.

But let me suppose a case predicated upon the alleged principle that we are bound to give our votes in accordance with the votes of our respective States, and ask the gentleman to answer it. There are twenty-four States, and three candidates for the Presidency. Suppose eight States should vote for each candidate; if we are bound to vote as our respective States do, no election can be made. And what will be the result? It is obvious. By adhering to the *principle* of which the gentleman speaks, you postpone three candidates, upon whom the people of the United States had fixed their eyes as fit persons for the Chief Magistracy, and each of whom had received the votes of one-third of the people of the United States for that office. You set aside all these, and let the Vice-President into that office; a man who had not received a single vote in the United States for the Presidency. What will the people's men say to this doctrine? And yet it is *principle*, sacred principle, according to the views of some gentlemen. But, says the gentleman, we are first to try to elect the people's man, and, if we cannot effect that object, then, and then only, take up some other candidate. We must yield to the necessity of the case. Mark me, it is moral principle, says the gentleman, by which we are bound. A principle is surely a very bad one which will not wear longer than one day, and which must be abandoned as soon as put into practice. But we must yield to the necessity of the case.

I had thought that that which yields to any necessity whatever was not moral principle, for moral obligation admits of no compromise. It is said that if on trial we cannot succeed in electing a President, to prevent the Vice-President's coming into that office, we must give way. But here are eight States in favor of each candidate. Who is to give way first? If I give way first, may not my constituents reproach me with an abandonment of principle? If the gentleman gives way first, does he not abandon principle? Sir, such a principle as must be abandoned on one day's trial is not a principle which I will ever recognize.

If, then, sir, we are under no moral obligation to vote for the candidate who has the highest number of votes, nor to obey the votes of our respective States, what, I again ask, is to be the rule which must govern us? Sir, it appears to me that the whole fallacy which pervades the arguments of the gentlemen whose views I am opposing consists in this—they are comparing the votes of the people taken *per capita* with the votes of twenty-four distinct and independent sovereigns. They are comparing things which have no points of resemblance, nor have they any assignable relation to each other. The States, as sovereigns, are all equal. The people, who make up those sovereignties, numerically considered, are totally unequal, and, in that respect, bear toward each other various and diversified proportions. Are we, then, to be bound by the votes of our respective districts? (This is the doctrine of the *people's men*, and all are *people's men* nowadays, from the much-reprobated caucus-men down to the humblest political professors.)

Here, I trust, I may be permitted to say that I shall, for once in my life at least, in the honest discharge of my duties, fall in with the doctrines of the *people's men*—I expect to represent the plurality of my district.

But are we bound by the votes of our districts? I mean in point of principle. Did the framers of the Constitution design that we should be so bound? If they did, wherefore does not the Constitution prescribe a uniform mode of electing representatives by districts? And yet the power of prescribing the mode is left with the legislatures of the respective States. Some States elect their representatives by general

ticket, as does Georgia, for example. How will gentlemen ascertain the votes of their districts under the general-ticket system? How will gentlemen extricate themselves from this dilemma? Will they do it by resorting to the statement that the State, in that case, is each member's district? If so, then each member is bound to represent the vote of his State. This brings the question back to the ground on which I have already considered it; and the doctrine is subject to all the objections to which I have already adverted. It is true that the gentleman from South Carolina cannot be mistaken as to the vote of the people, for in that State they elect members by districts. Should he recognize the principle of perfect obedience to the voice of the district, then should also every other member. If this is principle, what would be the consequence of adhering to it in the most of cases—indeed, in the actual posture of affairs at present? It is plain; no President could be made, and the Vice-President would come in. If it is principle, we are bound to adhere; but, if we may give way and are not bound to adhere, then it should no longer be dignified with the name of *principle*, but it is a mere question of *expediency*. Again, if we are not bound by the votes of our districts, (as is clearly the case in some of the States, for the simple reason that they have no districts,) but are bound by the votes of their respective States, then this dilemma might arise—a member might be obliged to vote for a candidate who was opposed by every man in his district. Here he gives up the wishes of all his constituents, the only people upon earth to whom he is politically responsible, and for what? To fall in with the vote of the State; and by adhering to that vote no President is elected, and the Vice-President comes in, after all these fearless and *patriotic* sacrifices.

Again, if our States were all of equal size, that is, equal in point of population, and the people fail to make an election in the electoral colleges, it is clear that no election could ever be made by the House of Representatives, should the members recognize as correct, and *adhere* to the principle, that they are bound to vote in accordance with the votes of their respective States. In the present unequal size of the States, under any ordinary circumstances of combination, the operation of that principle would defeat an election nine times out of ten; and in no solitary case can an election be made in the House of Representatives by adhering to the principle, except by enforcing the odious doctrine that the minority shall prevail over the majority—that is, by making thirteen or more of the smaller States, that had voted for one candidate in the electoral colleges *without effect*, come into the House and do the same with *complete effect*. What they were unable to do by reason of inequality of population, they are made to effect by the equality of their sovereignty. Sir, if these are the *people's principles*, I for one beg to be delivered from them.

It is said that in matters of *legislation* it is a vexed question whether the representative is not bound to obey the will of his constituents, and that many great and wise men have held the affirmative. Sir, I would not give a button for the doctrine, either one way or the other, so far as regards its practical utility. As to the mere theory, I concede it to gentlemen; they may delight themselves with whatever theories they please, whether ingeniously or artificially constructed. But, though the question as to legislation may be vexed, gentlemen tell us that in the business of electing a President by the House of Representatives there can be no doubt the case is a plain one. Sir, I argue directly the reverse. In the business of legislation the people, in primary assemblies, cannot act; it is constitutionally, it is physically impossible. There is, therefore, a propriety in a representative government like ours, that the legislative body should respond to the voice of the people; that as a reflector it should give back the people's wishes. But in the election of chief magistrate the people *can* act in primary assemblies. Those assemblies present the proper and the best mode in which the election can be made. But the people having attempted an election in this mode, and having failed of success, the Constitution brings the election to this House. This House is the empire, the judge on whom devolves the settlement of that momentous question, which the people have been unable to settle themselves for want of greater unanimity.

Sir, I hope I have now succeeded in showing the fallacy of the gentleman's—pardon me, the *people's*—doctrines of instruction. What, then, is our duty in the present crisis and on the approaching occasion? Is it to fall into the ranks of the candidate who happens to be strongest? (A very comfortable doctrine, indeed, particularly to those who happen to be in the minority; our understandings and conscience approving, we should like to be wafted with you, gentlemen, on the strong currents.) Is it to obey the voice of our States, or is it to obey the voice of our districts?

It is, in my judgment, neither more nor less than this: To do what is right, according to the best dictates of our own understandings, and leave the consequences to God and to our country.

It has been asked, how can we hold up our heads when we return home, if we have gone against the will of our constituents? Sir, we can hold our heads as erect as an angel. The man who has honestly done what he understood, after deep and anxious reflection, to be his duty, may meet the eyes of his constituents, aye, the eyes of the world, and neither blush nor quail, though none should smile on him. It has also been

said (and the remark, though it can have none here, may be calculated to have an effect abroad) that, whenever a man has done deeds of renown, the people delight to honor him, and will, with great certainty, elevate him to the highest offices. Sir, this is a mere truism; everybody here knows that this is true. It is what the people will always do; it is what they have done in a thousand instances; but, sir, it is *exactly* what, in the present case, they have *not* done. Else, why does the election come to this House? Sir, a majority of the people have distinctly told you that not even the most favored candidate is the man of their wishes. Neither is elected, though all may have been honored. It is we who must elect. We have also been told that, upon grounds of expediency, the scepter ought not to be placed in the hands of any man who has not a majority of the votes of his countrymen; and that, if we do place it in the hands of such an one, we only place it thus to lop off his arm.

Sir, this but ill agrees with what is a fundamental principle in the system of the *people's men*. What, sir, are an intelligent and enlightened people of these States, who are so much flattered in one breath, to be represented in the next as ferocious as tigers? Are they to rise in their wrath and hurl the full weight of their indignant vengeance at an individual who has done no harm—who has done no one act to excite their displeasure? Suppose three candidates should come before us with an unequal number of votes, I admit we should very properly feel inclined to elect him *ceteris paribus* who had the largest number, (for I would not willingly deprive gentlemen of the smallest comfort.) But, suppose that the candidate who had the smallest number should, in the result, be chosen President, is it maintained that the people of the United States would rise in vengeance against that man? Surely, sir, whatever vials of wrath might be exhausted on the heads of their guilty representatives, the people would pour out none upon the innocent head of a man who had done no one offensive deed, and whose only crime had been to be constitutionally presented for choice, and constitutionally chosen.

We have heard, further, and much to my astonishment, that the doctrine of the gentleman from Delaware would not flourish in old England—nay, that it is too strong even for the military despotism of Napoleon. I scorn to flatter any man, and I am sure that, on this occasion, I shall be exempt from the imputation of such design, when I say I was an attentive listener to the gentleman from Delaware, and did think, and still think, that sounder doctrines, or doctrines delivered with more pellucid clearness, never fell from the lips of any man than from those of that distinguished member; and I did consider the demonstration by which they were maintained precluded reply; and I am happy to find my own opinion bolstered and corroborated by an opinion that comes to me with so much weight and authority. I have not heard why his doctrines would not flourish in old England; the gentleman from South Carolina did not condescend to favor us with anything more on that point than the mere assertion. As to what was said in regard to the iron reign of Napoleon, and the declarations that he made, it is indeed true that that despotic ruler *professed* to be governed by the will of the people. (Boraparte, it seems, too, was a “people’s man.”) But, sir, while he *professed* this, he was supported by 250,000 bayonets; and in such circumstances, what was the “people’s will?” It was the will of their tyrant.

Here Mr. Mangum, not having concluded his remarks, gave way for a motion for the committee to rise.

FEBRUARY 7, 1825.

On motion of Mr. Wright, the House then went into Committee of the Whole on the state of the Union, Mr. Taylor, of New York, in the chair, and resumed the consideration of the rules (reported by a committee) to be observed by the House in conducting the election of the President.

And the question being on striking out the last clause of the third rule, which provides that the galleries may be cleared at the request of the delegation of any one State,

MR. MANGUM said that when the committee rose the other day, as he presumed, for his personal accommodation, he had well-nigh concluded the remarks which it was his intention to submit on this subject. He felt deeply sensible of the polite attention of the committee, and the best return in his power to make for their kindness was to refrain from trespassing again too far on their patience. This subject having already occupied a disproportionate space of the time of this House, he should not again take up the argument, but only submit a few general observations which he had designed to offer on the former occasion. He knew full well the immense advantages which gentlemen have when they address themselves not to the understanding and the judgment, but make ardent appeals to the prejudices and passions of the people. The people’s rights, and the sovereignty of the people!—the very finest and most popular themes for declamation. He felt the great difficulty of being heard, coolly and dispassionately, at the bar of reason at the moment when the passions are stimulated into tumult, and worked up to a pitch of frenzy.

In this country, as we have seen from the foundation of the Government, whenever

a new party was about to organize itself, or a new faction to spring into existence, its very first breath was breathed in a holy and fervent *love for the people*; its ardor and its devotion to the public weal transcended only by the purity and disinterestedness of its motives. I confess sir, that I have lived long enough to distrust these ardors. When I see the frosts of age dissolving under the warm glowings incident to youth, and the *patriot* of sixty entering the lists with the very flower and chivalry of the land, endeavoring to outstrip them in demonstrations of love and devotion to the people, I begin to look about me; for I fear mischief, or suspect treachery. I need not refer you only to our own history, but the history of other countries and other ages discloses the fact that many of the bloodiest tyrants that ever disgraced humanity began their career by fawning on the people, and sedulously and assiduously courting their favor.

It has been remarked by the gentleman from South Carolina that all sovereign power resides in the people, and that every agent in authority must act in obedience to that will. The abstract proposition is evidently true: but the difficulty arises in the application of it to the case in hand. How is the will of the people to be ascertained? Is it to be derived from the county meetings, town meetings, publications, and rumors? Are we to resort to these loose, unsatisfactory, and contradictory indications of the public will? or shall we resort to the constitutional indication—to that expression which has been made through legitimate organs? If the latter, it is apparent that a large majority have voted against either of the candidates. What, then, is our duty? I would again answer, to select according to the best dictates of our understandings. And yet, says the gentleman, this doctrine is too strong for revolutionary France; it would have been repudiated under the reign of Napoleon. Mr. Mangum said it was a little curious to remark the striking coincidence between the early professions of Bonaparte and those with which we are now daily saluted. He could hope that a coincidence should never be made to exist in this country in any other respect; for what was the sequel in the case of Napoleon? Though his first love was the love of the people, and though he bowed with the profoundest respect to their will, yet he flattered, he coaxed, and he courted them, until he placed his foot upon their necks, and crushed their liberties with the most frightful military despotism that the world ever saw.

This is the natural order of things in a free government, to begin a Jacobin and end a tyrant. We are told we must bow to the will of the people. I grant it. But I shall look for the indications of that will to a source which is unerring—to the constitutional indication of it. It is curious to remark how defective this *poor, tuttered* Constitution of ours is, according to gentlemen's notions of responsibility. They say we must vote with the people, (what people?) and yet the Constitution guarantees to us the mode of voting by *ballot*, in the exercise of which the vote of each delegation may be profoundly locked up in their own bosoms, and no human eye, not even the Argus eye of jealousy itself, can detect for whom that delegation voted. There are four States in the Union represented in this House, each by one member. Those gentlemen, according to the rules established on a former occasion, and according to the rules reported on this, may hide their secret from all the world if they choose. They have nothing to do but to make duplicate ballots, and drop one into each box among twenty-three other votes, and how are their ballots to be known, to be identified? How does this comport with the gentlemen's notions? How defective is the Constitution according to their views! Instead of requiring members to vote in a manner to prevent the practice of fraud and deceit, that same Constitution becomes *particeps criminis*, by throwing the mantle over deeds of darkness and crime, by shielding them from exposure to the vengeance of disappointed ambition or the scorn and hatred of a betrayed country. There have been some politicians silly enough to imagine that the framers of the Constitution looked afar off, and either dreamed or believed that occasions might arise when this provision would be found most salutary, that the safety of the republic might depend upon the ignorance of the tyrant where to direct his blows.

For myself, however, I hope, said Mr. Mangum, that I may be permitted to say, that I hate mystery—I hate all concealments in the discharge of a public duty; and shall be one of the last to shrink from the severest scrutiny into the manner in which I may have discharged it. I would scorn the use of the mantle.

I advert to these considerations with a view of showing with how many difficulties this subject is beset, and how arduous would be the task of framing a theory, according to gentlemen's views, that would harmonize in its practical operations with constitutional provisions on the subject.

Sir, it seems to me that the true conception of the framers of the Constitution is this: That the Representatives in this House would come immediately from the people—they are part of the people—presumed to be men of some character, connected with the community from which they emanate by a thousand ties: character, respect, family, children, a common interest, a common destiny. In a word, identified with that community in habits, feelings, sentiments, &c.; and that when the result, so much to be deprecated, of the presidential election being cast upon this House, shall happen, that all these ties and considerations form a sufficient guarantee that a wise, honest,

and judicious selection will be made. This view, I think, said Mr. Mangum, is conformable with the theory of the Constitution.

What are the contemporaneous expositions of the Constitution on this subject? In the work entitled "The Federalist," a work written by some of the ablest men who were in the convention, and which is resorted to by the ablest constitutional lawyers as high and grave authority, I find the following opinion: "But, as a majority of votes might not always happen to center in one man, and as it might be unsafe to permit less than a majority to be conclusive, it is provided that in such case the House of Representatives shall select, out of the candidates who shall have the five (now changed to 'three') highest number of votes, *the man who, in their opinions, may be best qualified.*" And yet it is said that these doctrines would be odious in revolutionary France—they are too strong for the reign of Napoleon.

Such are some of the difficulties into which gentlemen are deluded and bewildered by an overweening attachment to their new-born theories—theories that have sprung into life from a brain highly excited by political contests—theories that are cherished with all the love that the mother bestows on her rickety bantling.

But, sir, if these theories may not be deduced from the letter of the Constitution, may they not result from the *philosophy* of the Constitution of which we have heard in this debate? Yes, sir; the *philosophy* of the Constitution! That philosophy, which, I fear, is to arm this great Government with that stupendous power which is to sink our State sovereignties into mere corporations. That power which has prostrated some of these barriers that wise men of both the old parties recognized. That power which is incessantly, most fearfully, and alarmingly increasing.

Yes, sir; the philosophy of the Constitution! That philosophy which was reserved for the ingenuity and astuteness of modern times to discover, and of which that great and wise man, Patrick Henry—and a wise man he was—in all his awful vaticinations, never dreamed of. Yes, sir; it is by courting these sovereign people sedulously and ardently that all Jacobins begin their career. The people are sovereigns, but they are sovereigns in minority; they never have, nor will they ever come to the *crowns*, whatever some of their *flutterers* may do, and yet they have in full enjoyment one of the brightest and most undoubted attributes of sovereignty, *the flattery of their courtiers*.

I trust, I may say, and truly, too, that I have as profound respect for the will of the people, fairly expressed, as any man; and would preserve those interests committed to my charge as I would the apple of my eye. I would not look to the shouts of the multitude for the opinions of the people, but I look to their opinion as fairly and constitutionally expressed. To this I respond, to this I am obedient.

I regret that I have detained the committee so long on this subject. As regards the question immediately under discussion, I would not turn upon my heel for a decision of it, either one way or the other.

Mr. J. S. BARBOUR, of Virginia, said that a sense of duty made it necessary for him to offer to the committee a few remarks; and in doing so he should but express an entire concurrence in opinion with the gentleman from North Carolina, [Mr. Mangum.] that a new zeal had infused itself into our deliberations, resulting from the excitement at this moment pervading both this House and the country. He trusted that the fervor of this excitement would not warp the judgment of the committee, or divert it from the duty of calm inquiry, so imperatively enjoined on it. The first question presented to us I take to be this: Is it right to indulge the intense anxiety now felt by the public, in permitting an inspection of the proceedings of this House when constitutionally employed in selecting a Chief Magistrate? The history of that country whose precedents have supplied most of the forms of our deliberations discloses to us the existence of controversies between the Parliament and the people on questions of giving publicity to the transactions of the former. It was deemed, and accordingly punished, as a breach of privilege to publish the speeches or votes of members, and that, too, on the ground that those proceedings were matter of which the public had no right to be conversant. At the period of forming our Constitution, these demands from the people, and their denial by the Parliament of England, had made an appropriate impression in this country. To secure this right beyond the reach of cavil, and to supply the people with this safeguard for the responsibility of their representatives, claimed the attention of the wise framers of our political fabric. To secure this right, it is provided that the people have a just claim to know what Congress is doing, and that a journal of their proceedings shall, from time to time, be published, together with the yeas and nays, upon demand of one-fifth of the members present.

The usage of Congress supplies us with the best commentary upon this constitutional text. Its deliberations have been open to public inspection, with the exception of proceedings where high national considerations forbade immediate disclosure, and the precedent of 1801, which I think has been clearly demonstrated to merit but little attention. Is there anything, then, in the duty now cast upon the House by the happening of the contingency provided for in the Constitution to distinguish it from ordinary acts of legislation, and to demand an unusual measure of safety or precaution? Can

gentlemen imagine for a moment that our deliberations will be overawed, or that any intimidation whatever will influence members in discharging this high function? It is a suspicion fraught with injustice to ourselves as well as to the people. To row over your acts the veil of mystery and what is the result? All within is pure, and the members are engaged in the fearless fulfillment of the trusts reposed in them. Will it be so, sir, without? I apprehend not. Distrust will fill the public mind, and jealousy will fire its passions; and when these overtake us it will be in vain for us to rely upon the conscious rectitude of our actions and the dignity of silent deliberation to shield us from disrespect, or the suspicion of ignoble conduct and unworthy motives.

But I understand from the argument of the gentleman from Delaware [Mr. McLanahan] that, in making the selection, we act independently of the people, and, as a necessary deduction, that they have no right to witness it. I can never yield my assent to such a proposition. It has been successfully combated, I think, by the gentleman from South Carolina, [Mr. McDuffie.] With his opinions as to the rights of the people over our ordinary legislation I must also express my dissent. He informs us that the Constitution has vested the legislative powers of the United States in Congress, and asks, "What are the ingredients of legislation? Argument, inquiry, and deliberation?" Sir, when the gentleman presented so forcible an argument in another branch of this question upon the influence of popular will, could he not suppose that this, too, would necessarily enter into our acts of legislation? If tyrants, as he clearly showed, armed with power, are constrained to regard the will of the people, how much more forcibly should that argument apply to national legislation in a Government whose very basis is public sentiment? The will of the people is, in this country most especially, the mainspring of all political institution. This, alone, can with us give impulse to permanent legislation. I cannot agree with the gentleman from North Carolina, that the wise men who gave form to the Constitution are against me. The journals of that day reveal a singular incident relating to this question, which may seem to array against me a most distinguished authority. When the Constitution was in progress, amid the jealousies of its enemies and the anxieties of its friends, numerous amendments were proposed by the several State conventions. Among these, Virginia sought to ingraft upon it a provision that would secure, at all times, the *right to instruct* Representatives. In the first Congress that subsequently assembled, an illustrious man, then representing that State, and who has since thrown a luster over our character in the various acts of his public life, proposed this amendment, with an omission of so much as claimed *this right of instruction*. I am not prepared to receive this as evidence of his own enlightened view of the subject.

The Constitution, with all its amendments, is the offspring of a spirit of compromise. This alteration (by his proposition) of the expressed wishes of a convention, in whose deliberations he was himself a clear and steady light, owes its birth, in all rational probability, to the same parent. A plain refutation may readily be given (in my humble judgment) of all doubts that cluster around this question.

In whose hands is the sovereignty of this Union reposed? The Constitution supplies the answer: In those of the people. And what is the legislative power? It is but a seminal principle, which fructifies in those enactments denominated *law*. Sir, the writers upon jurisprudence inform us that law is a rule of action emanating from a sovereign power, commanding what is right, and forbidding what is wrong. If, then, the people, who make the constituent body, are admitted to be sovereign, and each Representative expresses the sense of his constituents upon every vote he may give in the passage of any law, do you not obtain a rule of action emanating from the sovereign power of the United States, and filling up the measure of the definition I have just recited?

The gentleman from South Carolina asserts for the people a controlling influence in performing the duty required of this House when the contingency presents itself in which a *selection* is to be made here of the Chief Magistrate, because the Constitution recognizes in the people the power and the capacity to make the election. There is a vice in this argument which I think is but apparent, or which may be easily resolved into our difference of the application of terms. The Constitution contemplated an election by the people; but that it was dangerous to give a power of such magnitude to less than a majority of the whole who voted. And what is the remedy provided for a failure so to choose? The people are scattered over a vast extent of country; to assemble them together is impossible. The theory of the Constitution then requires, as the most practicable mode, if a majority cannot be obtained, that a federative majority shall determine, combining with it the popular influence, by requiring a selection from the highest on the people's list. This is not the only security provided by the system to give effect to public will. Had it designed to make your President a federative officer, the choice, in the second instance, might have been given the States in their corporate capacities.

Not so, sir. The choice is to be made by the House of Representatives, the direct and immediate dependents of the people, but that, in selecting, they shall vote by States. It was always intended that he should be the President of the people, not of

the States, nor the creature of this House; and all the securities which the Constitution could furnish to assure this end seems, in my view, to point that way. It is true they may be inadequate to the purpose, but that it was designed cannot admit of doubt. This House, in its several State delegations, cannot be considered as the depositary of the sovereignty of the States, but as the representatives of the people, not responsible to the States, but to the districts which they severally represent. Would it not, then, be a departure from all the checks and principles of the Constitution, designed to secure the responsibility of public agents, to look upon members here as representing the States in this contingency, to whom they owe no obligation, and as not representing the people to whom all accountability is secured by the forms of the Constitution? If this conclusion be a just derivative from the view taken, what is the pending obligation in making the choice?

A sense of political duty will give the immediate reply. The President is designed to be the Chief Magistrate of the nation; the appointing body is chosen by the people, and the public will points to the path of safety when it points to the path of duty. It is your duty, because you are chosen by those who have the inceptive right of making the election, and this course justifies and responds to the high trusts confided. Safety results from it, because the magistrate so appointed reflects the wishes of the whole mass of the people, and will be the faithful guardian of their rights, their honor, and their independence. Elect upon these principles, and you constitute a President who unites public confidence and respect. He is clothed with a shield for your protection at home, and armed with the sword of retributive justice to punish foreign aggression. Choose him upon the other principle, he is the creature of the Legislature, and not the servant of the people; dependent upon you, and responsible to you, what security is left for the preservation of our popular system? Can he combine the affections of the people when his appointment is in pursuance, not of their will, but in manifest contravention of it? You may, indeed, have given him shape and form, and encircled him with the trappings of power and office, but he is not touched with the vital element which alone can give him being. Is he surrounded with the affections of a grateful and confiding people, which makes him the servant "of the people for the people's sake?" No, sir; he is pursued by their fears and trammelled with their jealousy. The wishes of the nation are driven contemptuously before him, while all the calamities of misrule follow in the rear.

Nor does the evil stop here; whoever the individual may be, he can be but man. Filled with the frailties that belong to his condition, will he not seek to convert his pillow of thorns into a bed of roses, and meliorate his condition by seeking to insure re-appointment? All the purposes of corruption will be essayed. The creature of this House, deriving being from it, amenable by impeachment to the Senate, who, with him, hold the appointing power of the Government throughout the extended sphere of patronage, what in some coming age may not occur, when corruption, which grows with our years, shall have sapped the foundation on which our purity rests? The purse of the nation in the hands of this House may be made to act upon the Senate, and they, in return, to distribute among the Representatives, or their instruments, all the offices, lucrative or honorable. What is the responsibility of such a President? Not in the impeaching power of the Senate; for this House, in which it must originate, and there where he is to be tried, are his copartners in guilt. Sir, to use the language of an eloquent gentleman on this floor, it was contemplated some years past "to set up a pageant, under color of law," in the chair of our Chief Magistrate. He would have been the President of the legislature, not of the people. And does any man believe for a moment that such a thing could have administered the Government? He would either have fallen a victim to the popular rage which such an act would have lifted into tempest, or, had he weight enough to sustain himself, the liberties of his country would have been crushed under his influence. And yet the gentleman from North Carolina considers such principles as these Jacobinical doctrines.

[Mr. MANGUM here observed, in explanation, that he had never said that these were the doctrines of Jacobins. What he said was this: that all Jacobins began their course with very ardent professions of love to the people.]

How does the explanation of the gentleman affect the principle? These doctrines were professed by Jacobins, and with them Bonaparte became the despot of France. Are such principles the less just among our sober, reflecting people because Jacobins and Napoleon professed them? We are told that "hypocrisy is the homage which vice pays to virtue," and it is as true in politics as in morals. If others have lost their freedom by being duped with such a deceptive avowal of just opinions, shall we abandon them when they have already proved the sheet-anchor of our safety? It would be easy to retort by saying that, if Jacobins have professed these principles, the doctrines of the gentleman are those upon which despotism has acted. If you view this body as one in which is a lodgment, a trust of the powers of ten millions of people, it is an august representative assembly. If a body exercising such high prerogatives independent on the people, they are either so many members clothed with arbitrary power, or they dwindle into individuality.

By such results it may happen that the public passions are kindled; the forms of the Constitution unable to restrain the turbulence of faction, Jacobins spring up, and tyranny follows. It was not these doctrines that gave a Bonaparte to France, but an abandonment of all rational love of liberty. Her revolution burst out as a volcano; its crater was the birthplace of Napoleon; its lava the food of his ambition. He was mistakenly hailed as the champion of freedom until his bloody banners floated in triumph over the fairest portions of continental Europe. When his followers awoke from the delusions into which he had lulled them, the iron power of despotism had fixed its dark dominion. Both he and his precursive Jacobin horde are alike swept from the earth, and, I ask, is the condition of humanity meliorated by the change?

Whenever, Mr. Chairman, a struggle shall arise between this country and the House for the choice of President, we may shudder for the continued existence of our political institutions. Either the representative body will sink in public estimation, or, if they triumph, it is a victory which subverts the basement of our free institutions.

The wise and jealous men who gave being to our form of government were deeply read in the history of past times, and they scanned with prophetic eye the coming events of futurity. The mournful lot of all the governments instituted for the professed purpose of insuring the liberty and happiness of man filled them with apprehensions of danger to our new experiment. The opinion was received that a republican form of government was suited only to a small extent of country; and, in the examples of past times, they found that intrigue, faction, and corruption were the most deadly enemies of democracy. Against their assaults they sought to plant round the pillars of this new and experimental system every possible guard. They contended that, when the popular will was to be gathered from a widely-extended territory, faction and intrigue, always limited in their theater of action, would not be able to expand their scope over this vast confederacy; corruption, usually secret in its operations, could not show itself in the face of day, and spread its influence over the same expanse.

In securing the power of electing a Chief Magistrate to the great body of the people, scattered over so vast a territory, it was believed that such only would be chosen who possessed those commanding talents, those sublime virtues, that are the subjects of universal admiration. By adopting the principle of the gentleman from Delaware, and vesting in this body an irresponsible power of selection, you banish this great safeguard of the Constitution. You force the election into that small space upon which full scope is furnished for the operation of these baneful enemies of our free institutions. Upon the theory I have sought to advocate, in which members are the mere organs through which public sentiment is disclosed upon this floor, this great conservative principle is maintained in all its purity. The honorable gentleman from North Carolina says that, by this course, no election could possibly be made. I think differently. If each Representative shall here speak the sense of his constituents, and that should not disclose on the ballot a majority of the whole, I take it that his duty would require of him by all exertions to give effect to their will. Should this be unattainable, and the last ray of expectation be extinguished in the gloom of despair, he should cast from him the expired hope, and yielding to the greater principle, which makes the safety of the nation the supreme law, he should make a President of one who, upon the best evidence before him, operating upon his honest judgment, appeared to combine the largest share of public affection and national support. The predilection of a part must, in the end, yield to the wishes of the whole.

The gentleman from North Carolina tells you that, according to the argument of the gentleman from South Carolina, you would fail to make a Chief Magistrate: and yet, in the course he speaks of pursuing himself, he would be conducted to the same result. He tells you that, for himself, he stands on an isthmus where the waves may lash in vain; unawed by fear, and undaunted by hope, he will not depart from his ground. What is to be the consequence, but the same catastrophe which he humbly thought was ascribed to the principles of the gentleman from South Carolina? We are further asked, how are we to ascertain the will of the people? The forms of the Constitution, framed in the wisdom of departed patriots, must be taken as the surest indications. If these are wrong, then is the Constitution resting on a vicious principle. It is somewhat difficult, in this country, amid both the freedom and the licentiousness of the press, to mistake the signs of the times. He would not seek to propagate theoretical principles, to which he would not in practice conform. Those who sent him here knew that he would have preferred two other candidates to the one who is their choice. He had no time to hesitate with his limited intelligence. He could not presume to put his judgment in resistance to the mass of intelligence in the forty thousand electing him. It had been in vain for him to tell them of his predilections and high estimate of others. They presented him their candidate, of whom they said, his genius was his fortune, and his virtues his acts; his past service a pledge for the future; and by their sense required him to give that candidate his support. Their will was to him a law. Not a cold and dubious support should follow it, but one that would falter with the last hope.

Mr. McLANE, of Delaware, rose, and said that he had been the unintentional cause of a

debate, which he regretted now to be obliged farther to prolong. If he could have foreseen the range the debate would have taken, when he briefly stated the grounds which would influence his course, he would have contented himself with a silent vote; but, unprofitable as the discussion was likely to be, he felt bound to make some reply to the observations of the gentleman from South Carolina, [Mr. McDuffie.] That gentleman had seized upon one or two general positions, which he [Mr. McLane] had originally advanced, to deliver, with his usual talent and adroitness, a popular harangue upon the presidential question, which, though certainly eloquent, was anything but an answer to the argument which Mr. McLane had submitted. Mr. McLane said he felt under no obligation to follow the gentleman through all the topics to which he had adverted, and he could but remark that the observations of the gentleman would have been much more pertinent, if he had been making a new Constitution, than in interpreting the present. Mr. McLane said it was no part of his business to inquire whether better and more expedient provisions might have been made, or whether the will of the people could be more readily attained. It was enough for him to consider his own rights and duties under the Constitution as it exists at present.

The points between the gentleman from South Carolina and myself, said Mr. McLane, are few, and confined to a small compass. I contend that the immediate constituents of a member of the House of Representatives have no right to instruct him in his vote for a President, and that, though the opinion of the people of this Union, when fairly ascertained, would be entitled to great weight, it would not be absolutely imperative, but that the Representative should in all cases exercise a sound and honest judgment, acknowledging only his ulterior responsibility. This is denied by the gentleman from South Carolina, who asserts the right of instruction, in this instance, to the fullest extent. To these points Mr. McLane said he should confine his argument, leaving the mass of the gentleman's remarks to produce an effect wheresoever they might. I distinguish our duty, said Mr. McLane, in the election of a President from that in cases of ordinary legislation, though not admitting the right of instruction in either, because in the former our duties are not legislative, but rather judicial, or a part of the electoral franchise, which, in its very character, implies freedom of thought and action.

The gentleman also distinguishes these duties, but reaches the opposite conclusion. He denies the right of instruction in matters of ordinary legislation, yet contends for it in our electoral duties! His theory is, to my mind, fallacious and unsatisfactory. He says the people have no right to make, are incapable of making, laws, and therefore delegate that power to us, and cannot control us; but the people have a right to elect a President, and therefore can instruct us in our choice! If the premises were sound, a precisely opposite conclusion would clearly follow: for, in the first instance, not being able to make laws, the people might well be supposed to constitute us their agents to act for them, and therefore, to a certain extent, retaining the right to exercise a reasonable influence over our conduct; but, in the other case, having the right to make a President for themselves, and failing to do so, they could not claim to direct us, who are not acting for them, but for ourselves and the nation at large. The argument, however, is not well founded.

The theory of our Government, it is true, is that all power is in the people, and derived from the people; but they never act themselves, excepting in their electoral franchise. They act through the different organs and functionaries of the Government, appointed by the Constitution and the laws, and they have not proper right to act in any other way. These functionaries are always responsible for a wise and faithful discharge of their various duties, but cannot be instructed in their exercise. The Congress are authorized to pass laws, and the judicial power to execute them—the people give the power to both, but they cannot properly instruct either.

The gentleman is in error in denying to the people the right of making laws. They have precisely the same right, in this respect, that they have to elect a President. If they had not, how do we get such right, deriving as we do all our powers from them? It is, after all, a mere matter of convenience. The people have the right to make laws, but finding it inconvenient or impracticable to exercise it, delegate the trust to both houses of Congress. They have the same right, and no more, to elect a President; being more practical in its exercise, they retain it in the first instance; but, foreseeing that this also might prove inconvenient or impracticable, they have delegated that power, in a certain extent, to the House of Representatives. In both instances the power is parted with for similar reasons, and therefore, so far as the original capability of the people is concerned, there is no ground for distinction. The choice of a President is both a power and a duty devolved upon the House of Representatives. It is devolved here, to be sure, by the people under the provisions of the Constitution, but differing, therefore, from any other delegated authority, only that, being an electoral and not a legislative franchise, it is not liable to be controlled, at least by a power less than that conferring it.

But, said Mr. McLane, let us apply the gentleman's own distinction to the case before us. He says the people have no right to instruct their representatives in a case of

ordinary legislation, because they are incapable of passing laws. Well, sir, in the case before us, they have proved to be incapable of electing a President; not in theory, but in fact; they have made the attempt and failed, and for that reason the duty falls upon us; how, then, upon the gentleman's principles can the right of instruction be claimed? But, said Mr. McLane, the gentleman from South Carolina further argued that the will of the people is the paramount law according to what he was pleased to term the philosophy of the Constitution—to this the representative is bound to yield his judgment and conscience; and shame, and disgrace, and infamy are denounced as the portion of him who shall venture to obey his own sense of right in opposition to this will. Before he could recognize a power so absolute, Mr. McLane said he was disposed to examine its source and character. He would make no lofty professions of regard for the will of the people according to the phrase of the day. Nothing was more easy, however, nothing more common—it was the ordinary theme of all political declamation. It is the common price of power, and paid most liberally by those who most covet it. We scarcely read of a tyrant the first page in whose history is not filled with hallelujahs to the people's will.

Sir, said he, ambition seeks not to be governed, but to govern; to govern this people; and it flatters the people to put more power over them. But it is the wild tumultuous will that is thus courted; that which springs from sudden excitements, irregular ebullitions, stirred up by practical causes, and confined to particular districts; of this false image of the people's will he was no worshiper, while for the real will of the people he sincerely felt a profound reverence. I mean, said he, the will of a *majority* of the people *constitutionally* expressed in the mode prescribed by the laws. It is this will which is the great moral and political power on which the Government reposes. It is this will which comes in the panoply of the Constitution should be a law to all. He would recognize no other will of the people than that so made manifest; everything else was but its counterfeit. For this constitutional will we manifest our respect by cherishing and sustaining the institutions of its creation. And of his respect, he said, he would give a practical proof by yielding a generous support to the man on whom the constitutional manifestation of this will should rest, supporting him when right, and opposing him when wrong. Now, sir, said Mr. McLane, the rights and duties we are so soon to exercise never can devolve upon us if this will be so expressed; and we are obliged to act because it was impossible it could be. No one of the three candidates before the House of Representatives has obtained this constitutional majority, and it is impossible for any of us to say which of them, or whether either, could do so, if the matter were again referred to the people. We should involve ourselves in infinite confusion and embarrassment to embark on such a sea of speculation. The people have no right to expect us to do so. We have rights as well as they, and both are equally bound by the forms of the Constitution. We cannot be ignorant of the speculations which are pouring in upon us from all quarters, and the zeal with which each class of politicians builds up plausible arguments to prove that its own favorite candidate has either obtained or would obtain a majority of the people in his favor. In the midst of all these conjectures, however, it is certain that neither has, constitutionally, the majority.

In this state of things, it is the right and duty of the House of Representatives to choose one of the three to be President, and the question is, whether less than a majority of the people have the right, in a loose, unconstitutional manner, to control that choice? If the Constitution requires a majority, it would be unwise in us to be swayed by less, and it would be usurpation in others to attempt it. I am bound to presume that the distribution of powers under this Government was for wise purposes. I will neither encroach upon the rights of others nor surrender my own. The moment different functionaries under this Government conflict with each other, the powers of each will be in jeopardy. The people are empowered, in the first instance, to elect a President in their own way, if they can. With their franchise, in this respect, we have no business to interfere. But if they fail, the same Constitution has created a new electoral power, over whose independent deliberations they have as little control. The opposite doctrine would array the people against their own institutions, and involve both in a common ruin. Our duty is not less important, not less responsible than that which the people have vainly attempted to discharge; and to suppose ourselves less independent than they would be to impeach the wisdom of the Constitution. The gentleman from South Carolina says the election of the President by the people is the best mode which human wisdom can devise. I may admit the position, but what follows? The Constitution supposes it the best, and therefore resorts to it in the first instance; but it also supposes it may fail in its object. It requires a majority of the people in favor of some one candidate to make an election; it supposes this majority unattainable, and, in such an event, which has now happened, directs a new mode of election, and by a different power. I ask gentlemen to look into the Constitution, and see what restrictions are imposed upon the exercise of this power. There is none but the number to which the choice is limited. Within this number it is in vain to shackle our discretion.

The Constitution meant, and for wise purposes, that the direct agency of the people in this election should cease after the result of the electoral votes, and that in the new and further election the federative principle of the Government should operate, rejecting all influence from numbers and the weight of population. It became absolutely necessary to resort to such principle to promote and insure an election by disregarding the causes which had prevented it in the electoral colleges. It designed to remove us from that very influence which had defeated the will of the majority. By giving each State a vote, without regard to its population, the electoral combinations or disagreements are broken up, and a new principle established. But the doctrine contended for by the gentleman from South Carolina brings the force of the population, in the worst and most irregular form, to operate on the election here and disappoint the great object of the change.

Sir, said Mr. McLane, it is plain that, if the Constitution had deemed the further agency of the people essential, or even proper, it would not have devolved the election upon us, where the largest and smallest State are upon an equality, but would have sent it back to the people for a new effort. It would have remitted the choice to them with the same restriction as to the number of candidates, or it would have sent the election to us to be made in proportion to the numbers of each State on this floor.

If it were deemed inexpedient to send the choice back to the people for a *constitutional* expression of their preference, it cannot be wise to control it here by a loose manifestation, or by vague and speculative conjectures.

The gentleman from South Carolina, said Mr. McLane, has spoken of an "inchoate election." He says the people have commenced the choice, and that we are only to complete what they have begun. He did not, he said, entirely comprehend the force of these remarks. If they were designed to argue that we should begin where the people had left off, pushing the highest by preference to the others, he could not assent to the proposition. Such an idea was as impracticable as it would be to add States to individual votes. But the act of the people, he contended, was complete, and their power at an end. Their act was to ballot for a choice; if any one received a majority, the election was complete. If such majority did not appear, the *failure* was as complete. He contended that the people were done with the matter; it was no longer in their hands; it had passed into ours, accompanied with a deep responsibility, which we could not otherwise discharge than by an honest, conscientious performance of our duty, according to our honest judgment.

What, then, said Mr. McLane, are our rights and duties in this matter? The Constitution, by which they are prescribed, provides that if no person shall have a majority, then, from the persons having the highest numbers, not exceeding three, the House of Representatives shall *choose, immediately*, by ballot, the President. The time of making this choice does, of itself, exclude the idea of any interference of the people by instruction. The House are to proceed *immediately* to the performance of their duty, making it impossible to procure any concerted or regular movement by the people to express their wish. Any other than such would be worse than folly; it would be delusive and dangerous.

But the House of Representatives are to *choose* a President. This is both a right and a duty.

The right of *choosing* implies the right of selecting—it implies, also, discretion, the exercise of an unbiased judgment, the duty of considering the fitness and qualifications of the respective candidates, their comparative merits, their capacity to sustain the institutions of the country, to promote the safety and happiness of the people at home and the honor and glory of the nation abroad; in short, sir, it necessarily implies the right of considering everything which fairly appertains to the preference to be ultimately declared. It is our duty to examine and deliberate upon everything connected with the subject in reference to the object to be attained. Are gentlemen willing to have this great duty resolved into a simple inquiry into personal popularity, of which of the three our particular constituents might prefer, or which would be most popular in a given district or State? Such an inquiry would divert us entirely from the merits of the candidates, and lead us into a field where everything is doubt and conjecture. What, said he, are the powers of the people when *they* are making the election, and by what motives are *they* to be supposed to be influenced in their choice? There are no limits to their power; *they* may even indulge in whim and caprice; but a wise, and virtuous, and intelligent, and patriotic people must be presumed to be guided in their choice by the character and fitness of the candidate. They look for a Chief Magistrate capable of presiding with safety and honor over the destinies of the country, and less power than they possess over the subject would be inadequate to the object—would impair the elective franchise. Have we not the same duties to perform, the same objects to attain, and are we clothed with less power and fewer means for their attainment? Could it have been the design of this Constitution to commit this high trust to our hands, and leave us dependent upon the will or caprice of others for its execution? It is *our* duty and *our* right to "*choose*," but, if we are liable to be instructed,

may, commanded, in our choice, the choice is not *ours*, but theirs who instruct us; it is not a free and independent selection, but obedience to the commands of a superior.

I admit, said Mr. McLane, that the preference of the people is worthy of consideration, accompanied by an inquiry into the grounds and motives of the preference, and we should fairly endeavor to elect the man who would or ought to be acceptable to the people; but in determining this we should rather consider the fitness of the man and the character of the people than any wild and irregular ebullitions of the popular will. The gentleman from South Carolina has argued that a great man of distinguished virtues will always command the approbation of the people. In the progress of things there is much truth in the observation, and, if we take care to select a man of real merit, who is in all respects fitted to promote the great objects of good government, we may confidently expect such a selection to be ultimately acceptable to the people.

It is made our duty to select from *three* candidates; and I contend (said he) that, as it respects the state of their vote out of this House, they are upon an equal footing; they are all equally nominated for our support, each resting his claims upon his own individual qualifications. Why was this scope given to our selection, if their relative strength be obligatory upon our judgment? Neither the Constitution nor the principles of our Government pay respect to less than a majority; and, as neither candidate before us possesses this advantage, what other guide have we? The gentleman has argued with great confidence, as if the plurality in vote were to control our choice. If this were so, the discretion secured by the Constitution would be mere mockery. It must be supposed to authorize us to choose from three, and yet to confine us to one. Our duty would be simply to elect the man highest in vote, without regard to fitness. But, sir, (said Mr. McLane,) this is not the principle of our Government. In the primary election, a majority of the people is to govern; *here*, a majority of the States. The plurality principle is in opposition to both. The majority of the people are certainly opposed to such a candidate—a majority of the States may be. The state of the vote in the colleges is the result of a state of things which no longer exists. It may have been produced by the number of candidates, and without reference to a preference between the three persons from whom a choice is here to be made. It is our high privilege to weigh and consider all these things—to deliberate upon the qualification of the candidates, and to consider who would best serve the people, and whom they ought to, not less than whom they do, prefer.

The gentleman from South Carolina has emphatically desired me to suppose that one man should receive 130 electoral votes, and asks if I should dare put by his claims. Sir, the case is by no means puzzling. I *should* dare to do so, if in my conscience I believed such a candidate unfit to be the ruler of this nation. I should consider the case as still one of expediency. I admit that so strong a vote ought to have, and could not fail to have, great weight; but still there would be 131 electoral votes opposed to him, being a majority of the people; and there would be quite as much propriety in supposing that that majority would prefer another, more especially if, in reality, he should be better qualified for the station.

This doctrine of the plurality preference and of instruction would naturally lead to the most dangerous consequences, and defeat one great object of confiding the choice to us. It holds all our information and experience for naught, and deprives the people of all advantage from the very qualities for which they have selected us for this duty. It can rarely happen that the people of these States can have a full knowledge of the character and principles of men who may be presented for their suffrages. They judge from the representations of others, or from some single glaring or striking act. The preference is no doubt founded upon his supposed fitness and capacity. They believe him to be a wise, enlightened, and virtuous statesman, sound and practical in his views, and deserving their confidence. But is it not possible for all these calculations to prove unfounded? Let me suppose, sir, (said he,) that we, who may be better acquainted with the individual, when we come to inspect his character and test his fitness find that he is in reality distinguished for no one virtue for which the people preferred him; that, in our consciences, we should be persuaded he was wholly incapable of administering the Government—what would the gentleman from South Carolina do in such case? Would he surrender his judgment and conscience to the mistaken preference of his constituents, or fearlessly consult his higher duty to his country?

It was no stretch of the imagination, said Mr. McLane, for him to suppose further that some one candidate returned to the House of Representatives should be discovered in the use of improper means to promote his election. The patronage of his office may have been held out in anticipation, and indications of a policy and administration injurious to the great interests of the nation. In such a case who could hesitate between the mandate of his instruction and his duty to the nation?

Sir, said Mr. McLane, the only true and safe course is to treat this body as an independent tribunal, bound to elect the men best qualified, in their judgment, to administer the affairs of the nation.

If we are bound by instructions, who have the right to instruct us? It has been already shown that the election is *federative*, and not by *numbers*; the votes are by *States*, and not by the *people*. We are called to perform this duty for the whole nation, not for any part of it; for all the States, and not for any one in particular. When we enter upon this duty we lose our relation to our immediate constituents, and are charged with the duty for the *whole* Union. We become the judges and umpires for the *whole*; we are to act for the interests of the *whole*.

It is in this way only that the equality of the votes of States here can be reconciled with the general theory of the Government. If I act here under the instruction and dominion of Delaware, the population of that State controls tenfold its numbers elsewhere. But if I act here under no more particular responsibility to my immediate constituents in Delaware than to the rest of the Union, and consulting the interests of the whole, this disparity, which has been so much complained of, disappears.

If in this election I preserve my ordinary relation to the people of Delaware, then to them only am I responsible, and upon me *their* instructions only are obligatory. What, then, becomes of the plurality vote, if their instructions command me to disregard and disobey it?

I ask again, said Mr. McLane, where is the power whence these instructions can constitutionally emanate? From the people they cannot, for there is no mode by which their will can be ascertained. For I desire to protest against all partial or local assemblages as indicating the will of the majority.

From the legislatures they cannot, for these bodies are charged with no such duties, and can have no better means of ascertaining the public will than we, who spring from the same source. Sir, said Mr. McLane, if we are called in the discharge of this duty to act for the whole people of this Union, and are bound to consult the interests of the whole, and if in the performance of our duty the plurality of the votes of the whole people, expressed in their elections, can have no obligatory force with us, how can it be said that the opinions or instructions of our particular county or district, or even a State, can be more imperative?

Mr. McLane said, when he was up a few days ago, he had ventured to argue that if we were bound to regard the will or instruction of our particular districts, we should be constantly in danger of making no election at all. If each State have the right to instruct its Representatives, there can be no change until the one or other give way.

The gentleman from South Carolina has taken occasion to express the utmost apprehension of the consequences of no election, and would conceive himself an object of just reprobation if he could be instrumental in producing such an alternative. But if he be bound by the instructions of his constituents, and they direct him not to give way, he is no longer responsible; he yields to the power of others, and takes no blame to himself. Is there no danger to be apprehended from this quarter? Does excitement prevail nowhere but in this hall? Are there no sectional jealousies and local prejudices to be stirred up in such a contest? Does not every one know the height to which the public excitement may be carried by political contests, and the zeal and obstinacy with which angry partisans maintain their point? Suppose under such a state of excitement that three candidates came to this House with the States equally divided, how could we hope to make an election? Each State instructs its Representatives to hold out; to nail their flag to the mast, and go down with their ship; and all the evils of contending passions and jealousies immediately ensue. My word for it, said Mr. McLane, let the popular fervor be once fully aroused, and the tumults will rage as wildly without as within these walls. We cannot avoid these difficulties until we learn to value our own freedom and independence; to be responsible only in the discharge of our duty to our own consciences, to the interests of a common country, and our ultimate dependence upon the will of a constitutional majority.

No responsibility could be weightier, and the doctrine of instruction and obedience, this counterfeit image of the people's will, could not fail to weaken it. It would do more; it would subvert the independence of the Representative, and seriously disturb the public tranquillity. As long as we are held to an honest, conscientious discharge of our duties here, we shall act with greater judgment and circumspection—we shall measure our obligations by the scale of the Union, and act under views worthy of so high a trust. But we should no sooner cast off this independence, and yield our judgments and consciences to the dictates of any authority whatsoever, than we should cease to exert our own faculties, and be driven about, the sport of every popular breeze. We should escape from our duty to the whole, and seek refuge under the local or narrow and envious views of a particular part. A high national responsibility, involving loftiness of character and virtuous fame, would give way to considerations of place and power; we should soon learn to value a seat on this floor more than the higher concerns of a great nation; and, instead of consulting the interests of the American people, we should obey only the commands of a single congressional district.

According to the theory for which he contended, said Mr. McLane, the duty of a member of this House is that of a great moral agent, looking, with a single eye, to the welfare of a common country, and guided by considerations of a similar kind.

He acts fearlessly and independently to the attainment of that end ; if he fail, from weakness of character, or through corrupt means, and give just offense, or produce injury to the people, the remedy is found in the elective power of the people. It is the ultimate remedy for all evils and abuses in the Government, and will never prove inefficacious as long as each public functionary shall be kept within its appropriate sphere. There is force enough in it to secure an honest discharge of our duty—it is terrible only to evil-doers. If it be rashly or vindictively applied, it deprives us of the honor of a seat here ; but it leaves us in possession of that which is of far more value, and well calculated to alleviate the loss of place. I do not say that the honor of a seat in this House is to be lightly esteemed, or that he who could not surrender it without regret would be unworthy of its occupation ; but I will say that it is not likely to be honored by him who would be incapable of performing its duties with an honest independence. Mr. McLane said he was not ambitious of figuring in an opposition to the popular clamor, nor was he at all disposed to court responsibility ; but he would not shrink from it, when it came upon him, and he could imagine it to be sometimes a virtue to oppose even the wildest tumult. It behoved every man placed in such a station to meet the crisis with calmness and fortitude ; to throw his eyes abroad over the whole scene, and do the best for the safety and happiness of the whole.

It would ill become us, he said, in such a crisis, to be found timid and wavering, infirm of purpose, bending to the storm, or yielding our judgments to the commands of others. Our great duty, upon such an occasion as the present, was to compose difficulties, not to heighten them with others, or to be agitated by them ourselves. The supposition is, when the election of a President devolves upon this House, that the public voice has been distrusted and distracted by serious and unavoidable difficulties ; by the number of candidates, personal predilections, and hostility ; local views and sectional jealousy ; party feelings and factions excitement. By these and other causes the public mind may have been thrown into the most bitter and violent commotion, alarming both social and public tranquillity ; the Constitution erects this House into a high and sacred tribunal, to compose and quiet these angry elements, to allow time for their fury to subside, to bring order out of confusion ; we should be false to ourselves and to the country, if, instead of doing so, we should launch forth upon this wild ocean, and fret and vex it afresh. It is not for me to say how surely this would be done by bringing public excitement to operate upon our deliberations in such an election.

Then, sir, said Mr. McLane, if I be correct in the views I have taken of the rights and duties of the House of Representatives in this election, does it not follow that all attempts to control or sway or intimidate the free exercise of our sober, independent judgment are indecorous and improper ? He would not now detain the House, after the time he had already consumed in detailing the various means which might be employed and the different kinds of influence which might be brought to control the independence of members. It was unnecessary for him, he said, to describe the effects of all these popular engines which a state of high public excitement always puts in motion, and which, from the seeds sown in county meetings to the fruits appearing in the persons of self-constituted committees which may daily surround this hall, were constantly operating. We guard the election by the people, said he, from all tumult and disorder, and carefully banish all illegitimate influence at a distance. Why are we fearful of surrounding our own liberties with equal security ? The character of all these influences is progressive, and the most fearful apprehensions entertained by able commentators upon our Constitution of an election by the House of Representatives have been from the effect of these extraneous influences, both civil and military, which may easily be put in motion. Mr. McLane said he had no apprehension of such evils at the present day ; but he repeated that now, when everything was comparatively tranquil and secure, was the most suitable time to make provision for the day when the tempers of gentlemen would be less calculated for cool deliberation. If the people had no power to interfere with our conduct, they could claim no right to superintend our deliberations. He had as little at stake as others, however, and should submit with as good a grace to the decision of the House.

Mr. McLane said he could not conclude his remarks without notice of another topic of the gentleman of South Carolina [Mr. McDuffie] to which he wished he could have been spared the duty of adverting. It was the reply which that gentleman had given to the precedent of 1801, which he [Mr. McLane] had on a former occasion called to the attention of the House. It had been summarily and violently denounced because it had emanated from the old federal party. Mr. McLane remarked that what he said on a former occasion on this subject would make it unnecessary for him to say much more now. He was not so weak as to enter at this time of day upon a grave and argumentative defense of the federal party. He well knew it was not to be defended by speeches in or out of this House. It would have to rely for its defense upon the wisdom and propriety of its works, to which the general state of our national happiness and the cool judgment of posterity were fast affixing their seal. To the survivors

of that party it must be a source of proud satisfaction to witness the wisdom of its policy daily triumphing over the bitterest prejudices, while those who had disappeared from the stage had passed to a higher reward. He could but lament, however, the disposition occasionally manifested to keep alive those old animosities. It was sufficient to satisfy him that the monster party was not dead, but sleeping, and not so sound but that now and then it would rouse up and shake its grizzly mane. We had not altogether distrusted the promise that in the present day some *Hercules* would appear to rid us of this monster with more heads than the *Lernean* of old, and he sincerely hoped that, after this labor should be achieved, he should not continue to be wounded by the arrows of the conqueror, more fatal than even those dipped in the gall of the ancient Hydra.

The honorable gentleman from South Carolina, [Mr. McDuffie,] however, had declined considering this as a precedent of the federal party, but had pronounced it the act of a party who had deliberately determined to violate the Constitution of their country; and the gentleman had further said their reward had been *political infamy*! Sir, said Mr. McLane, I hope this was rather spoken in the heat of debate than with a dispassionate foresight of the extent of such denunciation. We know the gentleman was too chivalrous to carry it out seriously to its consequences, and yet his remarks were liable to such an interpretation. However this may be, said Mr. McLane, it is but declamation. Nothing was attempted upon that occasion that the Constitution, at least, did not warrant, and men as pure as any this nation has produced embarked in the enterprise. Sir, the *political infamy* of which the gentleman has spoken exists only in his own imagination. It has tainted the life of scarcely an individual who was concerned in that famous election. If the gentleman will cast his eye over the Journal of that period, he will see the names of many whose fame and virtues are much more to be envied than shunned. One, and by no means the least eminent, was then an able Representative of the same State which the gentleman now represents upon this floor. From that period his life was marked by the exhibition of great probity and talents, commanding public and private admiration; sharing in his life the confidence of his fellow-citizens, and in his death, but the other day, wrapping a neighboring city in mourning.

Sir, said Mr. McLane, my own State had the honor to claim as her Representative an able and conspicuous statesman of that Congress. Deservedly distinguished as he was for the noblest private and public virtues, the luster of an illustrious life shone with new light upon the public eye after the scenes of that day. He lived only to give stronger proofs of his patriotism, and to fasten his hold upon public confidence and admiration. He was even selected, at a most critical period of public affairs, by a republican administration, for a highly important trust, and bore a conspicuous share in that memorable negotiation which restored peace to a bleeding country. Sir, I have a high respect for the gentleman from South Carolina, and would rather smooth than obstruct the path of his fame; but were my feelings for him much warmer than they are, I could not wish him a more enviable lot than the same portion of private and political character which rewarded the virtues of the distinguished individual to whom I have alluded, who was the pride of his State and the ornament of his country.

Mr. WEBSTER then rose and said that the precise question before the committee, as he understood it, was on expunging that part of the third rule to be observed in conducting the approaching election, which prescribes that the galleries of this House, which at first were to be open to the public, may be cleared at any time pending the election, at the request of the delegation of any one State. If the motion obtains, the standing rule of the House on this subject will then be in order, which is, that the Speaker, as a matter of duty and a matter of course, may cause the galleries to be cleared whenever any disorder on the part of those who attend there shall, in his opinion, render it expedient and proper, so that, in fact, the question before the committee, which has been, he would not say the subject, but which has been the occasion of such an extended discussion, is simply this, whether the power of clearing the galleries in case of disorder shall rest with the Speaker of the House or with the delegation from a State. This is the precise question which the committee have to decide. A very broad discussion had been gone into as to the effect of those various considerations which ought to influence a member of this House in giving his vote. As constituting, either in whole or in part, the delegation of a State, he would not say that the arguments which had been brought forward had not any relation to each other. But he must say that their relation to the question before the committee was but slight. The question had been treated with a view to national considerations, but it must be extremely evident that the House could not prescribe how much relative consideration ought to be given to one and how much to another of these considerations. And in such a case each member must judge for himself what degree of respect is due to this or that mode of expressing public opinion. Whether he shall have regard to public opinion as it now is, or as it will soon be, on every question of this kind each man must decide for himself.

A course of remark had been gone into, historical allusions had been made, and not

very slight denunciations had been uttered, in relation to a former precedent, to all which it might be expected that he should make some reply; and he certainly felt, as was natural in his circumstances, a strong desire to do so, but he was restrained from indulging this desire by what he considered to be his duty to the House. It must be by this time perfectly evident that no valuable result could be obtained by the most protracted discussion; and he would submit to the candor of gentlemen the propriety of making some disposition of the subject before them without further delay. He hoped that the motion he was about to make would be received in the spirit in which it was made. The House was on the eve of a great and interesting duty. It was indispensable that some rules of proceeding should previously be adopted. With respect to the particular rule now in discussion, he considered it as very unimportant in itself. If important at all, it had only been made so by the discussion of which it had been made the subject. Rather than spend ten minutes more of the time of the House, he would, for himself, willingly consent that the power in question should remain with the Speaker, or should be given to the delegation of a State. He, therefore, moved that the committee do now rise, and that the residue of the rules should be determined on in the House.

The motion was agreed to, and the committee then rose, reported progress, and were refused leave to sit again; and the committee was discharged from the further consideration of the subject.

On motion of Mr. Cocke, the Committee of the Whole on the state of the Union were discharged from the further consideration of the rules referred to it; and they were laid on the table. They were then taken up and read in order. The first rule is in the following words:

"1. In the event of its appearing, on opening all the certificates, and counting the votes given by the electors of the several States for President, that no person has a majority of the votes of the whole number of the electors appointed, and the result shall have been declared, the same shall be entered on the journals of this House." This rule, having been read, was agreed to.

The second rule, on motion of Mr. Bassett, was amended, by inserting after the word "called" the words "by States;" and thus amended, it read as follows:

"2. The roll of the House shall then be called, by States, and, on its appearing that a member or members from two-thirds of the States are present, the House shall immediately proceed, by ballot, to choose a President from the persons having the highest numbers, not exceeding three, on the list of those voted for as President; and in case neither of those persons shall receive the votes of a majority of all the States on the first ballot, the House shall continue to ballot for a President, without interruption by other business, until a President be chosen;" and, thus amended, it was agreed to.

The third rule having been read, a motion was made to strike out the last clause, which orders the galleries to be cleared at the request of the delegation of any one State.

On this question Mr. McDUFFIE rose and observed that he left it to the House to determine on whom the responsibility rested of giving to the present discussion the extensive range which it had taken. For himself, he had adopted, as a constant rule, not to consume the time of the House by any remarks which had not a direct reference to the subject before it, or which were not drawn out by topics brought into the discussion by other gentlemen. As to the present discussion, he had considered the gentleman from Delaware as assuming, at the commencement of it, as the ground on which he thought it wise policy to clear the galleries, that members of this House, when engaged in electing a President, did not act as the delegates of the people, and were not responsible to them; the reply which he himself had made was directed only to this principle. It went no further. In replying to his remarks, the gentleman from Delaware had extended the discussion still further, and had made a theoretical discussion of the powers of the House to bear on the question immediately before it. And now, at the close of one of the most eloquent and imposing arguments ever delivered in this House, a member rises in his place and suggests the impolicy of continuing the argument. He felt very great respect for that member, but he considered the matter to be discussed as of the greatest importance. The principle laid down had a very wide and extensive bearing, and he felt it his duty to submit to the dictates of his own judgment, and give the principle that discussion which he considered it entitled to receive. The responsibility rested upon him, and he well knew the impatience of the House, and was aware of the lateness of the hour. But he was compelled, notwithstanding these disadvantages, to go into the argument, and to reply both to the gentleman from North Carolina and the gentleman from Delaware.

Both of these gentlemen had put cases, urged with a great deal of ingenuity, to show that the doctrine for which he contended, viz, that, in electing a President, the people have a right to instruct their delegates, would operate in practice to defeat the election. Sir, said Mr. McDuffie, if that consequence can be shown to be fairly deducible from the principle I advocate, I will abandon it. But I think that, so far from this being the case, the danger exists only in the imagination of the gentlemen who

urge it. What is the case supposed by the gentleman from North Carolina? That there are three candidates, and that eight States vote for each of them. Well, take that case. The gentlemen say, if the people have a right to instruct their delegates, then instructions once given cannot be resisted, and so the delegate must go on voting to the end for the candidate designated by his own State, and thus the election will be prevented altogether. But this statement arises from an entire misapprehension of the ground-stake. I did not contend that the delegate must go on voting to the end as he began, and so defeat the election. I only contended that the popular will of the State is as binding on me as they say the dictate of conscience is binding on them. I will, therefore, turn the gentlemen's case upon themselves. Suppose there are three candidates, and the members from eight States hold themselves bound in conscience to vote for each of them, can there be an election in this case? No, sir. They say that, if the popular will is to bind me, I must continue to submit to it. Well, sir, if conscience is to bind them, they must continue to submit to it. I do not say that the people have a legal right to instruct their delegates, but—

Here Mr. WEBSTER observed that he rose with great pain. He hoped the gentleman from South Carolina would do him the justice to believe that nothing but an imperious conviction of duty induced him to interrupt an argument which he knew it would give him pleasure to hear, but he submitted whether it was in order to go into an argument in the House in reply to an argument urged in Committee of the Whole any more than if it had been urged in a select committee.

The Speaker decided that the observations of Mr. McDuffie were not in order on the ground stated, and that they were not in order for another reason, viz: that the whole scope of the debate was irrelevant to the question actually before the House.

Mr. MCDUFFIE, on the latter ground, submitted to the decision of the Chair.

The question was then put on the amendment, and carried.

Mr. WRIGHT moved further to amend the rule by inserting after the word "Senators" the word "stenographers;" which was carried.

And the rule, as amended, was adopted, and read, as follows:

"3. The doors of the hall shall be closed during the balloting, except against members of the Senate, stenographers, and the officers of the House."

The fourth rule was then read and adopted, as follows:

"4. From the commencement of the balloting until an election is made, no proposition to adjourn shall be received, unless on the motion of one State, seconded by another State; and the question shall be decided by States. The same rule shall be observed in regard to any motion to change the usual hour for the meeting of the houses."

The fifth rule was then read, in the words following:

"5. In balloting, the following mode shall be observed, to wit:

"The Representatives of each State shall be arranged and seated together, beginning with the seat at the right hand of the Speaker's chair, with the members from the State of Maine; thence proceeding with the members from the States in the order the States are usually named for receiving petitions, around the hall of the House, until all are seated; a ballot-box shall be provided for each State. The Representatives of each State shall, in the first instance, ballot among themselves, in order to ascertain the vote of their State, and they may, if necessary, appoint tellers of their ballots.

"After the vote of each State is ascertained, duplicates thereof shall be made out, and, in case any one of the persons from whom the choice is to be made shall receive a majority of the votes given on any one balloting by the Representatives of a State, the name of that person shall be written on each of the duplicates; and in case votes so given shall be divided, so that neither of said persons shall have a majority of the whole number of votes given by such State on any one balloting, then the word 'divided' shall be written on each duplicate.

"After the delegation from each State shall have ascertained the vote of their State, the Clerk shall name the States in the order they are usually for receiving petitions, and, as the name of each is called, the Sergeant-at-Arms shall present to the delegation of each two ballot-boxes, in each of which shall be deposited, by some Representative of the State, one of the duplicates made as aforesaid, of the vote of said State, in the presence and subject to the examination of all the members from said State then present; and where there is more than one Representative from a State, the duplicates shall not both be deposited by the same person.

"When the votes of the States are thus all taken in, the Sergeant-at-Arms shall carry one of the said ballot-boxes to one table and the other to a separate and distinct table.

"One person from each State represented in the balloting shall be appointed by its Representatives to tell off said ballots, but in case the Representatives fail to appoint a teller the Speaker shall appoint.

"The said tellers shall divide themselves into two sets, as nearly equal in number as can be, and one of the said sets of tellers shall proceed to count the votes in one of said boxes, and the other set the votes in the other box.

"When the votes are counted by the different sets of tellers the result shall be re-

ported to the House, and if the reports agree the same shall be accepted as the true votes of the States; but if the reports disagree, the States shall proceed in the same manner as before to a new ballot."

Mr. HAMILTON, of South Carolina, then moved to amend this rule, by striking out what follows the words "a ballot-box shall be provided for each State," and inserting the following:

"Labeled with the name of the State, placed in front of the Speaker's chair, on the Clerk's table—placed in the order of the States. The Clerk shall then proceed to call each delegation in the order in which petitions are then called, and the member of each delegation shall place his ballot in the box labeled with the name of the State. After all the States have thus voted, then the members of each delegation shall nominate a member of their delegation to act as teller, who shall proceed with the rest of the tellers appointed by the several delegations to count the votes of each State, commencing in the order in which they are called, at the close of which count the separate vote of each State shall be declared by the senior member of the committee of tellers, as well as the result of the aggregate ballot. Should the delegation of any State fail to appoint a teller, then the Speaker shall nominate one, and where there is but one member of a State he shall act as teller. These rules shall be observed in each successive ballot, until a choice is produced, in conformity with the provisions of the Constitution of the United States."

Mr. HAMILTON rose and observed that, in offering this amendment, he disclaimed any intention to provoke a debate on a subject which might be susceptible of extended and various considerations. My object (said Mr. Hamilton) is to endeavor to adopt, within the provisions of the Constitution, some mode by which the vote of each State (not the members of the several States) may be ascertained. To the members composing the delegations I know that the privilege of a secret ballot is secured. This I do not propose to violate; but I do propose that some mode should be adopted by which the vote of the State, when given, should be put on record on the journals of this House, and the people be enabled, in an authentic form, to know how their representatives have given the vote of the States which they represent.

Now, by the mode reported by the committee, there are to be twenty-four distinct and secret colleges, each State acting under its own discretion, and the strange result might occur that in one delegation blank votes would be counted, and in another rejected, and by this clashing it might, in effect, arise that an election should be produced which was not the result of a majority of the States. The amendments he had submitted provided that the vote of each State should be in a separate ballot-box, and be thus told and declared. He felt satisfied that, although it seemed in its operation to disclose the vote of a member when that person represented alone a whole State, yet this was an accident, either of good fortune or bad, according to the pride and regret with which such gentlemen might view their situation. Besides, he did not suppose that any gentleman on that floor would desire to have any result produced by his acts attributed to another, which, in the portentous darkness which was about to veil their proceedings in relation to the mode of balloting, might occur.

In conclusion, he would say that we were bound, as far as it was admissible within the secret ballot, according to each member, to allow the people to understand, at least in our condescension, how the vote of their different States have been given in a shape more authentic than rumor, or even a newspaper report. He defied any man, in the odious contest of 1801, to determine how the States had voted from the journals of this House; and he thought such a mysterious mode of choice suited rather the muffled secrecy of a Venetian senate than the assembly representing a free people. Let us have no approach, even in appearance, in our transactions on this eventful occasion, to that terrible image of jealousy, secrecy, and prostration of public freedom, exhibited by the brazen lion of Venice, who, with his gaping mouth, receives a vote which comes whence nobody knows, and for which nobody is responsible.

Mr. WEBSTER requested leave to make a single remark, which might save further discussion. The rule, as proposed by the gentleman from South Carolina, would be in direct violation of the Constitution. The Constitution says that the States shall vote by ballot. But the proposed amendment would defeat that intention. Some of the States are represented only by a single delegate; and if the proposed amendment prevailed, each of these gentlemen is compelled to declare in what way he has voted.

Mr. HAMILTON observed, in reply to the gentleman from Massachusetts, that, on a question involving a construction of the Constitution, he would advance his own opinions with some deference in opposition to the opinions of that gentleman. But he contended that, substantially, by this mode, the vote was given by States, which was all that the Constitution renders necessary; that, so long as the mode by which the sense and vote of each State were ascertained was by ballot, all the requisitions of the Constitution are complied with. His amendment, in fact, merely provided for a separate ballot-box for each State, rather than a general one, by which the votes of the several States would be wholly unknown. Mr. Hamilton then dwelt very briefly upon several public considerations which rendered such knowledge important, and

concluded by saying that, from the lateness of the hour, and the short time which was allowed them now for the passage of the rules, he would not press the discussion.

Mr. WRIGHT, of Ohio, observed that if gentlemen would examine the rule reported by the committee, and the amendment proposed by the gentleman from South Carolina, [Mr. Hamilton,] with the Constitution, they would find that the rule *was*, and the amendment *was not*, consistent with it. The Constitution requires the choice to be made by ballot; the votes to be taken by States, each State having *one vote*. The amendment goes upon the principle that you must present to the House one vote for each member from a State, instead of one vote for each State, without regard to the number of members. The difference must be obvious. The rule prescribes the manner in which each State shall ascertain its vote; when ascertained, how that vote shall be presented to the House, and be told off. The amendment seeks to deprive the States of a vote by ballot, and confer power on the tellers, who shall ascertain, by counting the ballots of the members, how the State would vote, to give the vote *viva voce*, not by ballot. The House constitutionally has little to do in determining the vote of the States. Its main power on the subject commences when that vote has been determined.

The amendment is objectionable in another point of view. It leaves the tellers to settle the disputed question (without the control of the delegation or the House) whether the vote or ballot of a State shall result from a bare *plurality*, or depend on a *majority* of the ballots of each delegation. This is a question, sir, of too much importance to leave for adjustment in such a way. It should be settled by the House voting *per capita*, and before any result is known calculated to influence the decision—it should be settled now. For himself, Mr. Wright said, having carefully examined the provisions of the resolution relating to the election of President, with a view to understand its literal meaning, as well as to discover its spirit, he entertained no doubt but that a majority of the delegation of any one State was necessary to determine a vote, and that nothing short of it would do. He felt confident the House would so determine.

Mr. HAMILTON spoke in reply, and made some observations to show that his proposal was in conformity with the Constitution. He hoped at least so much of it as provides twenty-four separate ballot-boxes would be adopted. He insisted that it ought to be known publicly and officially how each State had voted, and regretted the want of this knowledge touching the election of 1801.

Mr. McDUFFIE advocated the amendment of the gentleman from South Carolina. The question now was, whether the Constitution was to be so interpreted as to throw an impenetrable veil over the proceedings of this House, in so important an act as the choice of a Chief Magistrate. He felt bound to protect the honor of his State, and his own honor; but the rule, as it at present stood, rendered it impossible for him to show that he had been faithful to his constituents. Mr. McDuffie quoted the Constitution, and insisted that the amendment was not inconsistent with it—that the Constitution did not require that the vote of the States should be concealed; nor did it ever mean to screen the votes of the delegates themselves from public scrutiny. In declaring that the votes should be by States, it meant no more than that all the States should have their equal voice. It directed not that they should vote by States, but that they should be counted by States. If it happened that some of the States had only one delegate, that did not alter the requirements of the Constitution, nor the propriety of the plan proposed by his colleague. The Constitution would still be obeyed. He had no suspicion that the gentleman from Delaware, or any other of those gentlemen who stood alone in representing States, had any wish to conceal the vote that they should give, and he expressed the hope that they would support the amendment.

Mr. COOK, of Illinois, disclaiming all wish to have his vote concealed, was yet opposed to the adoption of the amendment now proposed, which he considered as striking a deadly blow at the Constitution. A fundamental principle of that instrument was, that the legislative and executive departments should be kept entirely separate. While, on the other hand, the President was protected from having an improper influence exerted over him by members of this body, it was proper, on the other hand, that the members of this House should be protected from his resentment, arising from a knowledge that any particular portion of them were opposed to his election. It was not proper that the President should know officially whence his power was derived. He should receive it from the whole people, and exercise it alike for the good of every portion of them. When the Constitution was revised in 1801, this great fundamental principle was preserved untouched. The rule proposed by the gentleman from South Carolina was calculated to render the Chief Magistrate the President of a party, not the President of the nation. The practical tendency was to array some of the States against the President, and the President against them, to cherish the seeds of faction, and to give to party spirit still greater bitterness. It was the duty of the House to be umpires, not agitators—to pacify the nation, not to irritate it.

Mr. WRIGHT again spoke in opposition to the amendment. He had supposed, he said, that no one could have doubted that the Constitution required only one vote for each State, instead of one for each member of the House—in the present case twenty-four

ballots instead of two hundred and thirteen; and he had supposed it equally clear that the framers of the Constitution never contemplated that the proceeding should stop the moment you had ascertained whether the State *intended* to vote, before the ballot or vote was prepared and deposited; but in this he found himself mistaken. He should despair of removing those doubts, and would forbear further argument as to it. It is urged that the plan proposed by the rule makes the proceedings among the States secret, and that you have no way to find out how each man voted. Why should that be known? What good would result from it? Does the Constitution authorize you to require publicity in this proceeding? I think not. Individually, I have no desire to keep my vote secret; I am willing to proclaim it to the world. The gentleman from Illinois [Mr. Cook] has presented to you, much better than I can do, some of the principles which govern elections by ballot, and urged some forcible reasons why the votes should be secret. I agree with the gentleman in the views he has submitted. The requisition upon a vote by ballot, to indorse his name on the ballot, or to rise when about to vote, and proclaim for whom he voted, would entirely defeat the object of voting by ballot, and break down all the guards the Constitution has established to protect the elector in the free enjoyment of his right.

Mr. STEWART, of Pennsylvania, regretted that time was not allowed more maturely to examine so important a proposition as that now before the House, before it was voted on. From the short consideration he had been able to give it, he could not perceive that it was inconsistent with the Constitution, and he should vote for it because he perceived that its object was to remove everything like secrecy from the transaction which was approaching. It was well known that the proceedings of this House on that occasion would be regarded by the people with suspicion. Was it a likely way of removing this to throw a mantle of secrecy over its proceedings? Was not this the way to set the tongue of slander in motion? When an allegation was made affecting the purity of any individual, would it be removed by his skulking and shrinking from observation? Would not this rivet the suspicion? If a man was charged with theft, was it the way to remove the charge if he shut his door and refused all admittance and observation? But if he threw open the suspected place, invited observation and displayed a candid, open deportment, the report would be disbelieved. So long as shadows, clouds, and darkness were suffered to rest on any of the doings of this House, the suspicions of the people would only be fixed and confirmed. With a view, however, to the further examination of the amendment, he moved that the House adjourn.

This motion was negatived by a large majority.

Mr. STEWART then demanded that, when the question was taken on the amendment, it should be taken by yeas and nays.

The House refused to order them.

The question was then put on Mr. Hamilton's amendment, and decided in the negative—yeas, 52; nays, 115.

And the rule, as above stated, was agreed to.

The remaining rules were then successively read and adopted, as follows:

"6. All questions arising after the balloting commences, requiring the decision of the House, which shall be decided by the House voting *per capita*, to be incidental to the power of choosing a President, shall be decided by States, without debate; and in case of an equal division of the votes of States, the question shall be lost.

"When either of the persons from whom the choice is to be made shall have received a majority of all the States, the Speaker shall declare the same, and that that person is elected President of the United States.

"8. The result shall be immediately communicated to the Senate by message; and a committee of three persons shall be appointed to inform the President of the United States, and the President-elect, of said election."

And then the House adjourned.

TWENTY-SECOND JOINT RULE.

IN SENATE, December 15, 1875

JOINT RULES.

Mr. EDMUNDS. I offer the following resolution about re-adopting the joint rules, and ask that it be referred to the Committee on Rules, to inquire into the matter:

"*Resolved*, That the joint rules of the Senate and House of Representatives in force at the close of the last session of Congress be, and the same are hereby, adopted as the joint rules of the two houses for the present session."

I move that the resolution be referred to the Committee on Rules. I think the subject needs inquiry and investigation as to the present condition of the rules between the two houses.

Mr. BAYARD. I ask the honorable Senator, as his experience in the body is greater

than my own, if this is the customary method of extending the rules from Congress to Congress, or whether it be necessary to adopt such a resolution?

Mr. EDMUNDS. That, as a celebrated Englishman said, is past finding out. The object of this resolution is to ascertain from the proper Committee on Rules whether the joint rules that were in force at the last session of Congress are in force now without any vote; and, if so, upon what principle of law or joint proceeding; and, if not, of course to take some steps to have some joint rules between the two houses.

Mr. BAYARD. Is this resolution to be referred?

Mr. EDMUNDS. That is my motion, that it be referred to the Committee on Rules for inquiry.

The PRESIDENT *pro tempore*. The resolution will be referred, if there be no objection. The Chair hears none.

January 11, 1876.

Mr. MERRIMON. The Committee on Rules, to whom was referred the resolution introduced by the Senator from Indiana [Mr. Morton] to amend the twenty-fifth rule of the Senate, so that bills may be introduced without previous notice, have instructed me to report the same back adversely.

I beg to say that originally there were no standing committees in the Senate; when a bill was introduced it was by leave, and a committee was raised to prepare a bill which would embody the motion. The first rule on the subject was this, adopted April 7, 1789:

"Every bill shall be introduced by motion for leave or by an order of the House on the report of a committee, and in either case a committee to prepare the same shall be appointed. In cases of a general nature, one day's notice at least shall be given of the motion to bring in a bill, and every such motion may be committed."

November 13, 1794, this rule was adopted:

• "Every bill shall be introduced by motion for leave or by an order of the House on the report of a committee, and in either case a committee to prepare the same shall be appointed. In cases of a general nature one day's notice at least shall be given of the motion to bring in a bill, and every such motion may be committed."

In the Annals of Congress, first volume, page 21, the action of the Senate upon the subject will be found. The rule was subsequently amended to read:

"RULE 12. One day's notice at least shall be given of an intended motion for leave to bring in a bill."

Here is an extract from the Journal showing how the proceedings were had:

"December 6, 1799.—Mr. Dexter notified the Senate that he should, on Monday next, ask leave to bring in a bill to revive the act entitled "An act for the relief of persons imprisoned for debt." * * * * *

"December 9, 1799.—'Agreeably to notice given, Mr. Dexter had leave to bring in a bill to revive the act entitled, &c., * * * which was read; and by unanimous consent the bill was read the second time.

"Ordered, That it be referred to Messrs. Dexter, Lawrence, and Tracy, to consider and report thereon to the Senate."

The object of the present rule was twofold: first, to give notice to the Senate that a bill of a particular nature was about to be introduced, so that any Senator who desired to speak to it at the moment of introduction might be prepared to do so; and, next, to prevent any Senator from introducing a bill and having whatever action he might see fit to take in connection with his motion spread upon the Journal when such a bill or such a motion might be distasteful to the Senate. The committee, upon consideration, regard this feature of the rule as having a very conservative tendency. If any one should desire to speak to the merits of a bill at the time of its introduction, another Senator might suggest that the rule must be observed, that notice should be given, and this would afford an opportunity to present any objections or to say what he might see fit in that connection.

But there is another important feature. Although one can scarcely conceive that a Senator would do so, it might be that in times of high excitement or for purposes of malignity a Senator would introduce a paper that might be insulting to the Senate or to a large body of it. In that case the Senate would have the notice of such a motion, and proper action might be taken in order to prevent its presentment to the Senate or prevent it from going upon the Journal or appearing at all.

I repeat that the committee have instructed me to say (and I believe the committee were unanimous in that) that this rule is regarded as having a very conservative influence, and they think it would be unwise to modify it in the respect proposed by the Senator from Indiana.

Mr. MORTON. I take it, from the remarks of the Senator from North Carolina, that the committee has totally misapprehended the object of my resolution. I did not introduce a resolution to take away the right to make an objection to the introduction of a bill where one day's notice had not been given, but my resolution was simply to dispense with the idle formality of saying, "I ask leave to introduce a bill without

having given previous notice," a thing that is never refused, and yet it is printed sometimes fifty times in the proceedings of one morning, requiring a large space in the minutes, costing hundreds of dollars to print it in the course of a session, and absolutely without any sort of use. I propose to dispense with this idle formality and at the same time to leave to Senators the right to object to the introduction of a bill where previous notice has not been given, reserving the right to require the bill to lie over one day in that case. I will read my resolution:

"*Resolved*, That the twenty-fifth rule of the Senate be so amended that bills may be introduced without previous notice unless objection is made, and that it shall not be necessary to state in the minutes that leave was given to introduce a bill without previous notice."

My object was simply to dispense with that idle formality. We hear the minutes read here every morning. For twenty minutes the Secretary is kept saying, "the Senator from North Carolina," or "the Senator from Missouri," "asked leave to introduce a bill without previous notice, and leave was given to introduce the bill." But it is not only the time taken here; it is the cost of printing. This custom as it exists I think is absolutely without any use; but if I offer to introduce a bill which the Senator from North Carolina or any other Senator thinks is not of a proper character, he can then make his objection.

At the same time I will say, Mr. President, that the reason for this rule in the first place has entirely passed away. My friend from North Carolina has shown that the rule was introduced at a time when there were no standing committees of this body and when every bill that was considered had to be referred to a special committee. Every bill was therefore a far more troublesome matter than it is now. As each bill had to go to a special committee, it was considered proper that no bill should be introduced without giving previous notice, and objection was sometimes then made to a bill on its first introduction—a thing that is never done now.

I submit to my friend from North Carolina that the committee has entirely mistaken the object I had in view.

The PRESIDENT *pro tempore*. The question is on the indefinite postponement of the resolution, as recommended by the committee.

Mr. MORTON. I suggest that this matter be recommitted to the committee. I desire the committee to act upon it in the sense in which the resolution was introduced. I do not, and did not, ask to take away the right to object to the introduction of a bill, but to dispense with this idle formality here on the floor of the Senate, which is afterward reproduced in the minutes sometimes fifty times a day.

Mr. EDMUNDS. May I ask the Senator whether, by retaining the right to object, he means the right of a single individual to postpone the question of introducing a single bill until the next day on objection, or merely to raise the question then and have it passed upon instantly?

Mr. MORTON. Whatever the effect of the rule is now by requiring leave to introduce, I am willing to reserve that right. I do not propose to dispense with that, but simply to get clear of what has been a bore to us, I think, ever since I have been in the Senate, and, probably, for a great many years before.

Mr. EDMUNDS. I think, and I have observed it to be useful as well, that the substance of the present rule—I am not speaking as to how it should be entered in the Journal or in the Record—but the substance of the present rule is very wholesome. The theory of it, as I understand, is that no member shall have a right to force the Senate into the reception of a bill without a day's previous notice; so that Senators who may be interested on the other side, or if it is something that they think ought not to be brought in at all, may have fair notice, and be here. Now, if you change the rule so that a majority of the body can, without any previous knowledge of the other Senators who may not be present on that particular day, bring in a bill and pass it to its first stage, then you lose the benefit of this security against surprise which the present rule gives us. But, if I now understand my friend from Indiana, he does not propose to change the substance of the rule.

Mr. MORTON. Will my friend allow me one moment to explain? I would make the rule what I think it is in regard to Senate resolutions. A resolution is introduced here, and if no objection is made it may be considered on the same day; but if any one wants it to lie over until to-morrow, it goes over. I would have the same rule in regard to bills, and not make it necessary to go over the "ask leave to introduce" in speech or in print.

Mr. EDMUNDS. I cannot concur in that view as to bills. It often happens as to bills that a bill is proposed which a majority of this body does not think ought to be brought in at all—which ought not to be considered. As to Senate resolutions, the scope of which of course is very narrow, usually relating to some right or proceeding of the Senate itself, the rule is otherwise, I take it, and anybody has a right to introduce a resolution. It cannot be considered on that day, but it is in the possession of the Senate, and goes over when objection is made. Now, as to a bill, the present rules do not allow that, and I do not think they ought to. We have had a notable instance within my

recollection and that of my friend from Indiana, where a very large majority of this body thought it was unfit that a bill, or a joint resolution, which is of course substantially the same thing, should be brought in at all. I think it was a joint resolution offered by one of the Senators from Kentucky, looking to the disposal of Arlington, where the Union soldiers are buried, and in strict accordance with the rules objection was made when he asked unanimous consent to its being brought in at all. Notice was accordingly given that on the next day he would move for leave to bring it in. He did move, and the question came up whether he should have leave to bring in the bill for consideration at all; and the Senate, by a large majority, and as I thought rightly, declined to grant him that leave. I wish to preserve the substance of that rule for just such cases.

MR. MORTON. There is no difference between me and my friend from Vermont upon this question. The rule in substance now is just as I would leave it. A member asks leave to introduce a bill without previous notice. It is an idle formality, and has never been refused but once since I have been in this body, and I remember that was on an objection made by Mr. Davis, of Kentucky. I would dispense with this formal asking of leave; I would dispense with the formal granting of leave in the minutes, and if I introduce a bill leave it as the right of every Senator to have the bill go over until to-morrow.

MR. MERRIMON. I do not think that the remarks of the Senator from Indiana cover the whole case, and particularly the merits of one feature of it. If I rise to introduce a bill I say, "I ask unanimous consent of the Senate to introduce a bill." At once it is sent to the Clerk's desk; the Clerk reads the bill by the title, and it goes upon the Journal. It is obliged to go there under the rule. If I am bound to give notice of that bill one day, I state that I give notice that I will introduce a bill to-morrow, or at some future day, for a particular purpose. If some one, thinking that bill is not one fit to be introduced, shall look into the matter, when I come to offer it to-morrow he says, "I object to the introduction of that bill, and I assign this reason, and the other reason, and another reason why it ought not to be introduced at all; it ought not to have place upon the Journals of this body at all; it is not a bill fit to go upon the Journals." In that case nothing would appear except the notice of the bill. Under the plan that the Senator proposes, every Senator introduces a bill as a matter of course, unless somebody who is not on the alert, not expecting such a thing, rises in his place and says, "I object to that bill being introduced."

This rule has been in existence for a long period of time, and, for one, I am not disposed to unsettle that which is settled, and which has proved beneficial by a long course of practice in the Senate. The Senator says there was a time when it was more difficult to introduce a bill and get it before the Senate than now. I beg to say to him and to the Senate that I think it would be very wise and well if bills could not be brought before the Senate so easily as they are now. We know by experience—I know by my little experience in this body—that scores of bills are introduced which had much better never have been introduced.

I do not care to debate this matter. I have no personal interest in it. The report I have made is the unanimous opinion of the committee. One of the committee, a gentleman who has been in the Senate for a long time, who presided in this body as Vice-President of the United States, and who has had large experience in administering the rules, is decidedly of opinion that it is wholesome, that it exerts a wholesome influence. As to the cost, that is a mere drop in the ocean; it is as nothing compared with the conservative influence that this rule exerts over our deliberations and proceedings.

MR. MORTON. Mr. President, I care nothing about this matter. I offered the resolution to avoid some expense, but the Senator says the expense is trifling. Perhaps it may not be over a thousand dollars a session, and that, he says, is a mere drop in the bucket. I agree to that; but still these drops in the bucket sometimes make the bucket full, and in these days of democratic retrenchment and reform I think even the saving of a thousand dollars a year is not a matter to be sneezed at. But my suggestion was to recommit the resolution because the committee did not seem to understand its purpose at all. They seem to have supposed that I was proposing to do away with the right to object to the introduction of a bill. I had no such idea. I think the committee had better take it again.

MR. ANTHONY. There seems to be such misapprehension as to the effect of the rule and the amendment that certainly I think the matter should be recommitted to the committee. I hope that will be done.

MR. HAMLIN. Mr. President, I have listened to the Senator from Indiana, and I fail to see that I misapprehended the scope of his resolution. If I understand him now, I certainly did not fail to apprehend it in committee. The objection to changing the rule is this: As the rule now stands, no Senator, as a matter of right, can put a bill before this body, introduce it without notice. The Senator virtually proposes to do away with that. That is the reason why, in my judgment, what he proposes should not be done. You may presume extreme cases where bills offensive to the body are offered. Although I may have a right to offer such a bill, as I offer a resolution or a

memorial, while parliamentary law says neither of those things shall be done in a manner offensive to the body, yet such a thing may be; and it is certainly within my knowledge that the right to present many bills has been refused. It is a little troublesome to observe in all respects this rule, I grant, but it is conservative in its action; it serves to protect the body, if you please, against extreme cases, and I think we had better keep the rule as it is.

Mr. MORTON. Mr. President, I have been very unfortunate, or else the Senator from Maine does not comprehend the purpose of my motion. As the rule now stands, if I introduce a bill I must "ask the leave of the Senate to introduce a bill without having given previous notice." If no objection is made it is understood that that leave is granted, and all this is printed in the minutes the next morning. Now, I would dispense with asking that leave; I would dispense with printing the permission; but I would leave the right to any member to object to the introduction of a bill to-day and require it to go over till to-morrow. It amounts to the same thing precisely. Unless somebody does object when I ask leave, the bill is introduced; and if I offer to introduce a bill without asking leave, but still give the right to object, I ask if it is not just the same thing precisely? To save my life I cannot see the difference.

Mr. MERRIMON. May I ask the Senator a question?

Mr. MORTON. Certainly.

Mr. MERRIMON. The Senator rises to introduce a bill, and he does it as a right; he does not ask any permission; he sends it to the table and the Clerk reads the title. After the Clerk has read the title and it goes upon the Journal, another Senator then sees that that is a bill which ought not to be introduced, and then he says, "I object." It goes over then, as he would have us provide; but it goes over after the title of the bill at least has gone upon the Journal.

Mr. MORTON. It amounts to precisely the same thing. If I proposed to introduce a bill now without previous notice, my friend from North Carolina would under no circumstances object unless he knew what the bill was and that it was offensive. He would wait, therefore, until he heard the title read, and then he would say "I object," and thereupon the bill would go over to the next day. But if I have the right to introduce a bill without asking leave formally, after he hears the title read I still leave him the right to object, and it goes over to the next day. The substance of the rule is observed, but we get clear of this idle formality. That is all there is about it.

Mr. MERRIMON. But if he gives notice, and the rule requires him to give notice, and he says "To-morrow I will introduce a bill" for a particular purpose, then I may, if I wish, ascertain that purpose; I may communicate with him; I may learn the scope of his bill; I may learn its nature; I may learn that it is offensive; and then, when to-morrow comes, and he offers to introduce it, so that it shall take its place on the Journal, I submit to the Senate such considerations as induce me to believe that it ought not to be introduced, and thereupon he is not allowed to introduce it; it has no status on the Journal at all.

The PRESIDENT *pro tempore*. The Senator from Indiana has moved to recommit the resolution, but the motion to postpone indefinitely has precedence. The first question is on the motion to postpone indefinitely.

The motion was not agreed to.

The PRESIDENT *pro tempore*. The question recurs on the motion to recommit the resolution to the Committee on Rules.

The motion was agreed to.

January 20, 1876.

The PRESIDENT *pro tempore*. The Senator from Vermont moves that all prior orders be postponed, for the purpose of taking up the resolution reported from the Committee on Rules on the 10th instant.

The motion was agreed to; and the Senate resumed the consideration of the following resolution:

"Resolved by the Senate, (the House of Representatives concurring,) That the joint rules of the Senate and House of Representatives in force at the close of the last session of Congress be, and the same are hereby, adopted as the joint rules of the two houses for the present session."

The pending question being upon the amendment of Mr. Morton, after the word "Congress," in the fourth line, to insert "excepting the twenty-second joint rule."

Mr. BAYARD. I submitted, yesterday, Mr. President, a resolution, as a substitute for the report of the committee, and if it be in order I should like to have it read now; and I ask whether, in the present stage of the consideration of the question, it can be offered?

The PRESIDENT *pro tempore*. The Senator's motion is in order.

Mr. BAYARD. Then I submit, as an amendment to the resolution, the substitute I offered yesterday, and ask that it be read.

The PRESIDENT *pro tempore*. The amendment will be read.

The CHIEF CLERK. It is moved to strike out all after the word "that" in the first line of the resolution and insert:

"The Committee on Rules of the Senate and House of Representatives be, and they are hereby, instructed to examine and, after conference, to report what amendments, if any, should be made in the present joint rules of the two houses; and also whether any, and what, legislation is expedient in regard to the matters considered in the present twenty-second joint rule."

Mr. CONKLING. Is that offered as an amendment?

The PRESIDENT *pro tempore*. As a substitute. The first question is on the amendment of the Senator from Indiana [Mr. Morton] before the substitute is voted upon.

Mr. BAYARD. As I understand the amendment of the Senator from Indiana, it is to adopt the joint rules of the two houses, as they now stand, excepting the twenty-second.

Mr. EDMUNDS. No, Mr. President; the precise proposition is not to adopt the joint rules of the two houses as they now stand, but to adopt the joint rules of the last session. Then the Senator from Indiana moves to amend that resolution by an exception. Now the Senator from Delaware offers a substitute for the whole thing; and as the Chair states it is clear that in order we must perfect the original resolution before we vote on the substitute, so that the question is on the amendment of the Senator from Indiana.

Mr. BAYARD. I had some doubt whether, pending the amendment to the original resolution, a substitute would be in order. I asked the Chair, and the information given me was that it would be in order. If now the decision of the Chair is that the amendment of the Senator from Indiana must be voted upon first, before my proposition can be considered, be it so.

The PRESIDENT *pro tempore*. The Chair replied to the Senator that his substitute was in order; but the rule requires that where a substitute is offered the text shall be perfected if the body sees fit to so perfect it. The Senator from Indiana having moved to perfect, the first question will be on his amendment. The proposition of the Senator from Delaware will still be pending, and when the text has been perfected the question will recur on the substitute of the Senator from Delaware. The question now is on the amendment proposed by the Senator from Indiana to except the twenty-second joint rule.

The amendment was agreed to.

The PRESIDENT *pro tempore*. If no further amendment be offered to the text of the resolution, the question is on the amendment of the Senator from Delaware as a substitute for the resolution.

Mr. CONKLING. I should like to inquire of the mover of this substitute whether to his knowledge there is any serious difficulty about either of the joint rules of the Senate and House of Representatives save the twenty-second joint rule?

Mr. BAYARD. I do not know at all of difficulties as to other joint rules. I assume that the joint rules of the two houses, which have been in existence almost from the foundation of the Government and have received the approval and sanction of those preceding us, will remain as they are. I take it for granted that this is the first time than an amendment or cancellation of the joint rules has been proposed, and I consider that the proper method of considering the subject is to submit it to a conference of the proper committees of each House; and then in regard to the twenty-second joint rule, upon which we have had some discussion, I submit to the Senate that the matters embraced in that rule should be acted on by legislation, and not by the joint rules of the two Houses.

Mr. CONKLING. No doubt the Senator from Delaware will anticipate the object of the inquiry I rise to make; and it is this: It strikes me, as I think it will strike the Senate, that if it be true, as the Senator and I agree, that there is no question about any of the joint rules save one, if the Senate proceeds to adopt the joint rules of the Senate and House all saving that one, then such motion as the Senator from Delaware makes or any other motion applicable to that one, to wit, the twenty-second joint rule, will not only be in order, but will be unembarrassed by a general reference to the whole body of rules. In other words, I submit to the Senator that the way to advance the object he has in view, namely a consideration of the twenty-second joint rule, is to dispose of the rest and residue of the joint rules, and establish them, there being in regard to them no question and no objection.

It may very well be that after the vote shall be taken, it will be seen that the mode proposed by the Senator from Delaware will be preferable to any other mode of approaching and considering the question of the twenty-second joint rule; but I cannot see how it advances the purpose of the Senator from Delaware to embrace all these rules in name, when in reality there is but one at which his motion is actually aimed. So then, unless there be something that does not occur to me on this subject, I should vote against substituting the resolution of the Senator from Delaware for this resolution, my understanding being, that, failing to substitute it, it will be, as an independent motion of its own, unimpaired by the vote, which in the mean time might be taken, and in addition to that, separated and relieved from what really should not encumber it, and what the Senator agrees with me in supposing is well enough as it is.

Mr. MORTON. I have no objection to the twenty-second joint rule being referred to the Committee on Rules; perhaps that will be proper. I will say, however, that it is now pending in the Committee on Privileges and Elections, and has been twice before that committee heretofore. That committee reported last session a substitute for the twenty-second joint rule in the form of a bill, which passed this body, and the same bill has been introduced this session. It is before the committee, and has been, I believe, partially considered. But if it is the will of the Senate to make this disposition of the subject, I shall be content.

Mr. BAYARD. As I stated in reply to the Senator from New York, I had nothing in contemplation in the way of interference or amendment with any of the existing joint rules of the two houses except the twenty-second joint rule. As a question has been raised, it is of great importance that it should be properly settled. Gentlemen have differed on this floor in regard to the power of each house over the joint rules. A very ingenious and able presentation of the subject was made by the Senator from Ohio who sits near me, [Mr. Thurman,] claiming that the House of Representatives was a continuing body, and that there was needed no adoption at the incoming of each new Congress of either the separate or the joint rules governing the preceding house. Having heard him and considered his point, I entirely dissent from his view. I believe that the House of Representatives is not a continuing body, and that, indeed, it is not only separate, but that each house has its operative legal existence and would be without any rules until it has adopted the parliamentary rules of the preceding house, as is usually done. The proposition has been made here that, this being a joint rule, made by two contracting parties, neither can at will retire from the rule. That is a very grave subject. Gentlemen on this floor have admitted such a view, and declared that it required a joint consent to the rescission of a rule as much as to its formation; but from that proposition I entirely dissent. I cannot believe that, either under the language of the Constitution or the very theory of checks and balances which the two houses were designed to enforce one upon the other, the independence of either house can be taken from it, either by its own act or an act of the other house. Therefore I hold, as these rules are made, they are made during the good pleasure of each house, and that it is in the power of either the Senate or House of Representatives to retire from a joint rule at any time, and simply give notice of that fact to the other branch of Congress.

But still the question has been made, and I think it would be advisable to have it settled by conference of the two houses through their respective Committees on Rules. I cannot doubt that on examination they will come to the conclusion to adopt the whole code, if I may so call it, except this twenty-second joint rule, which is highly exceptionable. Therefore I do not think there is any necessity to apprehend embarrassment in treating this subject, because I have referred the matter to the two houses. These points having been raised, I think they should be disposed of gravely and properly. I know no reason why there should not be an entire assent between the two branches on the subject; but the questions having been raised, I think it is a good opportunity to have the subject considered.

I should vote now for the adoption of the joint rules of the two houses, excepting the twenty-second joint rule, and I prefer to have the proposition made and considered in this formal and deliberate manner for the purpose of having the matter reviewed. It is a very grave subject. It has not been, so far as my researches enable me to discover, heretofore brought before the Senate in a manner that would admit of a clear decision, as it has been at the present time. There is no act of Congress on the subject. There is really nothing in the practice of the two houses on the subject. I am not aware that any joint rule of the two houses has ever been repealed. Such rules have been amended by the joint action of the two houses, but I submit that as yet I know of no case where either house has elected to retire from a joint rule; and yet I cannot doubt the power of either house to do so. Still I think it would be well, as we are treating of these joint rules, if we should invite the co-operation of the other house. If I am right in that, there will be no embarrassment, because the whole subject of the rules will be referred to the committee.

But now we come to a more important part of the proposition, and that is that the committee are to report whether any, and what, legislation is expedient in regard to the matters considered in the twenty-second joint rule. There seems to have been a lamentable want of discussion at the time of its adoption in 1865. The Senator from Indiana expressed his view of it, and that was very little. I think he stated that its author said that he had really forgotten that he had draughted it, and gave no reasons why he draughted it, and could give no reasons for the authority claimed and exercised by the two houses of Congress on the subject of that rule. If that be so, and I cannot doubt it after the statement of the Senator from Indiana, the people of this country have in reality, for the last three presidential elections, had hanging over them a power in either branch of Congress to defeat the popular choice by a motion made and decided without debate by either house of Congress. So long as a certain political party held the control of the House of Representatives, so long, under this joint rule, they could,

by raising any question, any pretext upon the count of a vote, upon a form of a certificate, have thwarted the popular will and have become themselves the electoral body of the President and Vice-President of the United States. It has not been a matter conceived in haste and corrected at leisure. It has been conceived in deliberation, continued deliberately from that day to this. Now that the political complexion and character of the other House of Congress has changed, it is seen that this terrible power of veto upon the popular will may be exercised by others than those whom it was intended to be exercised by.

Now, sir, upon this subject, immensely important as it is, I desire to say that, believing such an assumption of power to have been originally wrong, it cannot harden into right by acquiescence or by practice, and as this rule should never have had an existence, as such powers were exercised at the last count of the presidential vote never could have been properly exercised, so I wish it to be destroyed and negated by the action of Congress. Although I know that that party with whom I am in political affiliation has the power under this present twenty-second joint rule to declare, according to their will, who shall be the next President and Vice-President of the United States, they have no right to exercise such a power except in the contingency appointed by the Constitution; that is, the failure of any candidate receiving a majority of the electoral votes cast.

Sir, this question is one of the very gravest importance. True, the Constitution is unfortunately too silent. It provides simply that the President of the Senate shall open the certificates in the presence of the two houses, and that the votes shall then be counted. Taking the words strictly, there is merely a ministerial duty on the part of the President of the Senate with his thumb and finger to tear off the seals of the envelopes and present the certificates of votes. He is not to count them. The Constitution does not say that he shall count them, but simply that he shall open the certificates, and that they shall be counted. By whom? Can it be that this grant of constitutional power shall be put in force by the machinery of a joint rule that has not the obligation of a law, and over which either house holds at its pleasure complete control? I cannot imagine a more dangerous state of affairs.

Suppose it should be held by the House of Representatives that it is not competent for the Senate at their will and without notice to retire from the twenty-second joint rule and that they will hold us to the exercise of it, you can see what a dangerous condition arises between the two houses. It is one that should be settled before heat and excitement come, one that should be settled not in the spirit of party but by something far higher and more patriotic. Therefore it is that I believe that this power, scant though it be, obscure though the terms of its grant may be, is to be exercised by the aid of the machinery of legislation duly passed, that there should be the concurrent action of each house and the approval of the President, just as the Constitution requires his assent to any bill that may be presented. Therefore it is that I hope this substitute of mine may meet the approval of gentlemen of all political views in this Senate.

It is not worth while to speculate now on the possible tribunal in whom this judicial power, this power of discretion in regard to counting the votes, should be reposed. There can scarcely be a more important question for decision than that; but certain it is that it ought not to be left where it is now: it ought never to have been placed as it is now. For the last eleven years we have been living under this rule, and we have been living really under a Government not warranted by the Constitution. Powers have been claimed, powers have been exercised over this vital subject of determining the choice of the people, which ought never to have been claimed or exercised.

Sir, I hope that the proposition which I have moved in this shape will meet the approval of Senators on all sides of the chamber, and that if it is necessary—and I believe it is—that the scant language of the Constitution should receive the aid of legislation in order to make it operative, it should be done in the forms of law and not under the form of a mere rule of consent which has no other existence than the pleasure of each house. For that reason I trust the amendment I have offered as a substitute for the resolution will meet the assent of the Senate.

Mr. EDMUNDS. I beg leave to suggest to my friend from Delaware, whose views on this subject in a very considerable degree agree with my own, that he withdraw this substitute at present and let us adopt the joint rules of last session excepting the twenty-second, which we have already voted out. He and I both agree that at this moment we have no joint rules.

Mr. BAYARD. Pardon me; I did not say so, because the other house has not retired from the joint rules. The House, I understand, has adopted these very joint rules at the present session. The Senate is a continuing body, and therefore I do not think it is necessary for us to express their adoption.

Mr. EDMUNDS. Then I do not understand the answer. I understood the Senator to say that he did not believe in the power of any parliamentary body to bind its succeeding body, whether it be a popular body in the constitutional sense or a parliamentary body whose term of office has expired. I supposed he thought it could not set up a law for its successor which could bind that successor until there should be votes

enough to change it. Whether the House of Representatives has adopted these joint rules at this present session or not I do not know. I have no knowledge of it. I have never seen any such statement.

Mr. BAYARD. Not in the record of debates?

Mr. EDMUNDS. I saw in the record of debates a motion to adopt the rules of the last House of Representatives; I did not see anything else. If there was a motion to adopt the joint rules of the preceding session, we ought to have been notified of that first. We have received no such notice. That I am sure of, and I am sure my friend from Delaware will see when he looks at the Record that it was the adoption of the House rules proper alone. That being the state of the case, we have not, as my friend and I both agree, any joint rules. We all agree, as the practice has been, that joint rules may be adopted by acquiescence, by acting under them without objection. Some of them provide for intercourse between the two houses, and it may be that acting under one would not imply an adoption of another. I do not really think it would; but in drifting along in this way we are liable to be met by and by in one house or the other with the suggestion, "You have already got your joint rules for this session, however clear the law may have been that you had not any when you began your session, and it is now too late to make objection; and therefore you cannot change the twenty-second joint rule without the consent of both parties." I do not agree with my friend from Delaware that in a particular session, when the joint rules have been adopted by the concurrence of the two houses, either may retire at its own will by simply giving notice to the other party. I do not think that is the law. I cannot see any foundation for such a proposition as that. We might as well say that any member of this body can retire from the observance of rules as soon as it displeases him. Of course two governments treating with each other may retire from a treaty; but, unless the treaty provides for retiring from it, they retire from it by breaking it. Of course if either house, as a mere matter of power, without regard to right, (which must be supposed to govern both houses,) should say "We will disobey a joint rule which declares that messages from the House of Representatives shall be received through their Clerk, and that messages for the Senate shall be received there by our Secretary," the remedy might be difficult to find.

Mr. MORTON. If the Senator will allow me, I beg to suggest that the first thing to do, to make sure, is to get rid of the twenty-second joint rule, and after we have done that, this will come in necessarily as a new resolution.

Mr. EDMUNDS. If my friend had waited a minute he would have found it unnecessary to make that suggestion. I was coming to that as fast as my slow way of doing things would allow. I was endeavoring to illustrate the necessity of doing what the Senator from Indiana has suggested by showing that at this present moment this terrible joint rule, as it is called, is not binding on either House. We have not any such rule; we have not any other joint rule; and yet we are every day doing things in accordance with some of the joint rules of the last session. My friend says that we may retire from these joint rules of our own volition without the consent of the other party. I do not think we can do that if they are adopted at this session, but if none of them are in force, of course there is nothing to retire from. We may disobey the rules and refuse to receive the Clerk of the House of Representatives. That is abolition, not retiring. We have no right to do it, in my opinion; but the point now is that we have, by a unanimous vote of this body, expressed our disposition not to re-adopt the twenty-second joint rule as a joint rule of the two bodies, as it now stands. The Senator from Delaware agrees with us all that there is nothing else in the joint rules of the last session which requires special investigation, or to which there is any special objection. Let us, therefore, as the simplest thing in the world, adopt the joint rules of the last session, omitting this one. Then we have a set of joint rules covering all subjects of our mutual intercourse. Then, as he says himself, the subject of counting the electoral votes for President is one that must be proceeded with on the basis of legislation, and not on the basis of a rule; and if we are to proceed with it on the basis of legislation, then we must inquire into it by a legislative committee, in the ordinary course of things, and have a bill reported.

So, then, I submit to my friend, with great deference to his views, that the simplest and clearest thing to it at this moment is not to press the substitute but to adopt the joint rules of the last session, omitting this one, and then we shall have a clear field with the legislative inquiry which he himself proposes and which is so desirable to us all.

Mr. BAYARD. Mr. President, I have no disposition to change any of the joint rules except the twenty-second, and I do not know that any one in either house has. The object for which I offered the amendment was to have the question of the powers of the two houses over their joint rules examined and reported upon, and reported after a conference in regard to what legislation is expedient in regard to the matters embraced in the twenty-second joint rule. I have no objection to this resolution if it be amended in that way. It is of interest, of course, but it may not be important at this moment to decide as to the power of the Senate over the joint rules of the two houses.

The Constitution, on the subject of the rules, gives to each house the power to determine the rules of its proceeding. The very force of that word "determine" certainly is to put an end to any rule they may adopt. As to the joint rules it says nothing; but as part of the business of the two houses is concurrent, the power would be implied in each house to make rules for cases where its proceedings touch the proceedings of the other body as well as where they were confined to the action in the body itself. The power of each house to make rules having been expressly given by the Constitution, nothing more is to be implied; for I believe it is a safe rule that you are not to infer an implied grant of power from an expressed grant.

My present disposition is, with deference of course to the Senator from Vermont, to differ from him in regard to the power of the House at any time to retire from a joint rule on giving notice. Otherwise they would be tied up for the session irrevocably to a joint rule which, because it was a joint rule, had a binding effect which other rules could not have. The Senate cannot deprive itself of its power over its own rules; it cannot delegate any portion of this power to another branch of Congress; and it has no right to deprive itself of its power given to it for its own exercise in its sound discretion.

Therefore it is that I believe it is within the power of the Senate—I mean within the constitutional power of the Senate—to retire from any joint rule at will, under the forms prescribed by themselves for amendment and alteration of the law. I believe this idea is in furtherance of the necessary independence of each house of Congress from the other, in order to form a check on the action of the other, for this was designed to be a Government in which various checks should constantly interpose upon the power of each house. Each house was created with particular powers for the purpose of preserving those checks and balances in the Government. But I am anxious that the question shall be considered, and considered now by the respective Committees on Rules of the two houses. I have no idea that there will be found any necessity for amending any of the rules but the twenty-second joint rule, and that, I believe, had better be tried, because it is leaving that subject under the machinery of a rule which ought to be dealt with only under the machinery of a law regularly enacted.

If it be the object of the Senate to repeal the twenty-second joint rule and to leave the naked language of the Constitution, insufficient and meager as it has been found to be, to stand in doubt and obscurity until the next count of the presidential votes, then I shall say they will fall very far short of their duty in my opinion.

Mr. EDMUNDS. I beg to assure the Senator that I have no such object. My object is to have the joint rules which are not embarrassed with the twenty-second adopted, and then to provide by legislation, as we attempted to do at the last session, and I think my friend's opinion and my own came very nearly together on the general topic, for that contingency, and leave the joint rules disembarrassed of this one for the time being.

Mr. BAYARD. What is the objection to allowing this question of the rules to be settled by a report of the two committees, after conference? The subject of the power of each house over the joint rules is before us.

Mr. EDMUNDS. My objection is that the very substitute implies that the joint rules, the twenty-second and all, are now in force—a proposition from which I totally dissent.

Mr. BAYARD. As a question of fact, I do not propose to join issue with my friend on that subject, because he is more apt to be right than I in regard to the action of the House. I was endeavoring to find by the Record the action of the House on the subject of rules. I find that other gentlemen near me have the same impression I have, that there was by the House an adoption of the joint rules as well as the rules of the House itself.

Mr. EDMUNDS. I have never seen it, if there is anything of the kind.

Mr. WITHERS. I ask the Senator from Vermont if an amendment was not incorporated into the report of the House Committee on Rules, inserting the words "with the consent of the Senate," when they notified us of the adoption of the rules?

Mr. EDMUNDS. Does the Senator from Virginia ask me a question?

Mr. WITHERS. I ask for the Senator's recollection.

Mr. EDMUNDS. As far as I have seen any evidence of the action of the House of Representatives at all which was in the Record, all I saw was that on the motion of a gentleman from Pennsylvania the rules of the last House of Representatives, excepting certain ones which they did not wish to adopt, were adopted as the rules of the present House, and no reference was made to the joint rules. There was none that I saw; I am sure of that.

Mr. WITHERS. My impression is different, arising from the fact (which I have not been able to verify by reference to the Record on the subject) that there was an amendment moved "with the concurrence of the Senate," which I thought implied that action had been had on the joint rules as well as the separate rules of the House.

Mr. BAYARD. If there be no objection, I ask that the matter lie over informally. I think it is important.

Mr. EDMUNDS. I suggest to my friend that this is merely a proposition to the House of Representatives to adopt these rules, which we all agree ought to be adopted, except the twenty-second joint rule. If they have already adopted the joint rules, it is a proposition to them to adopt them again without that one. I am sure, as a matter of fact, that my friend will not find in the Record any action of the present House of Representatives upon the joint rules.

The PRESIDENT *pro tempore*. The question is on the amendment of the Senator from Delaware, [Mr. Bayard.]

The amendment was rejected, there being on a division—ayes 22, noes 26.

Mr. BAYARD. I move to amend the resolution by adding to it—

“And that the Committees on Rules of the Senate and House of Representatives be, and they are hereby, instructed to examine and, after conference, to report whether any, and what, legislation is expedient in regard to the matters considered in the present twenty-second joint rule.”

That relieves the resolution which I first offered from the embarrassment which the Senator from Vermont seemed to apprehend, and merely requires the committees to report their views to Congress.

Mr. EDMUNDS. I suggest to my friend from Delaware that, if he will offer that as an independent proposition after this matter is disposed of, so as to get some joint rules to act under now, his proposition, except so far as it relates to the legislative branch of the affair, would meet my entire concurrence. I have not the least objection to it; but it seems to me to be embarrassing a perfectly simple question in adopting the old joint rules by adding an amendment which does not provide for their adoption and leaves the whole thing open until we shall have, in the course of a month, an inquiry.

While I am up, if the Senator will pardon me, because I am taking his time, I will say that I have found, through the kindness of my friend from Massachusetts, [Mr. Dawes,] on page 9 of the Congressional Record for the 7th of December, an entry of the action of the House of Representatives upon the rules, and I hope in reading the proceedings of the House of Representatives I shall be pardoned on this occasion, although, except on a question of joint rules, it might be out of order.

“Mr. RANDALL. I submit the following resolution:

“Resolved, That the rules of the House of Representatives of the Forty-third Congress shall be the rules of the House of Representatives until otherwise ordered, except Rule 166 and Rule 167.”

Then he provides for a committee on rules it is not necessary to read. Therefore the Chair will perceive, as well as my friend from Delaware, that there can be no question at all that that action of the House of Representatives related to its own rules, and not to the joint rules. It says so in its terms. And if it were possible to hold that the rules of the House of Representatives included the joint rules, that possibility is excluded by the fact that two of the rules referred to are named as the rules of the house proper, Rules 166 and 167. This resolution, after discussion, was adopted on the statement of the Chair, with the assent of all hands, that nothing in the shape of rules of any preceding session, whatever they were, could have any force at all in that house until they were agreed to by the fresh body of men who had come in.

Mr. BAYARD. Do I understand the Senator from Vermont to consider that the action of the Senate in adopting certain joint rules, excepting the twenty-second joint rule, is interfered with by the amendment I have offered?

Mr. EDMUNDS. I understand it so. I understand that we are left with no other question open on the whole joint rules, except that not adopted, until both parties agree. The amendment is that on that we shall have an investigation. I may not have understood the amendment, perhaps.

Mr. BAYARD. I think the Senator has not understood the amendment. The amendment does not interfere with the action proposed by the Senate. His resolution proposes to do away with the present joint rules, except the twenty-second. I simply propose that the two committees shall report what legislation shall take the place of that joint rule.

Mr. EDMUNDS. But the trouble is that the House of Representatives may not be willing to have a joint committee consider the rules, whereas we need joint rules every day; and if we send over a proposition there, it must be taken *in solido*. They cannot adopt the joint rules without debate, and the proposition to have a committee may there lead to discussion. Some gentlemen there may have views that differ from those we have here, and in the mean time we have no joint rules and the thing drags along. If the Senator proposes this as an independent proposition, as far as I can now see it will certainly get my vote.

Mr. MORTON. I think it is too important to get clear of the twenty-second joint rule to let this opportunity pass. The adoption of the resolution, as amended now, strikes down the present twenty-second joint rule, and we are done with it. The adoption of the amendment offered by the Senator from Delaware will be construed to have the effect of an acquiescence in all the joint rules, including the twenty-second, and refers all of them to the action of the Committee on Rules hereafter. These commit-

tees may never agree, and there may never be an opportunity so favorable to strike down the twenty-second joint rule. Let us now strike down that rule by adopting the resolution, and then I am willing to vote for the proposition of the Senator from Delaware, and refer all the rules to a committee for revision. I think that is the safe thing to do.

The PRESIDENT *pro tempore*. The question is on the amendment proposed by the Senator from Delaware.

The amendment was rejected.

The PRESIDENT *pro tempore*. The question recurs on the resolution.

The resolution was agreed to.

Mr. CONKLING. Unless some Senator has business, I move that the Senate do now adjourn.

Mr. BAYARD. I would ask unanimous consent to consider the resolution offered by me, and which has been discussed at the present time as an independent proposition.

Mr. EDMUNDS. Let us hear it read.

The resolution was read, as follows:

“Resolved by the Senate, (the House of Representatives concurring,) That the Committees on Rules of the Senate and House of Representatives be, and they are hereby, instructed to examine and, after conference, to report what amendments, if any, should be made in the present joint rules of the two houses, and also whether any, and what, legislation is expedient in regard to the matters considered in the present twenty-second joint rule.”

Mr. CONKLING. I have no objection, as I think I intimated before, to this action as an independent proposition in the language of some other Senators. I suggest, however, that we are about to do an unwise thing if we adopt this; for this reason: We have adopted rules, and to which, so far as we know, there is no objection in either house. After the House of Representatives shall have adopted these rules, then I see no more objection than other Senators do to this resolution; but we send now to the House, if this resolution should go there as well as the other, two resolutions, one proposing to adopt the joint rules, and at the same time a resolution proposing to refer the whole subject to the committees of the two houses on rules. What impression does this convey? In place of this coming afterward as an independent proposition to take effect, it may be now, that for the time being we have adopted these rules, it goes as part of our action; and the result may be to defeat what we have just been doing, and that probably will be the result. Now, I suggest that we send to the House the resolution we have just passed. If the House concurs in that, then we shall have the state of ease to which the resolution of the Senator from Delaware is applicable. But if we arrest, as I think we probably shall do, the action already taken, by passing this resolution, it seems to me we defeat the very purpose we have in view.

As I have risen to make this suggestion, I venture to make also another. The whole theory of this, it seems to me, is contrary to parliamentary practice. The Senator from Delaware proposes virtually a conference committee; for so it becomes. What is the mission of a conference committee? To reconcile differences between the two houses. Now surely until we know that there is a difference between the two houses, we do not need a conference committee; and then we do not need it as to any matter upon which the two houses are agreed. Therefore I suggest to the Senator from Delaware, being entirely friendly to his purpose, that he allow this resolution to lie over for the time being. If the House concurs in the resolution we have already adopted, his resolution needs no change whatever. If on the contrary it turns out that the House has objection to other of these joint rules which we have now adopted, that we ought to know; and in the presence of that fact we ought to adopt this resolution. So it seems to me, and therefore I suggest that as the sense of the Senate has been taken on the rules as they stand, no objection having been made to any of them save one, we send that resolution to the House. When the House shall concur, then they will be joint rules, as they are not now, and then I shall see no objection to the resolution of the Senator from Delaware, and then I submit to him it will take the whole effect which he wants to give it whereas now I think it premature and likely to anticipate what has always been expressed as the judgment of the Senate.

Mr. BAYARD. My object in proposing a conference in this resolution was simply to secure consultation between the two houses in regard to measures for their joint proceedings. I used the words perhaps unnecessarily, and they certainly seem open to the technical objection of the Senator from New York, for the objection is technical. If the committees were by joint resolution to be instructed, that very fact would signify that they had the opportunity of mutual consultation before they made the report, and the use of the word “conference” suggests to them that the rules to be reported to the respective houses should be the same. The only object was to secure consultation. The words were put in, perhaps, unnecessarily.

But the Senate need not treat this as a matter of conference unless a committee of conference shall be found to be necessary. Every resolution that is to be acted on by the two houses on a matter like this would seem to make a consultation between the

committees necessary before they report. Otherwise there would be no use of the reports to each house. However, this resolution is to be considered by unanimous consent to-day or not at all. If objection be made from any quarter, it must go over. I was aware of that when I called it up; but at the same time, after there had been examination by a committee upon a very important subject, I trusted there would be no objection. The question ought to be considered of the power of each house over the joint rules, especially in regard to matters embraced in the twenty-second joint rule which has just been excepted by the Senate. I thought no more important question could be brought to the attention of this body, and that the report of a committee of each house ought to be had upon it in order that we might know what proper action to take.

Mr. CONKLING. I do not like to interpose an objection against the resolution of the Senator from Delaware, but as he seems not to be strenuous about it at this time, I prefer that it lie over. I should like to have a concurrence of the two houses on all these rules of which they are really agreed, to the end that we may have a completed record of these rules until we change them. We have adopted a mode of getting at them. I fear that if at the same time we send a resolution proposing a conference committee, or whatever it may be called, the force of our action may be mistaken by the House, and therefore although I do not like to interpose an objection I prefer that this resolution should lie over and be considered at what I think will be a more convenient and at all events a more wholesome time.

The PRESIDENT *pro tempore*. An objection being made, the resolution goes over.

Mr. CONKLING. I move that the Senate adjourn.

The motion was agreed to; and (at three o'clock and twenty-two minutes p. m.) the Senate adjourned.

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